



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

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

MATTER OF C-T-D-F- LLC

DATE: JULY 18, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a health food services catering and distributorship business, seeks to temporarily employ the Beneficiary as its CEO & president under the L-1A nonimmigrant classification for intracompany transferees. See Immigration and Nationality Act (the Act) section 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 it had control of the franchised U.S. entity and therefore, a qualifying relationship could not exist between the petitioning U.S. entity and the foreign entity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred finding that the Petitioner is controlled by the franchise agreement as it is wholly-owned and controlled by the foreign entity.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter to the Director, Vermont Service Center, for entry of a new decision.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a 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. Section 101(a)(15)(L) of the Act. 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. *Id.*

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

II. QUALIFYING RELATIONSHIP

The sole issue addressed by the Director was whether the Petitioner established that it and the Beneficiary's foreign employer are qualifying organizations. To establish a "qualifying relationship" under the Act and the regulations, a petitioner must show that a 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:
 - (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;
 - (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or

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subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

....

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

....

(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.

A. Evidence of Record

The Petitioner filed the Form I-129 on September 25, 2015. On the L Classification Supplement to the Form I-129, the Petitioner identified the Beneficiary's last foreign employer as [REDACTED] C.A. and stated that the Petitioner is a subsidiary of the foreign entity. Where asked to describe the stock ownership and managerial control of each company, the Petitioner stated that it is 52 percent owned by the foreign entity.

As evidence of ownership, the Petitioner submitted a copy of its Operating Agreement. Appendix A to the agreement shows that the foreign employer has a 52 percent membership interest and made capital contributions of \$57,500. The appendix also reflects that [REDACTED] and [REDACTED] each have a 24 percent member interest with a \$0 and \$60,000 capital contribution, respectively. The Petitioner also submitted a copy of its [REDACTED] Articles of Organization. Additionally, the Petitioner submitted copies of its IRS Form 1120, U.S. Corporate Income Tax Return, filed in both 2014 and 2013, confirming that the Petitioner is 52 percent owned by the foreign entity.

In a letter of support dated September 23, 2015, the Petitioner stated that it has a franchise agreement with [REDACTED] for a café-style food preparation model. The Petitioner acknowledged that the franchisor specifies certain items such as packaging materials, but that the Petitioner ultimately retains control over the U.S. entity. Specifically, the Petitioner noted that it retains control over the "ongoing existence and viability of the entity," including: "corporate registration, management of the U.S. and foreign entities, food sourcing, logistics in food preparation, logistics in delivery, employee oversight, management and payroll, and sales and marketing to school customers."

The Petitioner submitted excerpts from a Franchise Agreement between [REDACTED] and [REDACTED] and the Petitioner. The agreement was dated and signed by both parties. Aside from

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expected requirements of initial training and business activities, the Franchise Agreement does not negate the Petitioner's autonomy as a business or in regards to control over its organization. In addition, clause 16.1 of the agreement entitled "No Relationship," reads as follows:

The parties acknowledge and agree that this Agreement does not create a fiduciary relationship between them, that you shall be an independent contractor, and that nothing in this Agreement is intended to constitute either party an agent, legal representative, subsidiary, joint venturer, partner, employee, joint employer or servant of the other for any purpose.

The Director issued a request for evidence (RFE) on October 9, 2015, instructing the Petitioner to submit evidence to establish the facts of its ownership and control.

In response to the RFE, the Petitioner submitted a letter from [REDACTED] Founder and CEO of the franchisor, clarifying the franchise relationship between [REDACTED] and the Petitioner as follows:

This letter confirms that our company, [REDACTED] is a separate and distinct legal entity from [REDACTED]

[REDACTED] is a franchise company that enters into contractual franchise agreements with its franchisees. These agreements give our franchisees (independently owned and operated entities such as [REDACTED] a specific market territory from which to build their franchise business. Our franchisees have the legal right to provide and distribute for sale our approved products and services using our designated business system and our registered U.S. trademarks. In return for this business opportunity, our franchisees pay us an ongoing monthly fee.

In addition, the Petitioner provided letters from four other independently owned franchisees confirming that they are separately owned and controlled entities. The Petitioner also provided the full copy of the franchise agreement.

The Director denied the petition, concluding that the Petitioner did not establish that a qualifying relationship existed between it and the foreign entity. In denying the petition, the Director observed that the Petitioner has a franchise agreement with [REDACTED] which requires the franchisee to meet minimum gross sales, have all advertising and promotional material approved before use, and on occasion purchase other proprietary products of the franchisor. The Director acknowledged that the franchisor does not have any ownership of the Petitioner, but based on the evidence in the record, the franchise agreement affects the control the Petitioner has over its daily operations. As such, the Director found that the Petitioner did not establish that it controls the U.S. company and therefore, a qualifying relationship cannot exist.

