



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

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

MATTER OF C- LLC

DATE: NOV. 13, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a laundry services and tuxedo rental business, seeks to temporarily employ the Beneficiary as the President of its new office and to classify him an intracompany transferee under the L-1A nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director concluded that the Petitioner did not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity within one year of approval.

On appeal, the Petitioner asserts that the Director erred in her decision and that the evidence of record establishes that the Beneficiary qualifies for the classification sought. The Petitioner submits a brief and additional evidence in support of the appeal.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying 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.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

III. THE ISSUE ON APPEAL

The sole issue to be addressed is whether the Petitioner established that the new office would support the Beneficiary in an executive or managerial position within one year of approval of the petition.

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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.

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

A. Facts

On March 17, 2014, the Petitioner filed the Form I-129 on behalf of the Beneficiary, requesting a validity period of June 1, 2014 to May 31, 2015. The record shows that the Petitioner was established in [REDACTED] and it states that it began doing business in [REDACTED] when it purchased a preexisting company consisting of a formal wear rental shop doing business as [REDACTED] and a drycleaners doing business as [REDACTED]

The Petitioner submitted a letter dated January 17, 2014, from its foreign affiliate's administrative manager, who described the Beneficiary proposed duties as the U.S. company's President as follows:

As President he will have full authority to direct the management of the company, as well as exercise wide latitude in discretionary decision-making. He will be responsible for structuring and enforcing company policies and objectives in accordance with the guidelines of our company's vision. He will be responsible for reviewing activity reports and financial statements to determine the progress of the U.S. company.

Specifically, as President of the company, Beneficiary will hold weekly meetings with the Managers of both stores. During the meetings, Beneficiary will establish company's marketing and sales policies pertaining to the sale, and overall financial standing of the company, as well as exercise wide latitude in discretionary decision making. Those departments will present to Beneficiary reports and analysis regarding the amount of sales and inventory available at any moment and a series of reports on the day to day operations of the stores. Based on such reports, Beneficiary will establish the company's policy regarding the forecast of purchase and sale of the company's most profitable products in this case the tuxedo's and accessories, thereby providing expansion to its U.S. business operations. . .

Beneficiary will also supervise the influx of sales and services and be able to project in advance the quality and amount of products ordered and received. These reports will allow Beneficiary to implement short and long-term goals for both the U.S. and the foreign parent company.

....

In his positions as President, Beneficiary will perform the following job duties:

- a) Contact local and suppliers, hold meetings with them in order to negotiate order prices upon order sizes (especially in the garment business).
- b) Develop policy and instruct company staff.
- c) Set up guidelines for timing and manner of delivery of good and services (dry cleaning and tuxedo rentals);
- d) Develop marketing plans to expand business and sales in the South Florida area more especially in the formal wear and cleaning industry;
- e) Develop marketing guidelines to company staff

In the letter, the administrative manager stated that as of the date of the letter, the Petitioner had four full-time employees and one part-time employee, which included Manager (Tuxedo Rental), Manager (Dry Cleaner), Sales Coordinator, Driver and Presser. The letter also states that the Petitioner "will be hiring other employees by the end of 2014."

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The Petitioner further provided a copy of its business plan stating that its two businesses are located side-by-side and that the two together employ five individuals in the positions of: [REDACTED] Manager, [REDACTED] Manager, Presser, Driver (employed by both locations), and Customer Service (employed by both locations). The Petitioner submitted evidence of an initial investment of \$200,000 made by the foreign affiliate to finance the Petitioner's purchase of the preexisting businesses and inventory. The business plan states that the Petitioner anticipates "a payroll of 6 employees by the end of the first year of operations," including the beneficiary's position of president and the five positions noted above.

In a request for evidence (RFE), the Director requested, among other items, evidence to demonstrate how the company will grow to be of sufficient size to support a managerial or executive position and a more detailed description of the Beneficiary's proposed position to demonstrate that it will be in a managerial or executive capacity. In response, the Petitioner submitted a letter from the foreign affiliate describing the Beneficiary's proposed duties in the United States, emphasizing that the Beneficiary's main job duties would also include, among others, "the oversight and organization of the operations of the newly established US business, making discretionary decisions, and setting general business and operations policies and procedures. . . ." The RFE response also included a sample daily schedule for the Beneficiary.

The RFE response further explained the Petitioner's current structure, stating that the Petitioner employed persons in the following positions: Manager, Customer Service – Cleaners, Customer Service – [REDACTED] Presser, Customer Service (to be hired January 2015), and Driver (to be hired January 2015). The Petitioner identified four employees by name, not including the Beneficiary.

The Director denied the petition, stating that the evidence of record did not establish that the Beneficiary would be employed in a managerial or executive capacity within one year of approval.

