



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

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

MATTER OF R-E-USA, INC.

DATE: NOV. 13, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a “heavy duty equipment supplier,” seeks to extend the Beneficiary’s temporary employment as its president/managing director under the L-1A nonimmigrant intracompany transferee 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 evidence of record did not establish that: (1) that the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States; and (2) that the Petitioner’s foreign parent company is doing business as a qualifying organization abroad.

On appeal, the Petitioner asserts that it provided sufficient evidence to establish eligibility for the benefit sought.

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 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.

II. THE ISSUES ON APPEAL

A. U.S. Employment in a Managerial or Executive Capacity

The first issue to be addressed is whether the Petitioner established that it will employ the Beneficiary in a qualifying managerial or executive capacity in the United States.

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.

(b)(6)

Matter of R-E-USA, Inc.

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;
- (v) establishes the goals and policies of the organization, component, or function;
- (vi) 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.

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.

1. Facts

The Petitioner filed the Form I-129 on November 15, 2013. In a letter dated November 6, 2013, the Petitioner described the Beneficiary’s duties as follows:

[The Beneficiary’s] job duties as head of the worldwide company (Foreign and U.S. Entities) include: defining the strategic vision and mission of the company; making long term business plans for the company; directing and overseeing the overall operation of the corporation; making personnel decisions regarding hiring, firing, promoting and transferring high-level management; representing the company in meetings with industry leaders and potential clients; keeping abreast of industry trends to help advantageously position the company; coordinating with outside legal representatives, accountants, and other advisors to help evaluate and advance the company’s position; working with financial institutions to secure lines of credit for the company; supervising high-level management; signing contracts on behalf of the company; and making all final decisions on matters affecting the company.

. . . At the U.S. Entity, [the Beneficiary] is a manager of managers and a manager of professionals as well. He supervises the Vice President [REDACTED] who in turn supervises the Office manager, Shipping Officer, and Purchasing Officer and also holds a Bachelor’s degree.

The Petitioner submitted copies of contracts executed by the Beneficiary “demonstrating his authority to legally bind the company to contractual agreements.”

Matter of R-E-USA, Inc.

The Petitioner submitted an organizational chart that showed the Beneficiary as President/Managing Director reporting to the Board of Directors. The chart indicates that he directly supervises a business consultant as well as a Vice President, who, in turn supervises an Administration Officer, an Office Manager, a Shipping Officer and a Purchasing Officer. The Petitioner also provided evidence that the vice president has a bachelor's degree in library and information science, as well as a copy of its consulting agreement with the business consultant named on the organizational chart.

In response to a request for evidence issued on March 14, 2014, the Petitioner provided a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2013. The Form 1120 shows that the Petitioner paid \$34,000 in compensation of officers and \$29,555 in salaries in wages in 2013.

In a second request for evidence (RFE) issued on September 22, 2014, the Director requested, among other items, evidence to demonstrate that the Beneficiary will be employed in a managerial or executive position in the United States. The Director also noted that the information found in the Petitioner's 2013 Form 1120 regarding the salaries paid to employees and officers does not appear to be consistent with the Petitioner's claim that it employs six employees. In addition, the Director noted that the Petitioner did not submit sufficient evidence regarding the staff, such as job duties, to demonstrate whether the "beneficiary will be sufficiently insulated from performing primarily non-executive duties on a daily basis."

In response to the second RFE, the Petitioner explained that its Form 1120 for 2013 was correct and the salaries of the Beneficiary and the Vice President can be found on Form 1120, Line 12, as "compensation of officers." The Petitioner further explained that the remainder of the employee wages were listed on Line 13 and totaled \$29,555 in 2013. The Petitioner submitted copies of its IRS Form W-2, Wage and Tax Statements, IRS Forms 941, Employer's Quarterly Federal Tax Returns, and Texas quarterly wage reports for 2013.

This evidence showed that, in 2013, the Petitioner paid \$24,000 to the Beneficiary, \$10,000 to the vice president, \$5,000 to the administration officer, \$12,555 to the office manager, \$6,000 to the shipping officer, and \$6,000 to the purchasing officer. During the fourth quarter of 2013, at the time the petition was filed, the Petitioner paid \$6,000 to the Beneficiary, \$1,000 to the vice president, \$2,682 to the office manager, and \$1,000 to the administration manager. The Petitioner paid these four employees in the first quarter of 2014, but only three employees, including the Beneficiary, in the second quarter of 2014. The individuals identified as purchasing officer and shipping officer were paid only during the second and third quarters of 2013. The Petitioner did not provide evidence of payments made to its business consultant, who, according to the submitted consulting agreement, earns \$5,000 per month for his assistance with the acquisition of an offshore drilling rig and other projects.

