U.S. Citizenship and Immigration Services

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

MATTER OF T-M-USA INC.

DATE: FEB. 4, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a business specializing in consulting in the arts and creative industry, seeks to extend the Beneficiary's temporary employment as its president under the L-1A intracompany transferee classification. *See* section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 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.

## I. ISSUE

The Director denied the petition, finding that the evidence of record did not establish that the Beneficiary had one continuous year of full-time employment in a managerial or executive capacity with a qualifying organization abroad in the three years preceding the initial L-1 petition filed on his behalf.[1]

## II. 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:

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[1] The Director also denied the Beneficiary's request for an extension of stay, noting that the Beneficiary may be found inadmissible based on criminal grounds. We have no jurisdiction over this matter, as issues surrounding the Beneficiary's admissibility and maintenance of status are within the discretion of the Director. *See* 8 C.F.R. 214.1 § (c)(5). Accordingly, we will not address this issue. The visa petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws. When eligibility for the claimed status is established, the petition should be granted. *Matter of O*, 8 I&N Dec. 295 (BIA 1959).

(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.

Further, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a petitioner seeking an extension of a "new office" petition must submit the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

## III. EMPLOYMENT IN A QUALIFYING MANAGERIAL OR EXECUTIVE CAPACITY ABROAD

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary was employed by a qualifying entity in a managerial or executive capacity for one year in the three years preceding the initial L-1 petition. There are two parts to this analysis: (1) whether

the Beneficiary had one year of continuous full-time employment abroad with a qualifying organization, and (2) whether this employment was in a qualifying managerial or executive capacity.

A. Employment with a Qualifying Organization

The petitioner must establish that in the three years preceding the filing of the petition, the Beneficiary was employed full-time for one continuous year by a "qualifying organization" and that the U.S. and foreign entity have a "qualifying relationship, as defined by the Act and the regulations. The Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

> (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
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> (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
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> . . . .
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> (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
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> (J) *Branch* means an operating division or office of the same organization housed in a different location.
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> (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
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> (L) *Affiliate* means
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> (*1*) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
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> (*2*) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

1. Facts

The Petitioner filed the Form I-129 on November 28, 2014. The Petitioner stated on the petition that it is a business engaged in consulting in art and creative industry, has eight employees and a net annual income of over $1,000,000. According to the documents submitted, the Petitioner wishes to continue to employ the Beneficiary in the position of President with an annual salary of $45,000.

The Petitioner is a corporation organized under the laws of the State of New York. It claims to be a subsidiary of a Chinese company, In the Form I-129, the Petitioner states that it is 100% owned by The Petitioner's supporting evidence corroborates its claim that it is a subsidiary of this foreign entity.

According to the Form I-129 L Supplement, the Beneficiary was employed with from December 5, 2005 to September 5, 2012. The Beneficiary's resume submitted with the initial filing stated that he was employed by from December 2005 to August 2013, and employed by another Chinese company, from August 1999 to January 2005. The Beneficiary was last admitted to the United States on September 5, 2012 in B1/B2 status and was granted a change of status to L-1A in December 2013.

The initial filing did not include evidence of the Beneficiary's employment with (such as a letter from the Beneficiary's supervisor, wage statements, or tax records), but did include 2013 and 2014 Income and Balance Sheet statements for a Tax Registration and Business License for and copies of audit reports and notes to the audit reports for 2013 and 2014 for

The Director issued a request for evidence (RFE) requesting, among other things, that the Petitioner submit additional evidence concerning the Beneficiary's employment abroad. In response, the Petitioner submitted a document entitled Social Insurance Individual Record of Rights and Interests (Payment Information of Insured Employees)," showing that the Beneficiary was in "payment status" with the from January 2011 to March 2013. The Petitioner also submitted a letter from stating that the Beneficiary was employed by that entity as the Chairman of the Board of Directors and President from December 5, 2005 until September 2013.

The Director then issued a notice of intent to deny (NOID) notifying the Petitioner that the record contained inconsistencies regarding the dates of the Beneficiary's claimed employment with The NOID also informed the Petitioner that according to U.S. State Department records, when applying for a B1/B2 visa on May 9, 2012, the Beneficiary stated that he was working as the Chairman of

In response to the NOID, the Petitioner submitted an updated copy of the Beneficiary's resume, stating the Beneficiary was actually simultaneously employed by

Specifically, the updated resume now states that Beneficiary was employed by from December 2005 to August 2013 and employed by the from August 1999 to August 2013. The Petitioner submitted copies of various articles which report the Beneficiary simultaneously serving as President of both organizations