On appeal, the Petitioner stated that the previously submitted business plan was submitted without its approval and that it did not accurately reflect the state of the market. The Petitioner submits a new business plan which it says better reflects the current market conditions and highlights the growth of the business since the petition was initially filed. The business plan also includes a description of the Beneficiary's proposed duties with a breakdown of the percentage of time spent of each duty:

- (A) Formulating short- and long-term policies, goals, strategies, procedures and programs to ensure the continuous growth and profitability of the business (10%);
- (B) Planning and directing the company's financial, governance, and commercial operations at the highest level of management, with limited review from, the Board of Directors, and with the help of subordinate managers and professionals (20%);

- (C) Overseeing negotiations with banks, vendors and suppliers to ensure the most favorable terms and conditions (5%);
- (D) Coordinating the setting of accurate budgets for administration and marketing and monitoring these on a biweekly basis (10%)
- (E) Launching and directing the implementation of personnel management, recruitment, and training and development procedures and programs (10%);
- (F) Determining with shareholders a marketing and promotion strategy and, if necessary, entering into agreement with a marketing company (5%);
- (G) Directing and overseeing financial and accounting procedures and policies (8%);
- (H) Supervising and exercising discretion over subordinate employees and subcontractors who perform the day-to-day work with authority to hire and fire the employees (15%)
- (I) Monitoring staff performance through annual evaluations and ensuring highest level of customer/client services (15%); and
- (J) Reviewing activity reports and financial statements to determine progress and status in attaining objectives, and revising objectives and plans in accordance with current conditions (2%).

The revised business plan submitted on appeal also contains the Petitioner's plans and projections for the next four years. These plans include hiring an anticipated staff of 14 employees by the end of 2015, opening six additional drop-off/pick-up locations, and employing 24 individuals by the end of 2019.

B. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the Petitioner has not established that the Beneficiary would be employed by the United States entity in a managerial or executive capacity within one year of the petition's approval.

When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. The "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of a beneficiary in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally* 8 C.F.R.

§ 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). 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 either in an executive or managerial capacity. *Id.*

In the instant matter, the Petitioner asserts that the Beneficiary will be employed in the executive position of President. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct[] the management" and "establish[] the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The 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.*

Discussing how the proposed position meets the requirements of the regulations, the Petitioner stated that the "beneficiary's duties are required to develop an essential, executive function within the organization. The business projections of petitioner anticipate that the petitioner will be able to afford to hire both professional and technical full-time employees to continue to engage in the accomplishment of tasks necessary for the actual operation of the business." However, the evidence in the record does not support such an assertion. The duties assigned to the Beneficiary, such as "[c]ontact local and suppliers, hold meetings with them in order to negotiate order prices upon order sizes," "[s]et up guidelines for timing and manner of delivery of good and services, [d]evelop marketing plans to expand business and sales," and "[d]evelop marketing guidelines to company staff," concern the minutia of running the businesses and are not indicative of an executive level position. These duties, without further explanation, appear to require the Beneficiary to primarily participate in the company's day-to-day operations. While the Petitioner indicates that the Beneficiary will be supported by five additional staff members, the Petitioner has not indicated that any of these day-to-day operational responsibilities would be delegated to the subordinate staff. For example, in the RFE response, the Petitioner indicates that the Beneficiary will "oversee all marketing business endeavors of the US company," "will direct and coordinate promotion of services," have "marketing meetings with current customers, financial institutions, service providers" and with "prospective customers and business partners," but the Petitioner has not

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identified any other staff who would be responsible for actually performing any duties associated with these functions.

The Petitioner does claim that the Beneficiary will “have full authority to direct the management of the company,” will “exercise wide latitude in discretionary decision-making,” and “will be responsible for structuring and enforcing company policies and objectives.” While this description does suggest that the Beneficiary will exercise authority over the new United States operation, it offers little insight into what the Beneficiary is expected to actually do on a day-to-day basis during the first year of operations and beyond. 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. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Moreover, notwithstanding the Beneficiary's position title of President, the Petitioner's description of his duties indicates that he will have extensive direct contact with customers and suppliers.

Furthermore, as noted above, implicit in the definition of executive capacity is the idea that the organization must have a subordinate level of managerial employees for the beneficiary to direct. Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to understanding of beneficiary's actual duties and role in a business.