On appeal, the Petitioner asserts that it is owned and controlled by the foreign entity, not controlled by its franchise agreement. The Petitioner asserts that it continues to exercise authority and control with respect to hiring, firing, promotions, finances, and the overall manner of running its operations. The Petitioner contends that there is nothing in the submitted franchise agreement that would negate an otherwise valid claim of a parent-subsidiary relationship between the U.S. and foreign entities.

B. Analysis

Upon review, we find that the record is persuasive in establishing that the Petitioner is a subsidiary of the foreign entity, thus establishing the existence of a qualifying relationship.

In the instant matter, the Director's analysis focused solely on the Petitioner's operation of a franchise business rather than on the documentation provided establishing actual ownership and control of the Petitioner. The Petitioner's assertions relating to the franchise agreement and the letter from the franchisor clarifying who has the actual control of its business are persuasive. The Director incorrectly focused on the franchise agreement and the terms therein, such as advertising and promotional material and sales requirements, in finding that the franchise agreement grants the franchisor control over the Petitioner, and merely stated that the franchisor controls the daily operations of the Petitioner. In any operational or contractual agreement, it is reasonable to expect that certain terms and conditions are listed as requirements for each party.

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the Director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if a petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Here, the submitted evidence is relevant, probative, and credible. Here, the Petitioner provided sufficient information to establish that the foreign entity is the parent of the Petitioner, as that term is defined at 8 C.F.R. § 214.2(l)(1)(ii), and has established that a qualifying relationship more likely

than not exists between it and the foreign entity. The Director's finding to the contrary is hereby withdrawn.

III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

Although the Director's decision will be withdrawn, we find insufficient evidence in the record to establish that the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

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

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- (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.

A. Evidence of Record

On the Form I-129, the Petitioner stated that it is a health food services catering and distributorship business established in 2013, with two full-time and three part-time employees, and gross annual income of \$243,691.

In its letter of support, dated September 23, 2015, the Petitioner explained that its business model is two pronged: (1) to use a recognizable brand to make and deliver café-style health food to schoolchildren, and (2) to take the veggie chips that are known in Venezuela into [REDACTED] and other health stores, long term. The Petitioner stated that the Beneficiary will continue to serve as the CEO & General Manager of the global entity, but he will perform oversight and “generate more revenues” in the United States. The Petitioner provided a list of duties that the Beneficiary would perform for global entity. The Petitioner noted that the following duties would “be a US Duty after US L-1 Visa:”

Acting as CEO of [REDACTED] [and thus [Petitioner]]

- Reviewing and signing setup, registration and contractual paperwork.
- Meeting with the other owners to constantly tweak the master plan for the company and keep the products in Venezuela and the US aligned.
- Working with local (city & country) connections to ensure registrations are timely and approved (personal impact important in Latin America).
- Working with wider connections to keep the products flowing from the distributorship into stores (around Latin America).
- Acting as General Manager because he is the principal executive actively engaged in business oversight of the [REDACTED] store in [REDACTED]

Venezuelan General Manager Role [at [REDACTED]]

- Making sure the Store Manager has information about the company’s plans, an overview of the numbers, goods and people to run the store.
- Interfacing with the branding licenser of the store’s name & packaging . . .
- Training of management (by text and phone constantly).
- Oversight of numerous issues that management needs to tell the reporting executive who needs to provide executive input (on issues not listed here already- i.e., rain assistance for the delivery guys, etc).

(b)(6)

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- Monitoring daily & weekly numbers by interfacing with the Financial Administrator. Note: in US, it is the accountant.
- Marketing - Making personal calls to corporate clients to generate good will so they continue to send regular groups of employees to buy lunch at the store and to place orders for catered meeting in-house.

.....

CEO & US Development Role [for [Petitioner]]

- Traveling to the US on a regular basis to generate leads for new corporate clients for the US entity.
- Meeting with schools to determine potential interest for school lunches.
- Checking US financials with other owners all actively involved in the business, running difference segments.

In addition to those duties listed above, the Petitioner noted six additional duties to be undertaken by the Beneficiary in the United States:

1. Presidential duties: Executive oversight of the company's headquarters.
2. Lead generation for new clients [redacted]-area private schools and summer camps.
3. Lead generation for distribution of health food products into super markets, small health-food stores, other US delis and cafes that are similar to the Venezuelan store receiving products from the Venezuelan distributorship.
4. Generating more contracts (to hit over \$500,000 in Year 2 alone) and implement the next phase of growth as per plans to increase revenues.
5. Identifying US-based or overseas-based factory for manufacturing the proprietary veggie chips (same used by [redacted] in salads).
6. Commencing outreach and meetings with potential US distributors to generate interest in the distribution of the veggie chips.