Also in response to the NOID, the Petitioner stated that and the are related companies. The Petitioner wrote, "be advised that and have a legitimate relationship. . . To better understand, is a brand established to promote and expand business and corporation image of " The Petitioner also stated "the capital investment from is fully documented in the Security and Exchange Commission of of June 5, 2012 . . . which also verifies the legitimate relationship between the two entities." The SEC filing for submitted explains the relationship between the various companies as follows:

> purchased a controlling interest in the Company and changed its name to while affecting a one for 300 reverse stock split. entered into a transaction with corporation ( which was consummated on May 21, 2012. The owner of [the Beneficiary], was issued 23,000,000 shares of our stock in exchange for the shares of and our business became the business of . . operates through subsidiaries in Hong Kong and the mainland China. The immediate subsidiary of the is is an international investment company specializes in the cultural artwork business.
>
> was founded on June 6, 2006, and the headquartered located in PRC. It has set up branches in and other cities.

The SEC filing also lists the Beneficiary as the Chairman and Director of the and President of the President of , and Chairman of (Hong Kong).

The Petitioner also submitted the consolidated financial statements for which state that is a non-operational holding company and that all income is generated by its subsidiary

The Director denied the petition, finding that the Petitioner did not resolve the inconsistencies regarding the Beneficiary's prior employment, and that as such, the Petitioner had not established that the Beneficiary had one year of employment abroad for a qualifying organization in a managerial or executive capacity.

On appeal, the Petitioner again states that are related companies, and as such the Beneficiary's past employment has been portrayed in a consistent manner.

2. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the Petitioner has not established that the Beneficiary had one year of continuous full-time employment with a qualifying organization in the three years preceding the filing of the initial petition.

The record contains numerous inconsistencies regarding the name of the Beneficiary's employer abroad and the dates of employment. Specifically, the Petitioner asserts that the Beneficiary was employed by is the qualifying employer abroad for these proceedings. However, the documentation submitted regarding this claimed employment is issued in the name of While it appears these companies may be related, the Petitioner has not asserted or established that they are one in the same as Based on the unresolved discrepancies in the company names, this evidence is not sufficient to establish that the Beneficiary was employed by the Petitioner's parent company as claimed.

Notwithstanding the Beneficiary's omission of his employment with on his visa application; the claim that the Beneficiary was simultaneously employed by both the from December 2005 to August 2013, raises questions as to the length of continuous full-time employment that the Beneficiary has with Without a detailed description of how the Beneficiary spent his time and how it was split between the organizations, we cannot determine that the Beneficiary has one year of continuous fulltime employment with a qualifying organization in the three years preceding the filing of the initial petition.[2]

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[2] The corporate structure of and its relationship to the other companies named, is unclear. The evidence in the record includes references to the following companies:

It is unclear how or if these companies are related to one another. It is also unclear how is related to the claimed qualifying organization, is named as a party in debt to but the Petitioner has not shown that is related to the claimed qualifying organization.

Finally, the inconsistencies surrounding the dates of employment raise questions as to the veracity of the facts submitted. The Petitioner has at various times stated that the Beneficiary was employed by from December 2005 to August 2013; December 2005 to September 2012; and December 2005 to September 2013. Although the Petitioner attempts to explain these inconsistencies in response to the Director's NOID, the Petitioner did not submit documentary evidence to support what it claims are the Beneficiary's true dates of employment. Further, the only payroll documentation provided indicates that the Beneficiary was an employee of beginning in January 2011. As noted, the record does not establish that this entity and are the same company.

Therefore, we find that the evidence in the record is not sufficient to establish that the Beneficiary had one year of continuous full-time employment with a qualifying organization within the three years preceding the filing of the initial petition. Accordingly, the appeal will be dismissed.

B. Managerial or Executive Capacity Abroad

Also at issue in the Director's finding is whether or not the Beneficiary was employed abroad in a primarily managerial or executive 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.

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

In the initial submission, the Petitioner stated that the Beneficiary was employed abroad by the as the President; however, the Petitioner did not submit a description of what this position entailed or information on the organizational structure of the foreign entity. The Director issued an RFE requesting additional information regarding the Beneficiary's position abroad. In response, the Petitioner submitted a letter dated October 10, 2013 from which stated that the Beneficiary was employed as "Chair of Board Member, President," with the following position description (errors contained in original):

1. Decide company's mid-term and long-term development goals, strategies and plans.
2. Formulate high level managers' job duties, working policies, business regulations, supervise the implement condition of given duties, working policies, and business regulations.
3. Make final decision of departments merging, splitting, new offices establishment and closing.
4. Lead overall, high level of finance budgeting, finance resource allocation, annual marketing strategies directions.
5. In charge of the final decision of hiring, examination, replacement, promotion, penalty and dismiss of high level managers.
6. Obtain mid to high level working performance, and board members' performance.
7. Maintain important public relations with government, local trading agencies.
8. Supervise high level managers' job performance, and board members' performance.
9. Handle emergent issues of the company.

