



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

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

MATTER OF Z-C-, LLC

DATE: APR. 28, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a restaurant consulting business organized in the State of Connecticut, seeks to temporarily employ the Beneficiary in the position of consulting director of its new office under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that: 1) it secured sufficient physical premises to house its business operation; and 2) it would employ the Beneficiary in the United States in a qualifying managerial or executive capacity within one year of commencing its operations.

The matter is now before us on appeal. In its appeal, the Petitioner submits a brief statement disputing the Director's findings and provides an excerpt from the local zoning regulations to establish that the Petitioner's home office constitutes a sufficient physical premises.

Upon *de novo* review, we will dismiss 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(1)(3) states that an individual petition filed on Form I-129, Petition for Nonimmigrant Worker, shall be accompanied by:

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

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.

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## II. SUFFICIENT PHYSICAL PREMISES

The first issue to be addressed in this proceeding is whether the Petitioner established that it secured sufficient physical premises to house the new office.

### A. Facts

The record shows that the Form I-129 was filed on March 4, 2015, and was accompanied by a supporting statement in which the Petitioner explained that the Beneficiary currently leases a residence, which it claims “has sufficient space for his current office needs,” as the Beneficiary’s consulting and marketing work would be primarily conducted at the Petitioner’s clients’ facilities. The Petitioner also provided a copy of the Beneficiary’s residential lease, which identified [REDACTED] as the landlord and showed an execution date of April 30, 2014. The lease was for a one-year term, which commenced on May 1, 2014, and was set to terminate on April 30, 2015.

The Director issued a request for evidence (RFE) informing the Petitioner of various evidentiary deficiencies. Among the issues discussed in the RFE was that of the Petitioner’s physical premises. Namely, the Director determined that the residential lease that the Petitioner provided as proof of having obtained a sufficient physical premises was insufficient. The Director noted that the lease did not indicate that commercial activities are permitted on the leased premises or that the location is zoned for commercial use. The Director also noted that the Petitioner did not show that the leased premises has room for a support staff and who would conduct daily business activities, such as answering phones and perform marketing and sales tasks. Accordingly, the Director instructed the Petitioner to provide additional supporting evidence, including an executed lease showing the square footage and office space on the premises, a letter from the property manager confirming that a sublease to the U.S. entity is permitted, and colored photographs showing office space on the premises.

In response, the Petitioner provided a statement explaining that the Beneficiary is currently its sole representative, whose primary activities include identifying consulting and other business opportunities in the restaurant field. The Petitioner stated that based on the size of the current U.S. operation, its “space needs are limited to a single office with internet access, which [the Beneficiary] maintains in his home.” The Petitioner further stated that it would acquire additional office space if the restaurant consulting services business is successful. In addition, the Petitioner provided a letter, dated March 27, 2015, from [REDACTED] indicating that a sublease to the petitioning entity was approved.

On June 19, 2015, the Director issued a decision denying the petition. The Director considered the Petitioner’s submissions in response to the RFE and reiterated her prior finding that the evidence was insufficient to establish that the Petitioner acquired sufficient physical premises to house its business operation. While the Director acknowledged the submission of the March 27, 2015, letter from [REDACTED] she found that the evidence did not establish that the leased premises is zoned for commercial office space or that commercial activity is permitted at the leased location.

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## B. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that it secured sufficient physical premises to house the new office.

As a threshold matter, we acknowledge that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office. The phrase “sufficient physical premises” is broad and somewhat subjective, leaving United States Citizenship and Immigration Services (USCIS) great flexibility in adjudicating this legal requirement. There may be cases in which a residential premises or home office would satisfy the regulatory requirements. However, the petitioner bears the burden of establishing that its physical premises should be considered “sufficient” as required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(A). To do so, it must clearly identify the nature of its business, the specific amount and type of space required to operate the business, its proposed staffing levels, and provide evidence that the space can accommodate the petitioner’s growth during the first year of operations. USCIS may also consider evidence that the company has obtained a license to operate the business from a residential dwelling, if required, evidence that the landlord has authorized the use of residential space for commercial purposes, evidence that the company has established separate phone lines or made other accommodations for the use of the premises by the U.S. company, or any other evidence that would establish that a residential dwelling or portion of a residential dwelling will meet the company’s needs. Finally, photographs and floor plans of the premises may assist in determining that the premises secured are sufficient to accommodate the petitioner’s business operations.

