



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

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

MATTER OF D-C- INC.

DATE: OCT. 9, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR NONIMMIGRANT WORKER

The Petitioner, an industrial software and equipment company, seeks to employ the Beneficiary as the general manager of its new office under the nonimmigrant L-1A 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 Petitioner did not provide sufficient evidence to establish that the Beneficiary's position abroad was in a qualifying managerial or executive capacity or that the Petitioner would support the Beneficiary in a managerial or executive capacity within one year of the approval of the petition.

On appeal, the Petitioner asserts that it submitted sufficient evidence to establish the Beneficiary's eligibility for the requested classification.

## 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.

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states 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, 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 (1)(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.

### I. FACTS AND PROCEDURAL HISTORY

The record shows that the Form I-129 was filed on September 4, 2014. The Petitioner submitted supporting documents, including, in part, a cover statement dated August 18, 2014, briefly discussing the Beneficiary's former and proposed positions as general manager of the foreign entity and the proposed U.S. employer. The Petitioner also provided various business documents pertaining to both entities, an organizational chart and payroll records for the foreign entity, as well as a copy of its business plan.

On September 10, 2014, the Director issued a request for evidence (RFE), informing the Petitioner of various evidentiary deficiencies that may preclude approval of the petition. Among the issues addressed was that of the Beneficiary's former employment abroad. Namely, the Director instructed the Petitioner to provide a detailed account of the Beneficiary's job duties and the percentage of time spent performing each of his assigned tasks. The Director further instructed the Petitioner to articulate a more specific time line for the employees it plans to hire and the job duties that the prospective employees will be assigned. The Director asked the Petitioner to explain how it plans to support the Beneficiary in a qualifying managerial or executive position within one year of starting its U.S. operations and to provide a copy of the feasibility study and/or market research that led to the decision that there was a need for the U.S. business. The Director indicated that the Petitioner's business plan should include a time line for each proposed action within the first year of operation.

In response, the Petitioner provided a statement, dated October 23, 2014. The Petitioner claimed that, with the exception of a brief period from June 2013 through March 2014, the Beneficiary worked abroad for the same foreign employer in the position of general manager. The Petitioner offered a document titled "Certificate," dated October 2, 2014, which included a list of the Beneficiary's job responsibilities and closely resembled the job description provided at the time of filing.

With regard to the new office in the United States, the Petitioner indicated that it would employ a general manager, a secretary, a support engineer, and a sales representative within its first year of operation for a total of four employees, including the Beneficiary.

After reviewing the record, the Director determined that the Petitioner did not establish eligibility for the benefit sought herein and therefore issued a decision, dated November 6, 2014, denying the petition. As previously indicated, the Director concluded that the Petitioner did not provide sufficient evidence to establish that the Beneficiary's position abroad was in a qualifying managerial or executive capacity or that the Petitioner would support the Beneficiary in a managerial or executive capacity within one year of commencing business operations.

With regard to the Beneficiary's employment abroad, the Director found that the Petitioner provided insufficient information regarding the Beneficiary's job duties with the foreign entity. With regard to the Beneficiary's proposed U.S. employment, the Director emphasized that the Petitioner did not provide job descriptions for the Beneficiary's proposed subordinates and for the Beneficiary himself. The Director further found that the Petitioner did not provide sufficient evidence to establish that the Beneficiary would oversee the work of professional, managerial, or supervisory employees who would relieve him from having to perform non-qualifying tasks within one year.

The Petitioner filed an appeal on December 5, 2014, contesting the Director's findings.

Based on our own comprehensive review of the record and for the reasons provided in our discussion below, we find that the Petitioner has not provided sufficient evidence to overcome one of the grounds for denial and, therefore, the appeal will be dismissed. While we have considered all evidence that has been submitted into the record, we will specifically reference only those submissions that are relevant to the Beneficiary's current position with the foreign entity and proposed position with the U.S. entity.

## II. THE ISSUES ON APPEAL

### A. Petitioner's Ability to Support a Manager or Executive Within One Year

The first issue to be addressed is whether the Petitioner provided sufficient evidence to establish that it would have the ability to support the Beneficiary in a qualifying managerial or executive capacity within one year of commencing its business operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

When a new business is 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 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 order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). 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.

(b)(6)

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

Here, the Petitioner described the Beneficiary's proposed duties as follows on the Form I-129:

Designs the business plan; assign the company activities; assign the task of each Department; develops and monitors strategies for the long-term viability of the company; develops future leadership within the company; hires, manages and fires the employees; evaluate the company activities in quarter basis; and improves and modifies the business plan if necessary to reach the company's target. [S]hall act as the overseer for the operations in [REDACTED] including marketing, finance and human resources; shall have the authority to perform the following: (a) select the office for the subsidiary; (b) hire, supervise[,] fire and transfer employees; (c) determine the appropriate marketing strategies; and (d) maintain the financial health of the company.