The Petitioner also submitted a letter dated October 30, 2014 from its Office Manager who further described the Beneficiary's duties as follows:

(b)(6)

Matter of R-E-USA, Inc.

1. Beneficiary defines the strategic vision and mission of the company (10%). He keeps abreast of industry trends to help advantageously position the company (5%):

The vision of our company is to provide professional engineering, general oil field equipment, mechanical and civil service to Nigeria energy, oil and gas industries. Beneficiary has and will have the power to determine business ventures, contracts to be entered and services to be performed by Petitioner. He will also determine the length and level of Petitioner's engagement. . . .

2. Directing and overseeing the overall operations of the corporation (10% of the time). Supervising high-level management (5%, Making personnel decisions regarding hiring, firing, promoting, and transferring high-level management (5%):

[The Petitioner] employs five persons with the status of employee (President, Vice President, Office Manager, Shipping Officer, Purchasing Officer). In addition, Petitioner contacts/outsources the duties relating to the Petitioner's day-to day-operational tasks to [REDACTED], and independent contractor/Consultant[,] and Consulting agreement between Petitioner and [REDACTED] ("Consultant"), of [REDACTED]

.....

[The Beneficiary], as President and Managing Director, defines the overall description of the services to be rendered by either the employee or independent Consultant. He also defines what type of services to contract outside the office. He ensures that all engagements entered by Petitioner are accomplished by employees and contractors in the manner that advances the vision and mission of Petitioner. The day-to-day operational tasks are performed by an independent contractor of Petitioner and not the Beneficiary, President and Managing Director. . . .

Furthermore, Petitioner's foreign parent company employs 60 individuals in managerial and professional positions (see attached organizational chart and job descriptions). Both Petitioner and foreign parent company's employees and contractors perform other supervisory, professional and ordinary operational tasks. Therefore, Beneficiary, employed as President/Managing Director, only performs duties related to operational and policy management.

.....

3. Representing the company in meetings with industry leaders and potential clients (20%); signing contracts on behalf of company (15%)

Beneficiary is the President of the Petitioner. With this title come the responsibilities of representing and engaging Petitioner with industries leaders and potential clients. As mentioned above, Beneficiary will have sole authority to represent company and engage company in business transactions with various industry leaders including Government agencies and business partners. He has and will sign contracts on behalf of Petitioner. . . .

Finally in the Company's bylaw, herein attached, President is vested with authority to preside at all meetings of shareholders; execute bonds, mortgages, and other instruments requiring a seal, in the name of the Petitioner; and has authority to sign certificate of stock.

. . . .

4. *Making long-term business plans of the company (5%).*

The vision of our company is to provide professional engineering, general oil field equipment, mechanical and civil services to Nigeria energy, oil and gas industries. Beneficiary has and will have the power to make long term business plans of the company through business ventures, contracts to be entered and services to be performed by Petitioner. He will also determine the length and level of Petitioner's engagement.

As set forth in the contracts and MOU submitted, [the Beneficiary] engaged and will continue to engage Petitioner in joint venture to provide a spectrum of engineering services. He will also determine future projects and activities of the company.

. . . .

5. *Coordinating with outside legal representative, accountants, and other advisors to help evaluate and advance the company's position (5%). Working with financial institutions to secure lines of credit for the company (10%).*

As a Representative of Petitioner, Beneficiary has a responsibility to ensure that the company's interests are protected when engaging the latter in contracts with other companies. He also must ensure to seek other professional advice such as accountant when necessary to facilitate Petitioner's achievement of goals.

. . . .

6. *Making all final decisions on matters affecting the company (10%)*

(b)(6)

Matter of R-E-USA, Inc.

In the light of the duties explained above, it is clear that Beneficiary makes final decision affecting the company. He does so by representing company in meetings with clients and professionals, by signing contracts and other binding documents on behalf of the company and by directing the operations of the company. This authority is vested in him by [t]he company's articles of incorporation and by-laws. . . .