In the present matter, the Petitioner has not specified the amount of space required to operate its business, nor has it provided specific information about its proposed staffing levels to establish that the home-based office would accommodate the Petitioner’s growth during its first year of operation.

Further, while the Petitioner supports the appeal by providing an excerpt of zoning regulations that apply to the town of ██████████ Connecticut, where the Petitioner claims to have its home office, it does not provide sufficient evidence to establish that it meets the requirements of section 3.3.A.3.a of the zoning regulations, which states that a home office within the same dwelling as the primary residence is permitted so long as the home office does not take up more than 20% of the total square footage of the residence, excluding garage, attic, and basement area. Namely, the lease that the Petitioner submitted as proof of sufficient physical premises does not disclose the amount of square footage of the entire residence; nor does the Petitioner provide evidence to establish how much square footage would be required to operate its business as a home office within the leased premises. 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’l Comm’r 1972)). Also, despite the Petitioner’s submission of the March 27, 2015, sublease letter, which permitted the Beneficiary to sublease the leased premises to the Petitioner, the letter was written prior to April 30, 2015, when the original lease expired. The record does not contain a current lease showing that the

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Beneficiary continued to lease the premises at [REDACTED] Connecticut beyond April 30, 2015.

In addition, as the Petitioner did not provide photographs of the business premises, we are unable to determine whether the Petitioner was in compliance with the provision at section 3.3.A.3.b.iv of the [REDACTED] Connecticut zoning regulations, which prohibits a home-based business from displaying “signs or products in, on, or about the premises except as permitted by these Regulations . . . .”

The Petitioner did not establish the acquisition of a sufficient physical premises to house its business operation; therefore, we cannot conclude that the Petitioner meets the eligibility requirement cited at 8 C.F.R. § 214.2(l)(3)(v)(A) and the petition cannot be approved.

### III. QUALIFYING EMPLOYMENT IN THE UNITED STATES

The second issue to be addressed is whether the Director was correct in denying the petition based on the finding that the Petitioner did not establish that it will have the ability to employ the Beneficiary in a qualifying managerial or executive capacity after its first year of operation.

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:

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- (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.

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. *See* section 101(a)(44)(C) of the Act.

A. Facts

The record shows that on page 23, No. 7 of the Form I-129, L Classification Supplement, the Petitioner responded “Same as answer above,” when asked to describe the Beneficiary’s proposed job duties in the United States. It is noted that No. 6 of the L Classification Supplement asked the Petitioner to describe the Beneficiary’s job duties abroad for the three years preceding the filing of the petition. In response, the Petitioner described the job duties the Beneficiary performed during the course of “coordinating the food service activities of the restaurant,” which the Beneficiary jointly owned with one other partner. The Petitioner stated that the Beneficiary’s job duties included estimating food and beverage costs, purchasing supplies, communicating with personnel in the preparation of menus and other activities associated with the dining room, bar, and banquet operations, directing the hiring of employees and task assignments, reviewing financial transactions and monitoring the budget, and consulting “with various restaurant making design and menu changes to increase profits[.]” In addition, in its initial letter of support, the Petitioner stated that the Beneficiary would assume the position of director of consulting in which he would participate “in establishing overall business goals and in the formulation of the business development strategy, as well as in staffing strategy and personnel planning.”

After reviewing the Petitioner’s submissions, the Director determined that the Petitioner did not provide sufficient supporting evidence to establish that it would support an executive or managerial position within one year of the petition’s approval. Accordingly, the RFE instructed the Petitioner to provide evidence describing the scope of the U.S. entity, its organizational structure and financial goals, the size of the U.S. investment, and the financial ability of the foreign entity to pay the Beneficiary and commence doing business in the United States. The Director indicated that the Petitioner’s original support letter was overly vague and thus instructed the Petitioner to provide, in part, a letter from the foreign entity indicating the proposed number of employees, the types of positions they will hold, and the duties to be assigned to each proposed position; a feasibility or market research study used by the foreign entity to determine the Petitioner’s ability to support a

managerial or executive position within one year of operation; the Petitioner's business plan summarizing the commencement of the new office and a time table for each proposed action within the first year of operation; an organizational chart showing the Petitioner's proposed staffing; and the amount of the U.S. investment, accompanied by proof of the foreign entity's capital contributions, such as initial wire transfers, canceled checks, deposit receipts, and/or bank statements.

