



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

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

MATTER OF T-USA, LLC

DATE: NOV. 23, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a company that intends to operate a retail business and a plastics recycling business, seeks to temporarily employ the Beneficiary as the vice president/CFO of its new office and to classify him as an L-1A nonimmigrant intracompany transferee. *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 Director granted the Petitioner's motion to reconsider and affirmed her decision. 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 the Beneficiary would be employed in a qualifying managerial or executive capacity within one year of approval of the petition.

On appeal, the Petitioner asserts that the Beneficiary will be employed in a qualifying executive capacity and that it provided sufficient evidence to support the approval of the petition.

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.

II. THE ISSUE ON APPEAL

The sole issue addressed by the Director is whether the Petitioner established that the Beneficiary would be employed in a qualifying managerial or executive capacity within one year of approval of

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the new office petition. The Petitioner has consistently claimed that it will employ the Beneficiary in an executive capacity.

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.

Further, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 01(a)(44)(C) of the Act.

A. Facts

The Petitioner filed the Form I-129 on April 17, 2014. The record shows that the Petitioner was established in the State of Georgia in [REDACTED]. The Petitioner states that it intends to operate gas stations with convenience stores and eventually enter the plastics recycling industry.

In a letter dated March 30, 2014, the Petitioner provided a description of the Beneficiary’s proposed duties noting that he will allocate his time as follows:

1. Sales and Profitability Functions:

The beneficiary will develop strategies for the sales operations of the Petitioner. His specific functions will include, but will not be limited to: overseeing the functioning and development of ongoing business to accomplish sales and profitability, identifying sale opportunities, developing sales forecasts, managing allocated funds, establishing goals and policies for sales, marketing and revenue departments. He will be required to manage multiple, often complex, tasks.

He will be specifically responsible for managing and executing all sales and marketing components including achieving targeted revenue for the company. He will maintain accurate revenue forecast for current and future quarters.

The Beneficiary will spend 25% of his time on this duty.

2. Financial and Budget Functions:

Beneficiary will be responsible for managing and executing the financial operations of the Petitioner. He will be specifically responsible for reviewing financial reports and finalizing the budget of the company.

The Beneficiary will spend 25% of his time on this duty.

3. Marketing and Market Research Including Mergers and Acquisitions:

Beneficiary will be responsible for sales, marketing, market research and revenue operations of the Petitioner. He will be responsible for driving all phases of the business development process from identifying key market trends, actively targeting prospective clients in United States, delivering targeted marketing propositions to clients and converting prospective clients into confirmed clients for the company.

Beneficiary will be responsible for mergers and acquisitions to expand the business. In addition, the Beneficiary will perform crucial marketing functions such as developing and supervising implementation of marketing strategies and programs, developing and implementing marketing plans which would leverage the Petitioner's current strengths and opportunities in the market. Beneficiary will ensure that the petitioner's company brand continues its impact with partners in American while strengthening the company's links with key intermediaries.

The Beneficiary spends 15% of his time on this duty.

4. Liaison between U.S. and India Offices:

The beneficiary will liaison between the Petitioner and the Indian company in performing his functions as Vice President/CFO. Since the petitioner's parent company is in India, a significant amount of coordination for operations and activities at various levels, is the key to optimal performance of the U.S. Company in a cost effective timely manner.

The Beneficiary will spend 10% of his time on this duty.

5. Administration/Legal/Human Resources functions:

Beneficiary will be responsible for the internal control of the business operations of the company. Beneficiary will have the discretion to hire and fire personnel, development, implementation and management of HR policies and procedures, and ensuring HR administrative legal compliance with federal and state regulations. Beneficiary will be responsible for, and have complete discretion to make decisions for a more productive functioning of all the sales and marketing departments.

The Beneficiary will spend 15% of his time on this duty.

6. Public and Client Relations

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[The Beneficiary] will be in charge of building relationships with clients interested in tying up business with the petitioner company. He will respond to requests for proposals from clients and he will initiate contacts with potential businesses.

The Beneficiary will spend 10% of his time on this duty.

The Petitioner submitted its business plan, which indicates that its mission is “acquiring businesses initially in the convenience store/gas station industry, and subsequently establishing a factory to manufacture plastic waste materials to finished products in USA.” The plan also outlined a “broad timetable of the Company’s mission” indicating that the Petitioner expects to acquire a gas station with a convenience store between June and October 2014. The timetable indicates that, between August and December 2014, the Petitioner will “start researching ways to purchase recycled plastic materials in the United States and ship to India for manufacturing of end products,” and “look into establishing a factory in the United States to manufacture end products from recycled raw materials in the United States for local sales and/or export.” In January 2015, the Petitioner anticipates that it would acquire a second gas station with a convenience store. The business plan also stated that the Petitioner is “currently looking at a business named [REDACTED] in [REDACTED] GA.” The business plan states that the Petitioner’s Indian parent company transferred \$31,000 towards the start-up of the Petitioner’s business operations.