In this case, there are inconsistencies in the way the Petitioner describes its current and proposed organizational structure and the duties of the Beneficiary's subordinates. At the time of filing, the Petitioner stated that it employs a level of managerial employees consisting of the Manager (Tuxedo Rental) and Manager (Dry Cleaner). In response to the RFE, the Petitioner stated that it employs a single manager (with authority over both locations), Customer Service – Cleaners, and Customer Service – [REDACTED]. The Petitioner also submitted pay stubs showing that in January 2015 its two fulltime employees were those identified as filling the positions of “Operations Supervisor” and “Dry Cleaning Sales Representative.” It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, based on the positions descriptions provided, it appears that these variously named positions are largely customer service oriented positions dealing directly with the public and do not entail primarily managerial duties. The evidence must substantiate that the duties of the Beneficiary and his subordinates correspond to their placement in an organization's structural hierarchy; job titles alone are not probative and will not establish that an organization is sufficiently complex to support

an executive or managerial position. The Petitioner has not provided evidence of a proposed organizational structure sufficient to support the Beneficiary in an executive position with the necessary subordinate employees within the one year time frame.

On appeal, the Petitioner provides a position description that is materially different from that provided in the initial filing or in the RFE response. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Furthermore, in addition to being markedly different from prior assertions concerning the proposed duties, the description of the U.S. position on appeal contains generalized and vague duties and is not sufficient to establish the nature of the position and the day-to-day duties it entails. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990). While several of the broad responsibilities described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the Beneficiary's actual proposed responsibilities. Moreover, the position description includes generic descriptions of the duties of a president and includes references to the "board of directors" and "shareholders," but according to the documents submitted by the Petitioner, it has a single owner and does not have a board of directors or shareholders. Therefore, it appears that these duties may not relate to this specific position and the new description has limited probative value for this reason.

Furthermore, our analysis of the Beneficiary's employment and the Petitioner's ability to employ him in a qualifying capacity by the end of the first year of operations is restricted because of the lack of specificity in the business plan submitted with the initial filing. As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). The regulations require the Petitioner to provide information regarding the proposed nature of the office "describing the scope of the entity, its organizational structure, and its financial goals." 8 C.F.R. § 214.2(l)(3)(v)(C)(I).

Describing the Petitioner's financial projections the business plan states "[a]fter a first year to settle down and stabilizing its operations and organization, the company estimates an accelerated increase of sales for the rest of the estimated period. The second year will achieve a 25% of growth on sales, due to the business expansion of additional stores, consolidation in Brazil, and a good marketing position in the U.S." Overall, the Petitioner's original business plan did not provide sufficient specificity to indicate the basis for its sales predictions to support the claim that the business operations would expand to such a level as to support an executive or managerial position within the year. The business plan also did not provide a timeline for hiring additional workers, and did not specify a timeframe for the planned expansion to additional locations.

As noted above, on appeal, the Petitioner submits a revised business plan dated January 2015, while the initial petition was filed in March 2014. The Petitioner must establish eligibility at the time of

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filling. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 1at 176. Nonetheless, we have reviewed the submitted documentation. The Petitioner claims that the business has already grown since it was established in [REDACTED], and that it will continue to grow. However, given the passage of time and the additional submission on appeal, we can now see that the in the nine months that passed between the filing of the petition and the filing of the appeal, the Petitioner has not increased its staff and has not submitted evidence to show a marked increase in revenue that would support the Petitioner's assertion that it would have been able to expand its business or hire additional employees to relieve the Beneficiary from performing non-executive duties within one year of approval. Rather, the revised business plan shows that as of January 2015, the Petitioner remains staffed with five employees, contrary to the claims in the initial petition that stated that the Petitioner would hire additional employees by the end of 2014.

Regarding its future plans, the Petitioner now states that it plans to employ 14 individuals, including the Beneficiary, by the end of 2015 and that it hopes to employ 24 individuals by the end of 2019. The Petitioner also states in the revised business plan "[b]ased on the above-mentioned organizational structure, there is sufficient manpower assigned to the daily operational duties of [the Petitioner]. Therefore, the President will be relieved from performing non-qualifying duties by the end of 2019." While the business plan submitted on appeal states that the Petitioner plans to expand its business operations over the next four years to relieve the Beneficiary from non-qualifying duties, the evidence in the record is not sufficient to establish that the Petitioner would be able to support an executive or managerial position within *one year* of approval. As noted above, the Petitioner requested a one-year period of approval commencing on June 1, 2014. Overall, the record lacks information regarding the anticipated organizational structure and financial status of the company within that timeframe.

The evidence in the record, including the evidence submitted on appeal, does not meet the Petitioner's burden to establish that the company would be able to support a qualifying managerial or executive position within a twelve-month period. The regulations require the Petitioner to present a credible picture of where the company will stand in one year, and to provide sufficient evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within that time. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Based on these deficiencies, we find that the Petitioner has not established that it would be able to support the Beneficiary in a qualifying managerial or executive capacity by the end of the first year of operations. Accordingly, the appeal will be dismissed.

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons. 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 C- LLC*, ID# 14476 (AAO Nov. 13, 2015)