In response, the Petitioner provided a one-page business plan in which the Petitioner stated its intent "to grow its business in the [U.S.] by offering restaurant consulting services to small and medium-sized full service restaurants in the tri-state areas as well as new entrepreneurs opening their first venue." The Petitioner referred to restaurant consulting as "a fast growing field" and claimed that it could best serve smaller establishments that are unable to afford full-time professional managers but that would be "interested in hiring professional consultants who are paid a basic monthly fee and an incentive fee based on a percentage revenue growth." The Petitioner stated that it would provide the following services to its clientele:

- Brand concept and identify consulting;
- Food and beverage menu development;
- Interior design and construction consulting, including floor plans, lighting, fixtures [and] finish materials;
- Installation and implementation of operations management systems;
- Marketing and PR strategies; and
- Staff recruiting and training assistance.

The Petitioner explained that the initial capital investment is minimal due to small overhead, which includes only salary, but no equipment or inventory. The Petitioner claimed that a single manager could service up to seven clients and estimated that its initial annual revenue would be approximately \$85,000.

On June 19, 2015, the Director issued a decision denying the petition based, in part, on the conclusion that the Petitioner did not provide sufficient evidence to support the claim that it would be able to support the Beneficiary in a qualifying managerial or executive capacity after its first year of operations. The Director found that the Petitioner's business plan was insufficient in that it lacked a projected staffing plan within the first year of operation, did not identify any subordinate positions, and did not articulate the Beneficiary's job duties. The Director further determined that the Beneficiary himself would actually deliver the consulting services to the Petitioner's projected clientele, thus indicating that the Beneficiary would not be relieved from performing the operational tasks of the organization.

## B. Analysis

Upon review of the evidence of record, including materials submitted in support of the appeal, we find that 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 operations.

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.

As properly discussed in the Director's decision, the Petitioner provided a deficient business plan, which contained no plans to hire any support personnel, thus leaving us to conclude that the Beneficiary himself would carry out the tasks that are necessary to provide the restaurant consulting services to the Petitioner's business clients. While a beneficiary is not required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services 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'r 1988). Merely establishing that the beneficiary would perform tasks at a professional level is not sufficient unless those tasks rise to the level of managerial or executive capacity.

Further, the Petitioner did not comply with the RFE instructions asking it to provide a feasibility or market study used by the foreign entity to determine the probability that the Petitioner would support a manager or executive within one year of the approval of the petition. Rather than providing the requested evidence, the Petitioner offered its own unsupported analysis of the restaurant consulting industry without explaining where it derived the basis for its assertions. We note that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Furthermore, 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 Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Finally, we find that the Petitioner offered deficient and unreliable information to describe the job duties to be carried out by the Beneficiary in his proposed position. The Petitioner's initial reference to the Beneficiary's job duties abroad when asked to provide a job description for the proposed position was misleading, as the Beneficiary's placement in the foreign entity's organizational chart indicates that he was employed as chief executive of the restaurant operation, rather than as a director of consulting, thus indicating that he performed job duties associated with owning and running a restaurant. The claim that the Beneficiary's job duties abroad in his position as a restaurant general manager are similar to those he would perform in his proposed position as director

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of consulting in the United States is both confusing and inconsistent. While additional information was provided in response to the RFE in the form of a business plan, the overall lack of any support personnel, either immediately or within one year of the Petitioner's commencement of operations, strongly indicates that the Beneficiary would directly perform the revenue-generating services offered to the Petitioner's clientele. The Petitioner also provided insufficient evidence that anyone other than the Beneficiary would be available to market and sell the services offered by the Petitioner, to actually provide those consulting services to the Petitioner's clientele, or to carry out the organization's daily administrative tasks.