The definitions of executive and managerial capacity 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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

While these duties suggest that the Beneficiary will exercise the appropriate level of authority over the U.S. company as its owner and general manager, the Petitioner provided insufficient detail regarding what he will primarily do on a day-to-day basis during the first year of operations and beyond. 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).

Further, we note that these duties are largely identical to those provided for his position with the foreign entity, a company that has at least 15 employees and has been doing business for well over a decade. The Beneficiary will undoubtedly exercise the same level of authority in both companies as the owner; however, the Petitioner's claim that his actual duties would remain exactly the same while serving as general manager of a new office with no current staff, and in a new market, is not credible.

The fact that a beneficiary owns and manages a business does not necessarily 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"). Here, neither the Beneficiary's senior position in the company nor his position description alone is sufficient to establish that the beneficiary's duties would be primarily in a

managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. *See generally*, 8 C.F.R. § 214.2(l)(3)(v)(C).

The Petitioner provided a business plan indicating its intent to employ a secretary, a support engineer and a sales representative during the first year of operations. However, the business plan did not provide a clear timeline for hiring employees, projected salaries for these employees, or financial projections showing that it will be able to pay the salaries of four employees during its first year. For example, the Petitioner stated at page 18 of its business plan that it projects a static monthly payroll expense of \$14,700 for the first year, but it has not provided a projected profit and loss statement with all expenses accounted for to show that that this projection is feasible. The Director specifically requested a more detailed timeline for specific actions during the Petitioner's first year of operations as well as additional information to support the broad projections made in the business plan, but the Petitioner did not provide this information in response to the RFE. 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)).

Further, while the Petitioner provided descriptions for the Beneficiary's proposed subordinates, it has not outlined the educational requirements for the positions, and the evidence is insufficient to establish that the employees to be hired will be professionals, managers or supervisors. In addition, the Petitioner has not identified a proposed employee or employees who will order inventory, create and update the company's website, provide training services, maintain relationships with suppliers, and perform tasks related to invoicing, banking and bookkeeping by the end of the first year of operations, all of which functions are contemplated by the Petitioner's business plan.

Overall, the Petitioner's claim that the Beneficiary's subordinates "will carry out the majority of the day-to-day non-managerial tasks needed to operate the business" within one year is not adequately supported by the submitted evidence. Even if we assume that the Petitioner will hire three employees as stated, but not adequately supported, in the business plan, we cannot determine whether the Beneficiary would be relieved from primarily performing non-managerial duties, or that company will grow to the point where it requires the Beneficiary to perform primarily managerial duties within one year.

In light of the Beneficiary's overly broad position description and the deficiencies noted with respect to the Petitioner's business plan and projected staffing levels, the Petitioner has not established that it would support the Beneficiary in a qualifying managerial or executive capacity within one year of commencing its U.S. business operation. For this reason, the petition cannot be approved.

B. Foreign Employment in a Managerial or Executive Capacity

The remaining issue to be addressed is whether the Petitioner established that the Beneficiary was employed by its foreign affiliate in a qualifying managerial or executive capacity.

The Director denied the petition, in part, based on a finding that the Petitioner did not submit a detailed description of his duties performed as general manager of the foreign entity. The Director further determined that the Petitioner "did not submit any supporting evidence," to show that the Beneficiary performed the duties described in the submitted job description.

Upon review of the totality of the record, we find sufficient evidence to establish that the Beneficiary has been employed abroad in a qualifying managerial capacity.

While the Petitioner did not fully respond to the Director's request for a more detailed description of the Beneficiary's day-to-day duties with the foreign entity, it would be incorrect to conclude that the Petitioner "did not submit any supporting evidence" to corroborate the job description provided. The record contains organizational charts reflecting the structure and staffing levels of the foreign entity, position descriptions for each of the foreign entity's employees, and payroll records which corroborate the foreign entity's employment of the individuals identified on the organizational charts.

In visa petition proceedings, the burden is on the petitioner to establish eligibility. *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). In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.* We must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Here, the evidence shows that the foreign entity regularly employs 15 to 18 employees, some of which are supervisors, to perform the company's sales, marketing, technical and administrative functions, and that it is more likely than not that these employees relieve the Beneficiary from any significant involvement in non-managerial and non-qualifying first-line supervisory functions. Further, the Petitioner's description of the Beneficiary's duties and its need for a qualifying managerial position are credible in light of the foreign entity's documented staffing levels and its current stage of development.

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Accordingly, we will withdraw the director's decision as it pertains to this issue only. The petition will remain denied as the Petitioner did not overcome the Director's adverse finding with respect to the Beneficiary's proposed U.S. employment.

#### IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons. 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 D-C- Inc.*, ID# 13925 (AAO Oct. 9, 20154)