



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

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

MATTER OF I-K-G-, LLC

DATE: JAN. 27, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR NONIMMIGRANT WORKER

The Petitioner, a golf supplies retailer, seeks to extend the Beneficiary's status as an intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The Director, California 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 will be employed in a qualifying managerial or executive capacity.

On appeal, the Petitioner asserts that it submitted sufficient evidence to establish the Beneficiary's eligibility for the requested classification. Petitioner further states that it has not yet established the requisite organizational structure and requests leniency in the adjudication 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 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)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by 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.

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

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- (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.

## II. THE ISSUE ON APPEAL

The sole issue to be addressed is whether the Petitioner established that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

### A. Facts

The Petitioner filed the Form I-129 Petition for Nonimmigrant Worker on February 5, 2015. The Petitioner indicated on Form I-129 that it is an [REDACTED] system company established in [REDACTED], with one employee and a gross annual income of \$5,000. The Petitioner's Korean parent company develops and sells [REDACTED] for management of golf course driving ranges.

In a letter dated January 30, 2015, the Petitioner stated that the Beneficiary will have sole managerial authority over the day-to-day operations of the business and she will be responsible for developing and coordinating services and goods to its client base in the United States. The Petitioner states that the proffered wage for this position is \$20,000. Specifically, the Petitioner notes that the Beneficiary's duties will be as follows:

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1. Identify strategies for US market expansion.
2. Manage integration of US business, including transfer of [REDACTED] strategies to US business.
3. Conduct corporate strategy, development, business planning and budget approval.
4. Execute technological development strategy.
5. Supervise hiring and management of US staff.

The Petitioner further stated that the Beneficiary will be responsible for overall management duties, including managing client relationships and subordinate professionals. Additionally, the Petitioner stated that her “ultimate” responsibility will be to support the company’s expansion into the U.S. market, including hiring skilled contractors to install [REDACTED] and hiring support professionals.

The Petitioner provided a copy of its business plan dated September 1, 2013, which projected a “personnel dispatch plan” consisting of two new hires (an office worker and an engineer) in 2014 and three new employees in 2015 (an office worker, engineer, and a salesman). The Petitioner also submitted a second business plan dated March 2014, which reflected “total projected local employment per year” of one office personnel, one engineer/technician, and one commission-based salesperson in 2014. The business plan also projected that the Petitioner would employ two office personnel/warehouse persons/in-house salespersons, one engineer/technician, two commission-based salespersons, and one field operator/ball collector in 2015. The March 2014 business plan also includes a “projected organizational chart” with the Beneficiary listed as President & CEO, and [REDACTED] listed as the Beneficiary’s subordinate Dispatched Engineer. The chart also indicates that the “office support team” will report to the Beneficiary, and lists the Beneficiary as “Sales Team” directly reporting to President & CEO. Under “Sales Team,” there are boxes entitled “commission-based” and “in-house/warehouse” reporting to the Beneficiary.

The Director issued a request for evidence (RFE) on February 24, 2015, in which she advised the Petitioner that the submitted position description did not sufficiently describe what the Beneficiary’s duties will be under the extended petition or the percentage of time she will devote to specific duties. The director noted that it was unclear from the record whether the position of “Executive Manager” is managerial or executive. The Director requested a copy of a proposed organizational chart which details the organizational hierarchy of the U.S. company. The Director also requested additional information regarding the job duties, educational levels, and salaries of other company employees hired during the previous year. The director requested that the Petitioner submit copies of the U.S. entity’s State Quarterly Wage Reports for the 4th quarter of 2014 to evidence the Petitioner’s current organizational structure and staffing levels, along with the U.S. entity’s payroll summary and Forms W-2, W-3 and 1099-MISC showing all wages paid to all employees under the Beneficiary’s direction.

In a letter submitted in response to the RFE, the Petitioner reiterated the Beneficiary’s duties which were outlined in the original filing and attached a percentage of time spent on each duty as follows:

1. Identify strategies for US market expansion. (35%)

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2. Manage integration of US business, including transfer of [REDACTED] strategies to US business. (10%)
3. Conduct corporate strategy, development, business planning and budget approval. (35%)
4. Execute technological development strategy. (10%)
5. Supervise hiring and management of US staff. (10%)

The Petitioner stated that the Beneficiary's "proposed subordinate" is [REDACTED] and that Petitioner is "awaiting [REDACTED] approval" before formally hiring Mr. [REDACTED] to "oversee the required construction work for the [REDACTED]." The Petitioner stated that Mr. [REDACTED] is in California awaiting the disposition of this petition and that once hired, he will directly report to the Beneficiary.

The Petitioner also submitted Mr. [REDACTED] resume, Form W-3 Transmittal of Wage and Tax Statements for 2014 indicating that the Petitioner paid one individual \$7,500, a 2014 Form W-2 Wage and Tax Statement for the Beneficiary reflecting \$7,500 in wages paid, the Operating Agreement for the U.S. entity, and Form 941 Employer's Quarterly Federal Tax return for the fourth quarter of 2014, reflecting one employee and wages paid of \$7,500. The W-2 confirms that the employee is the Beneficiary of the instant petition.