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). 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, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the present matter, not only does the record lack a detailed job description for the Beneficiary's proposed employment, but it also offers no specific plan for hiring a support staff as a means of relieving the Beneficiary from having to allocate his time primarily to performing the Petitioner's operational tasks beyond its initial year of operation. While the Petitioner disputes the Director's findings on appeal, it offers no supplemental evidence to overcome those findings.

In light of the deficiencies noted above with respect to the Petitioner's business plan, lack of projected staffing, and the overall lack of information pertaining to the Beneficiary's proposed position, we find that 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 operations. For this additional reason the petition cannot be approved.

#### IV. QUALIFYING EMPLOYMENT ABROAD

Finally, beyond the Director's decision, we find that the Petitioner has not provided sufficient evidence to establish that the Beneficiary's employment abroad was in a qualifying managerial or executive capacity. As indicated above, a detailed job description is critical when determining the managerial or executive capacity of a given position, as the actual duties themselves reveal the true nature of the employment. *Id.* at 1108. In the present matter, the Petitioner's supporting statement indicated that the foreign entity operates a restaurant and bar in ██████████ Spain, and offers restaurant consulting services to other restaurants in the area. In addition to the job description offered in the petition supplement, the Petitioner stated that restaurant consulting involves the following services: site location and evaluation; competitive analysis; acquisition and divestiture; creation of business plans; investment and cash flow analysis; construction management, building and health code compliance, and project development; kitchen design and equipment specifications; and menu planning and marketing. The Beneficiary's résumé, which was also offered in support of the petition, indicates that the Beneficiary's position abroad involved the following job duties:

- Restaurant manager and co-owner.
- Architectural [d]esign, construction management, and project development.

- Responsible for the marketing campaign, including all aspects of design such as Logos, Menus (from scratch with photos), souvenir T-shirts, Flyers, and social media.
- Evaluation of possible location and nearby competitors[.]
- Creation of a Business plan, including, [sic] executive summary, company description, and a market analysis[.]
- Evaluate and hire new staff[.]
- Create comprehensive list of necessary equipment in accordance to plans and codes[.]
- Social media marketing[.]
- Organize Gran [sic] opening and vip [sic] list including local [t.v.] channel, newspaper and food blogger[.]

The Petitioner offered a more detailed job description in the form of a statement from the foreign entity, which was provided in response to the RFE statement. The foreign entity stated that during his employment abroad, the Beneficiary was responsible for the restaurant's overall business operation, including making discretionary decisions regarding capitalization of the business, investments in the facility and equipment, budgeting, and finance; negotiating leasing contracts and contracts involving the purchase of goods and services; restaurant layout and design; developing food and beverage concepts, menus, and recipes; marketing, advertising, and sales promotions; coordinating assignments of the kitchen and wait staff; hiring, training, evaluating, scheduling, and terminating of personnel; and managing relations with government agencies associated with regulating sanitations, alcoholic beverages, and food services.

In addition, the Petitioner provided the foreign entity's organizational chart, which shows that the foreign entity's only employees aside from the Beneficiary were those who staffed the foreign entity's restaurant. Based on our review of the information offered in the organizational chart within the scope of the Beneficiary's job descriptions, it appears that the Beneficiary directly provided the restaurant consulting to the foreign entity's clients, carried out marketing and sales-related functions, and was the creative force in the establishing menu offering and restaurant design. Thus, despite the foreign entity's organizational chart depicting the Beneficiary as its chief executive, the Petitioner did not provide evidence to establish that the majority of the Beneficiary's time was allocated to his role as chief executive or restaurant manager, as opposed to his role as restaurant consultant. As indicated above, the Beneficiary's job description is critical to a determination of whether his position abroad was within a qualifying managerial or executive capacity. In the present matter, in light of the information provided in the Beneficiary's résumé and the overall lack of sufficient evidence of a support staff capable of relieving the Beneficiary from having to provide the services of a restaurant consultant, we find that the Petitioner has not established that the Beneficiary was employed abroad in a qualifying managerial or executive capacity. Therefore, on the basis of the additional ground discussed herein, this petition cannot be approved.

## V. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291

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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 Z-C-, LLC*, ID# 16354 (AAO Apr. 28, 2016)