The business plan includes a pro forma income statement for the years 2014 to 2016. Estimated sales for each year range from \$900,000 in 2014 to \$1,050,000 in 2016. The financial projections indicate that salary and wage expenses would be \$135,200 in 2014, \$160,000 in 2015 and \$170,500 in 2015. The business plan shows consistent rent expenses for all three years. The business plan does not identify the company’s anticipated start-up costs.

The Petitioner submitted an organizational chart that indicated the Beneficiary as Vice President/CFO who in turn will supervise an Account Manager, an Operations and Sales Manager, an Assistant Manager, and two support staff, and outside law firms and accounting firms. The organizational chart also lists employees that are expected to be hired by the second or third year of operations, including an Operations and Sales Manager, an Assistant Manager, and two support staff. The Petitioner provided a list of job duties for each position on the chart.

The Director issued a request for additional evidence (RFE) on April 22, 2014, and requested; among other items, evidence to demonstrate how the company will grow to be of sufficient size to support an executive position within one year and evidence that the Beneficiary’s proposed position will be in an executive capacity. Specifically, the Director requested information regarding the proposed nature of the office and the size of the U.S. investment, as well as an overview of the organizational structure of the new office.

In response to the RFE, dated May 29, 2014, stated that the “Business Plan is sufficiently detailed about what they want to do, including a staffing plan detailing how they want to organize themselves.” The Petitioner also explained that at the time of filing the petition, it had not yet looked for a new business but since filing they have searched and they have a letter of intent to purchase a

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gas station and convenience store. The Petitioner provided a copy of the letter of intent as well as copies of 2012 and 2013 tax returns for doing business as The Petitioner explained that the Beneficiary is also communicating with individuals in the plastics manufacturing business in the United States and submitted copies of two e-mails sent by the Beneficiary.

The Petitioner also stated that the foreign parent company transferred \$31,000 and it is “ready and able to transfer additional sums to remunerate [the Beneficiary] and start this business but they take a cautious approach and will transfer additional funds once this petition is approved.”

The Petitioner’s response to the RFE also included a revised description and breakdown of the Beneficiary’s proposed duties. Briefly, the Petitioner stated that the Beneficiary will allocate 25% of his time to “Operational Management” including entering into contracts, reviewing logistical and supply reports, meeting with managers, handling administrative matters, and maintaining contacts and relationships with vendors. The Petitioner stated that the Beneficiary would also allocate 15% of his time to “Marketing Management and Public Relations,” 35% of his time on “Purchasing, Budgeting and Financial Management,” and 25% of his time to “Human Resources and Personnel Management.”

The Director denied the petition on July 1, 2014, finding that the Petitioner did not establish that the Beneficiary would be employed in a qualifying executive capacity within one year of the petition’s approval, or that the new office would support an executive position. The Director observed that the Petitioner’s projected organizational structure and staffing levels for the initial year of operations are not plausible in light of the Petitioner’s stated intent to operate a retail business that is open for business for 24 hours daily. Further, the Director found that the Petitioner’s evidence did not corroborate its claim that it would commence business activities in the plastic recycling field by the end of the first year. The Director noted the lack of detailed financial information in the Petitioner’s business plan and insufficient evidence in the record to establish that the foreign entity has the means to fund the new office during the start-up phase.

On July 30, 2014, the Petitioner filed a motion to reopen and reconsider. The Petitioner maintained that it provided a detailed description of the Beneficiary’s proposed duties sufficient to establish that he would be employed in an executive capacity. Further, the Petitioner stated that even if it employed only three employees, its staffing would be sufficient to provide 24 hour per day service. The Petitioner submitted evidence that it received a second \$31,000 wire transfer on July 28, 2014. In a decision dated February 20, 2015, the Director affirmed the denial of the petition.

On appeal, the Petitioner asserts that it provided all information necessary to support the approval of a new office petition, and to establish that it will employ the Beneficiary in a qualifying executive capacity within one year. The Petitioner emphasizes that the foreign entity has invested a total of \$62,000 and contends that this amount “combined with available funds, if needed, should be adequate in proving that the Parent Company has committed sufficient funds.” The Petitioner explains that the initial \$31,000 transfer was used to secure an office, cover the Beneficiary’s

expenses and was also intended to contribute to the purchase price of the business and its operational expenses.

B. Analysis

Upon review, the Petitioner has not established by a preponderance of the evidence that the Beneficiary would be employed in a qualifying executive capacity within one year of the approval of the petition.