The Director denied the petition on May 22, 2014, concluding that the Petitioner did not establish that it would employ the Beneficiary in a qualifying managerial or executive capacity under the extended petition. In denying the petition, the Director found that the Petitioner's descriptions of the Beneficiary's duties did not demonstrate what she does on a day-to-day basis, and therefore did not establish that her actual duties are primarily managerial or executive in nature. The Director also noted that the Petitioner did not submit an organizational chart for the U.S. entity to illustrate the number and types of employees and that the Petitioner indicated that Beneficiary has a "proposed subordinate" who has not been formally hired. The Director noted that future hiring of employees has no bearing on whether the Beneficiary's proposed duties qualify as primarily managerial or executive and that the Beneficiary's eligibility for the classification must be demonstrated at the time of filing. The Director further determined that the record did not establish that the Beneficiary has been relieved of performing day to day non-supervisory duties of the business and performance of those tasks precludes the Beneficiary from being considered a manager or executive.

On appeal, the Petitioner states that it has not yet established the required organizational structure and requests leniency regarding the petition. The Petitioner submits an additional list of duties as follows:

1. Authority to implement transferred budgets from [REDACTED]
  - a. Select the most effective business plan and budget plan using the given proceeds
  - b. Execute a funded project and maintain the flow of budgeted funds from [REDACTED] to [REDACTED]
  - c. Forecast unexpected business expenses and make an adequate reserve fund
2. Review and select professional business partners and establish rapport

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- a. Selected an account company
  - b. Selected an architectural firm
  - c. Selected a company attorney
  - d. Ordered feasibility studies for prospective business partners and the new venture: a company owned sports bar
3. Leased a business office, created an operable business setting
    - a. Hired an incidental day laborer to establish the office setting and other maintenance needs
    - b. Hired private English tutors to improve English communication skills and get assistance in English documents
  4. Researched, planned and now executing a new business venture
    - a. Establishing a company owned sports bar
    - b. Will execute formal lease agreement with [REDACTED] to consummate the agreement to expand the current lease for additional space
      - i. Manage hiring and building a sports bar without the aid of a franchise company
      - ii. Manage and coordinate the details of construction, decoration, and equipment in completing the bar to be ready for business
      - iii. Make an operating policy for employ conduct, work hours, job descriptions, and tax planning
      - iv. Hire permanent employees for the bar business
  5. Adjusted business plans, modified and reviewed operational procedures
  6. Managed and reviewed business performance on a monthly basis
  7. Other related business
    - a. Preparing and arranging an educational trip from [REDACTED]
      - i. Organizing experienced employees from [REDACTED] to visit the [REDACTED] and train local hires in other business operations
    - b. Ordered feasibility study to develop [REDACTED] by the architecture firm.

The Petitioner states on appeal that the Beneficiary did not proceed with fully setting up the new company infrastructure due to the uncertain circumstances of her visa situation and that she mainly performed preparatory work during the initial approval period. The Petitioner states that she was not provided an adequate amount of time to settle in and hire employees while establishing an organizational structure. The Petitioner notes that the U.S. entity now plans to establish a company owned sports bar with screen golf play systems and submits a site plan and feasibility study relating to the new business proposal. The Petitioner submits a lease proposal for the period of July 1, 2015 until June 30, 2018. The Petitioner also submits on appeal a two revised organizational charts. The first is identical to the organizational chart submitted in response to the RFE, but added vacant facility design engineer and maintenance/technician positions as subordinates to the engineering team. A second organizational chart, dated April 2015, lists the Beneficiary as President & CEO and includes four additional direct reports (all vacant) including “office support team,” “engineering team,” “sports bar team,” and “sales team.” There are eight additional position titles reporting to the engineering, sports bar, and sales teams listed on the chart that are not filled. Finally, the Petitioner

submits a copy of the Form 1120 U.S. Corporate Income Tax Return from 2014. The Petitioner's 2014 tax return does not reflect any gross receipts or sales, and salaries and wages paid of \$7,500.

## B. Analysis

Upon review, and for the reasons discussed herein, the Petitioner has not established that the Beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition.

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).

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 in either an executive or a managerial capacity. *Id.* 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 proposed 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 a complete understanding of a beneficiary's actual proposed duties and role in a business.

Here, although the Petitioner provides on appeal a more detailed list of the Beneficiary's responsibilities, it has not identified what specific tasks she performs on a day-to-day basis within the context of the Petitioner's current operations. The Petitioner initially described the scope of the Beneficiary's authority in only the broadest terms, noting, for example, that she will identify strategies for U.S. market expansion (35%), and conduct corporate strategy, development, business planning and budget approval (35%). The Petitioner did not include any additional details or specific tasks related to each duty, nor did the Petitioner indicate how such duties qualify as managerial or executive in nature. 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).