The Petitioner stated that its vice president is "responsible for the management of day-to-day operations of the company; arranges for important business meetings for the President; and oversees staff and reports directly to President." The office manager's stated duties include overseeing the flow of documents to and from the vice president, managing the company's operations, analyzing market and business opportunities and advising management based on reports prepared by the shipping and purchasing officers. The Petitioner also included brief descriptions for the positions of purchasing officer, shipping officer, and business consultant.

The Director denied the petition on February 17, 2015, finding that the Petitioner had not established that the Beneficiary would be employed in a qualifying managerial or executive capacity. The Director determined that the evidence does not establish that the Beneficiary will be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who will relieve the Beneficiary from performing non-qualifying activities. Further, the Director found that the submitted evidence did not support the Petitioner's claim that it has six employees.

On appeal, the Petitioner asserts that the Director "improperly relied on the Petitioner's small size in determining that Beneficiary's duties did not meet the statutory definition of 'managerial capacity.'" The Petitioner also objects to the Director's findings that the Petitioner provided a vague description of the Beneficiary's duties and that the Petitioner did not provide a description of the Beneficiary's subordinates' duties. The Petitioner emphasizes that the Beneficiary relies on the vice president to oversee day-to-day operations and utilizes the services of an engineering consulting company, [REDACTED] such that he "only performs duties related to operational and policy management."

In support of the appeal, the Petitioner submits copies of invoices issued by [REDACTED] dating between April 1, 2013 and October 1, 2014 which amount to a total of \$180,710 in consulting fees and expenses.

2. Analysis

Upon review, the Petitioner has not established by a preponderance of the evidence that the Beneficiary will be employed in a qualifying managerial or executive capacity.

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 definitions of executive and managerial capacity each have two parts. First, the Petitioner must show that the Beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the Petitioner

must show that the Beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the Beneficiary manages a business or a component of a business does not establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of “manager” or “executive”).

In response to the Director’s RFE, the Petitioner submitted a lengthy job description for the Beneficiary’s position, including a breakdown of the percentage of time he spends on each duty. Despite the considerable length of the description, the Petitioner explained the Beneficiary’s duties in very generalized terms, noting that the Beneficiary will “define the strategic vision and mission of the company”; “decide the scope of work and responsibilities to be partaken by Petitioner”; “direct[s] and oversee[s] the overall operations of the corporation”; “represent[s] and engag[es] Petitioner with industry leaders and potential clients”; “makes long-term business plans”; makes “all final decisions”; and “ensure[s] that the company’s interests are protected.” The duties are overly broad and focus on the Beneficiary’s level of responsibility rather than providing an understanding of the specific tasks the Beneficiary will perform on a day-to-day basis. 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. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

Overall, the position description alone is insufficient to establish that the Beneficiary’s duties would be primarily in a managerial or executive capacity. When examining the managerial or executive capacity of a Beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a Beneficiary’s duties and those of his or her subordinate employees, the nature of the Petitioner’s business, the employment and remuneration of employees, and any other facts that contribute to an understanding of a Beneficiary’s actual role in a business.

The Petitioner claims on appeal that the Beneficiary is employed in an executive capacity. However, the totality of the evidence submitted does not support a finding that the Beneficiary primarily performs executive duties. 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

(b)(6)

Matter of R-E-USA, Inc.

only “general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” *Id.*

The Petitioner claimed to have six employees at the time of filing and provided an organizational chart which depicts a vice president, an administration officer, an office manager, a shipping officer, a purchasing officer and a business consultant. According to the Form W-2s for 2013, the salaries paid that year were as follows: Vice President - \$10,000; Administration Officer - \$5,000; Office Manager - \$12,555; Shipping Officer - \$6,000; and, Purchasing Officer - \$6000. Further, the Petitioner’s Texas quarterly wage report for the fourth quarter of 2013, which corresponds to the date of filing, shows that the Petitioner employed only the Beneficiary, the vice president, the office manager and the administration officer at the time of filing, and that two of these employees – the vice president and the administration officer – each received only \$1,000 in wages during this three-month period. The evidence further shows that by the second quarter of 2014, the Petitioner employed only the beneficiary, the vice president and the office manager. The Petitioner’s claim that it employs six workers is not supported by the record and the Petitioner did not establish that it employed either the shipping officer or purchasing officer at the time of filing or at any time since the petition was filed, although it continues to list these employees on its organizational chart. 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).