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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, 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.*

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.*

Here, while the Petitioner has consistently stated that the Beneficiary will be employed in an executive capacity, it provided two different position descriptions for the same position, and two different accounts of how the Beneficiary would allocate his time among his responsibilities. The first description indicated that the Beneficiary would allocate 100% of his time to: sales and profitability functions (25%); financial and budget functions (25%); liaison between India and U.S. offices (10%); marketing and market research functions (15%), administration/legal/human

resources functions (15%) and public and client relations (10%). In response to the RFE, the Petitioner stated that the Beneficiary would allocate 100% of his time to: operational management (25%); marketing and customer relations (15%); purchasing, budgeting and financial management (35%); and human resources and personnel management (25%). The Petitioner did not provide any explanation for the revisions and the lack of clarity makes it difficult to discern how the Beneficiary would actually allocate his time during the first year of operations and beyond.

In addition, while the submitted descriptions indicate that the Beneficiary will be the senior employee in the United States and exercise the appropriate level of decision-making authority, a number of the duties attributed to him are not consistent with the statutory definition of executive capacity. For example, the Beneficiary's responsibility for "marketing and customer relations" includes direct interaction with the customers of the Petitioner's proposed convenience store and sole responsibility for any marketing activities undertaken. In addition, the Petitioner states that the Beneficiary "will continuously research the market," "review purchase orders and invoices," "travel to vendor's sites to determine the best products for sale," "review logistical and supply reports and order sheets," "handle administrative matters," "prepare financial documents before giving them to the company Accountant," and review daily expenses.

Based on the current record, it is evident that significant portions of the Beneficiary's time will be spent on many operational and administrative activities that are not executive in nature, and we are unable to determine whether the claimed executive duties would constitute the majority of the beneficiary's duties, or whether the beneficiary will primarily perform non-executive duties by the end of the first year of operations. Although the Petitioner divided the Beneficiary's areas of responsibility into four to six categories and assigned a percentage to each area, each category includes non-qualifying duties. Therefore, the Petitioner's descriptions of the Beneficiary's job duties do not establish what proportion of the beneficiary's duties will be managerial in nature, and what proportion will be actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988). Again, an individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise. The actual duties themselves 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). The job descriptions provided do not establish that the Beneficiary would be primarily focused on the broad policies and goals of the company within one year, rather than directly involved in its day-to-day operations.

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 a complete understanding of a beneficiary's actual duties and role in a business. The petitioner's 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 timeline provided in the Petitioner's business plan indicates that the Petitioner anticipates opening two gas stations with convenience stores and entering the plastics recycling market during the first year of operations. However, the pro forma financial statement included in the same business plan suggests that the company does not anticipate expanding beyond a single retail location during its first two to three years in operation. The Petitioner anticipates earning \$900,000 in gross income its first year in operation and \$1,050,000 in its third year of operation. The retail business it intends to acquire reported gross receipts of \$970,509 in 2013. Therefore, the modest increases in gross income included in Petitioner's financial projections would be consistent with the continued operation of this single retail business, but not with the acquisition and operation of a second retail store as well as entry into the plastics recycling business. Similarly, the Petitioner's projected expenses for employee salaries and wages show little growth over the same period, despite its claim that its staffing would nearly double during this period. 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).

The Petitioner submitted an organizational chart indicating that it intends to hire three subordinate "managers" and two support staff during the first year of operation; however, the record contains no corroborating evidence to establish that the company's hiring plan is feasible in light of the company's projected income and expenses for the first year of operations. The Petitioner did not provide a timeline for hiring staff or their projected salaries. Further, given the Petitioner's claim that it intends to be open for business for 168 hours per week, the projected staffing would barely be sufficient to keep a single employee in the store during its operating hours; the employees identified as "managers" would reasonably need to perform the duties of a cashier or clerk in order for the business to remain open. The Petitioner's assertions that it will employ three tiers of managers and only two support staff are not credible given the nature of the business. Moreover, the Petitioner has not included in its business plan any proposed staff who would assist the Beneficiary with tasks associated with entry into the plastics recycling business, which would reasonably require someone to perform non-executive duties such as market research, purchasing, logistics and export-related duties.

In addition, while the Petitioner has established that it has received initial funding of approximately \$31,000, and an additional transfer of \$31,000, it has not offered adequate support for its statements that this amount is sufficient for the company's start-up. The Director noted that a review of the foreign company's tax returns does not corroborate with the Petitioner's claim that the foreign

company generates \$1.5 million annually. The Petitioner stated that the foreign company's operations uses cash transactions that are not always indicated in the tax returns but the documentation is not clear as to the foreign company's ability to provide the necessary funds for the Petitioner to purchase the gas station and convenience store and start operations. 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)).

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Upon review, and for the reasons stated herein, the Petitioner has not established by a preponderance of the evidence that the Beneficiary will be employed in a qualifying executive capacity within one year of approval or that the new office would support an executive position. Accordingly, the appeal will be dismissed.

III. CONCLUSION

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of T-USA, LLC*, ID# 14653 (AAO Nov. 23, 2015)