10. Supervise the and approve overall fund allocation and collection condition; supervise and approve implementation of budgets.
11. Hold board of directors meeting regularly, and give options to board committee level operation issues, and to conduct voting event in order to make decision.
12. Suggest with promoting, dismissing deputy or general manager, chair of finance department to board director committee; report the committee with high level mangers position replacement condition and decision.
13. Deal with other daily operations of board directors committee.

The RFE response did not address the organizational structure or staffing of the foreign entity.

2. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the Petitioner has not established that the Beneficiary was employed abroad in a managerial or executive capacity. Notwithstanding the absence of evidence of actual employment discussed above, we have also examined the duties of the claimed position abroad and find that the information presented in the petition is not sufficient to establish that the claimed position abroad was in a 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 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).

The Beneficiary's duties abroad were also stated to include such duties as: "[d]ecide company's mid-term and long-term development goals, strategies and plans," "[m]ake final decision of departments merging, splitting, new offices establishment and closing," and "[h]andle emergent issues of the company." While these duties may generally fall within the statutory definition of managerial or executive capacity, the Petitioner did not indicate which of these were his primary duties, nor did it explain how non-qualifying duties associated with implementing the broad goals and policies of the foreign entity had been performed by the foreign entity's other employees. The fact that the Beneficiary manages or directs a business does not necessarily establish eligibility for classification as a multinational manager or executive within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

Here, the description of the Beneficiary's position abroad is insufficient to show that the Beneficiary primarily performed qualifying duties abroad. The Petitioner did not demonstrate what proportion of the Beneficiary's duties consisted of managerial duties and what proportion consisted of non-managerial duties. Reciting the Beneficiary's vague job responsibilities or broadly-cast business

objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The description of the duties does not provide any detail or explanation of the Beneficiary's claimed managerial activities in the course of his daily routine. The actual duties themselves will 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 (2nd Cir. 1990). Absent a clear and credible breakdown of the time spent by the beneficiary performing her/his duties, we cannot determine what proportion of those duties would be managerial or executive, nor can we deduce whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the Petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to understanding of a beneficiary's actual proposed duties and role in a business. Here, the totality of the evidence does not support the Petitioner's claims that the Beneficiary was employed in a qualifying managerial or executive capacity.

For example, the Petitioner provided a list of the Beneficiary's job duties which in large part focused on the Beneficiary's oversight of "high level managers" and "board members." However, the lack of information concerning the positions filled by these high level managers and board members, as well as a lack of descriptions of their duties and identification of their respective subordinates' positions, prevents us from fully analyzing the Beneficiary's claimed position abroad. Without information on the structure and staff of the foreign entity, we cannot determine the Beneficiary's place in the organization or the managerial or executive nature of his claimed duties, as they related to the oversight and supervision of the foreign entity's staff

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. §§ 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*2*). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

The absence of information on the staff and organizational structure of the foreign entity precludes us from finding that the Beneficiary was employed as a personnel manager. We cannot analyze the Beneficiary's role as a manager of supervisory, managerial, or professional staff when no information regarding the organization and its workers has been provided. Therefore, the evidence in

the record does not demonstrate that the Beneficiary was employed as a personnel manager, as defined by the regulations.

The Petitioner has also not established, in the alternative, that the Beneficiary was employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the Petitioner has not asserted that the Beneficiary was employed as a function manager abroad, and the record does not demonstrate that the Beneficiary was employed as a function manager.

Likewise, the Petitioner has not established that the Beneficiary was employed in an executive capacity. 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.*

While the Beneficiary may represent a high-level employee of the foreign entity; this alone is not sufficient to establish that he was *primarily* employed in an executive. The designation hinges on whether or not the Petitioner demonstrates that the foreign entity has the requisite level of subordinate staff capable of carrying out the duties associated with the day to day operation of the business. In this case, incorporating our earlier discussion of the deficiencies of the job description provided and the lack of evidence regarding the foreign entity's staffing and organization structure, we find that the Petitioner has not established that the foreign entity had an organizational structure sufficient to elevate the Beneficiary to a position that was primarily executive in nature or that the foreign entity has sufficient subordinate staff to relieve the Beneficiary of non-qualifying duties. For the reasons discussed above, we find that the Beneficiary was not employed abroad as an executive.

## IV. 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 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 T-M-USA Inc.*, ID# 15886 (AAO Feb. 4, 2016)