On appeal, the Petitioner submits a second list of job duties for the Beneficiary. For example, the Petitioner indicates that the Beneficiary will be responsible for selecting the most efficient business plan and budget plan, reviewing and selecting business partners, leasing operating space, and hiring day laborers. The Petitioner has not explained how these duties qualify as managerial or executive.

Additionally, the duties also relate to a new proposed venture for the company, a sports bar. The Beneficiary's duties relating to the sports bar include researching, planning, and executing the building of a sports bar, which will include executing a lease agreement, constructing a bar, and hiring employees. The Petitioner also submitted a new organizational chart reflecting its new sports bar. We will not consider the Beneficiary's proposed job duties with respect to the sports bar, as it did not exist at the time of filing. The petitioner must establish that the position offered to the beneficiary, when the petition was filed, merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

When examining the managerial or executive capacity of a Beneficiary, we review the totality of the record, 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 a complete understanding of a Beneficiary's actual role in a business. The evidence must substantiate that the duties of the Beneficiary and those of his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. To establish that the Petitioner has staffed the new operation in the previous year, the Petitioner must submit a description of staffing, including the number of employees and the types of positions, as well as evidence of the wages paid to the employees. 8 C.F.R. § 214.2(l)(14)(ii)(D).

On review, the record as presently constituted is not persuasive in demonstrating that the Beneficiary has been or will be employed in a primarily managerial or executive capacity. The Petitioner indicates that it plans to hire subordinate managers and employees in the future. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the Petitioner is ineligible by regulation for an extension. The submitted Form W-3 Transmittal of Wage and Tax Statement for 2014 indicates that the Petitioner employed one individual at the end of 2014. Form W-2 Wage and Tax Statement for the Beneficiary, the Operating Agreement for the U.S. entity, and Form 941 Employer's Quarterly Federal Tax return for the fourth quarter of 2014, all indicate that the Beneficiary was the Petitioner's sole employee in 2015. The Petitioner did not submit any documentation indicating that it had hired additional employees as of the date of filing.

We note that the Petitioner states on appeal that "the organization lacks hierarchy due to a lack of staff," however, the Petitioner asserts that the Beneficiary meets the definition of a manager despite being the sole employee. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the Petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The

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regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) requires the “new office” operation to support an executive or managerial position within one year within the date of approval of the petition. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the Beneficiary from primarily performing operational and administrative tasks, the Petitioner is ineligible by regulation for an extension. In the instant matter, the Petitioner has not demonstrated that it can employ the Beneficiary in a primarily managerial or executive position.

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. Here, while the Petitioner described the Beneficiary’s duties in broad terms, it did not provide a detailed description of her duties sufficient to establish that she primarily performs qualifying executive tasks, nor did it establish how the Beneficiary could be relieved from substantial involvement in the day-to-day operations of the business without any additional employees.

In sum, as the Petitioner has not provided a sufficiently detailed description of the Beneficiary’s managerial or executive duties or described how she is alleviated from the day to day operations of the business, the totality of the evidence in the record is insufficient to establish that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

### III. BEYOND THE DECISION OF THE DIRECTOR

An application or petition that does not comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145.

#### A. Managerial or Executive Capacity Abroad

Beyond the decision of the Director, the Petitioner has not established that the Beneficiary was employed abroad in a primarily managerial or executive capacity. On form I-129, the Petitioner indicates that the Beneficiary was employed by its parent company, [REDACTED], from October 4, 1997 to “present.” The Petitioner stated that the Beneficiary’s job duties abroad for the three years preceding filing consisted of the following:

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Beneficiary has worked or [REDACTED], the parent company of [the Petitioner] since 1997. Over the last 15 years, she has been a key employee and was involved in the development of the [REDACTED] the irontown structure, the safety net, and safety facilities and software for the management of driving ranges, training instructors, and publications of guild books for driving range businesses. Beneficiary has formerly held positions as a CEO and Director of [REDACTED], which she resigned from following the initial approval in May 2014 for her L1A status as an Executive Manager of [the Petitioner].

The Petitioner has not explained how the Beneficiary's job duties with its parent company qualify as managerial or executive in nature. 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 petitioner has not provided any detail or explanation of the beneficiary's activities in the course of her daily routine abroad. 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 (2d. Cir. 1990). For this additional reason, the appeal must be dismissed and the petition denied.

#### B. Doing Business in the United States

Beyond the decision of the director, the petitioner has not submitted evidence that the United States entity has been doing business for the previous year as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H). The Petitioner's 2014 tax returns do not reflect any gross receipts or sales for the year, and the Petitioner did not submit any other forms of documentation to establish that it had been doing business for the year prior to filing the instant petition. For this additional reason, the appeal must be dismissed and the petition denied.

### III. 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, 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 I-K-G-, LLC*, ID# 15178 (AAO Jan. 27, 2016)