Further, the Petitioner has not provided sufficient evidence of its payments to [REDACTED] in support of its claim that the Beneficiary relies on services provided by this consulting company to relieve him of various operational responsibilities. The Petitioner submitted a copy of its consulting agreement with [REDACTED] dated May 6, 2013. On appeal, the Petitioner now submits copies of monthly invoices issued by [REDACTED] which indicate that it billed the Petitioner for over \$70,000 in services and expenses in 2013, beginning in April 2013. However, these expenses are not reflected in the Petitioner’s 2013 Form 1120, nor did the Petitioner include evidence of its payment of these 2013 invoices. The Petitioner also stated that the foreign company employs “60 individuals in managerial and professional positions,” and that “[b]oth Petitioner and foreign parent company’s employees and contractors perform other lower supervisory, professional and ordinary operational tasks.” The Petitioner submitted an organizational chart for the foreign company but did not provide sufficient evidence that these employees are actually employed by the foreign company such as tax returns, payroll records and paystubs. Further the Petitioner did not provide sufficient explanation of their job duties and how they assist the Beneficiary in performing the operational duties of purchasing and shipping equipment in the United States. “[G]oing 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 Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

The Petitioner correctly observes that a company’s size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa petition for

classification as a multinational manager or executive. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for us 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 “shell company” that does not conduct business in a regular and continuous manner. See, e.g. *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 reasonable needs of the Petitioner will not supersede the requirement that the Beneficiary be “primarily” employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

The Petitioner states on appeal that the vice president and subordinate employees perform the daily operational duties rather than the Beneficiary. The Petitioner also states that the independent contractor/consultant will perform many day-to-day tasks such as “evaluation of rig surveys and rig management requirements, quality and cost control; overseeing the selection of the rig presentation and purchase as well as rig funding, schedule, and company presence in Nigeria.” As discussed, the Petitioner has established that it employed only the beneficiary, the vice president, the administration officer and the office manager at the time of filing, and that two of these employees received wages consistent with part-time employment during the quarter in which the petition was filed. At the time the Petitioner responded to the RFE, it submitted evidence that it employed only the beneficiary, the vice president and the office manager. Further, the Petitioner did not provide sufficient evidence of any payments it made to the independent contractor/consultant in 2013.

In sum, the most recent evidence shows that the Petitioner employs only the Beneficiary, the vice president and the office manager, and not the staff of six employees claimed at the time of filing. The Petitioner has also not provided evidence to support its claim that the foreign entity’s staff or the external consultant contribute to the petitioner’s day-to-day operations. The Petitioner asserts that the vice president and office manager “share the duty of Operations management which should emphasize that Beneficiary is indeed relieved from performing day-to-day operations tasks.” However, the petitioner has not established who performs the duties attributed to the shipping officer, purchasing officer, and administration officer who are no longer with the company, nor does the record support the Petitioner’s claim that the vice president and office manager, as the Beneficiary’s only subordinates, would be responsible for management or supervision of lower-level employees or to what extent they are able to relieve the Beneficiary from performing non-managerial and non-executive duties. As noted by the Director, the Petitioner provided little information regarding the Beneficiary’s subordinates’ duties and did not establish that these employees are managers or professionals.

While we do not doubt the Beneficiary’s senior level of authority within the company as the Petitioner’s president, the Petitioner has not met its burden to establish that he primarily performs executive or managerial duties. Based on the foregoing discussion, the Petitioner has not established that it will employ the Beneficiary in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

B. Doing Business Abroad

The remaining issue to be addressed is whether the Petitioner established that the foreign entity is doing business.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In denying the petition, the Director noted that the Petitioner did not provide sufficient evidence that its parent company in Nigeria has been providing regular and continuous business services such as a valid business license, tax returns, invoices, receipts, bank statements, bills of lading, purchase orders or evidence that its contracts were completed.

On appeal, the Petitioner asserts that it did in fact submit contracts, bills of lading, invoices, company marketing materials, 2013 income tax documents, photographs and other relevant evidence of business activities sufficient to establish that its parent company continues to do business.

Upon review, the Petitioner's assertions are persuasive. Upon review of the totality of the record, the Petitioner has established by a preponderance of the evidence that its foreign parent company is doing business in Nigeria. Accordingly, we will withdraw this portion of the Director's decision.

III. 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 R-E-USA, Inc.*, ID# 14424 (AAO Nov. 13, 2015)