In support of the petition, the Petitioner submitted its organizational chart, dated September 15, 2015, which shows that the Beneficiary in the position of "Executive Operations." Reporting to the Beneficiary are the "Marketing & Sales Department" and "Finance Department." The Marketing & Sales department had two positions listed: (1) an unnamed "Market Support + Research "Operation Eatery" 2013-2014," and (2) [redacted] "Event Planner 2013-2014 (Market Outreach Consultant)." The Finance Department also had two positions listed: (1) [redacted] "CPA" and (2) [redacted] "Bookkeeper & Payroll."

The Petitioner also submitted its IRS Form 941: Employer's Quarterly Federal Tax Return for the last two quarters of 2014 and first two quarters of 2015. The last two quarters of 2014 show one employee paid and the first two quarters of 2015 show zero employees paid. The Petitioner further submitted employment contracts for a chef and sous chef.

B. Analysis

Upon review, the Petitioner has not established that it would employ the Beneficiary in a managerial or executive capacity in the United States.

The definitions of managerial and executive capacity each have two parts. First, the Petitioner must show that the Beneficiary performed certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary has been *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the foreign entity's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

When examining the executive or managerial capacity of a 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.* The fact that a beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The Petitioner's brief description of the Beneficiary's duties does not establish that the Beneficiary will be engaged in either a primarily managerial or executive position. The Petitioner asserts that the Beneficiary will continue to hold his current position as CEO and general manager of the foreign entity, while also being employed by the Petitioner as CEO and president. Although the Petitioner attempted to delineate the Beneficiary's responsibilities for each position, the Petitioner also asserted that even the duties specific to the Beneficiary's role as general manager of the Venezuelan company would become a "US duty after US L-1 Visa." Based on the description of the Beneficiary's duties, it is unclear what duties he would be performing as general manager on behalf of the foreign entity while physically located in the United States, what duties he would be performing in his capacity as CEO and president of the Petitioner, or how he would divide his time. As such, the Petitioner has not provided a clear description of what duties the Beneficiary will perform for the Petitioner. Without a specific and accurate description of the proposed position, we are unable to determine whether his duties would qualify as managerial or executive. 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).

Furthermore, whether a beneficiary is a managerial or executive employee turns on whether a petitioner has sustained its burden of proving that her/his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the Petitioner did not document

what proportion of the Beneficiary's duties would be managerial functions and what proportion would be non-managerial. The Petitioner listed the Beneficiary's duties as including both managerial and administrative or operational tasks, but did not quantify the time the Beneficiary spends on them. This absence of documentation is important because several of the Beneficiary's daily tasks, such as "[m]eeting with schools to determine potential interest;" "[m]arketing-making personal calls to corporate clients;" and "[w]orking with wider connections to keep the products flowing from the distributorship into stores" do not fall directly under traditional managerial duties as defined in the statute. Based on the current record, we are unable to determine whether the claimed managerial or executive duties will constitute the majority of the Beneficiary's duties, or whether the Beneficiary will primarily perform non-qualifying administrative or operational duties. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). For this reason, we cannot determine whether the Beneficiary is primarily performing the duties of a manager or executive.

In addition, a number of duties provided on the secondary numbered list do not qualify as managerial or executive level duties. Specifically, "[l]ead generation for new clients;" "[l]ead generation for distribution of health food products;" "[g]enerating more contracts;" and "commencing outreach and meetings with potential US distributors" are the duties required to perform the sales and marketing function of the healthy food catering business. 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 also* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

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 company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

Even though the Petitioner claims that the Beneficiary directs and manages the marketing and sales and finance activities, it does appear to have anyone on its staff to actually perform the marketing, sales, and finance functions. The organization chart lists positions for a CPA, bookkeeper & payroll, and an event planner that the Petitioner claims were employed as of September 2015. The Petitioner has not provided position descriptions to explain what these individuals do, or evidence of wages paid to show that these positions were employed as of the date of filing. Furthermore, the Petitioner's Form 941: Employer's Quarterly Federal Tax Return for the quarter immediately preceding the quarter of filing shows zero employees. If the CPA, bookkeeper, and event planner positions are in fact contractual positions, the Petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the Petitioner has not explained how the services of the contracted employees obviate the need for the Beneficiary to primarily conduct the Petitioner's business. Without documentary evidence to

support its statements, the Petitioner does not meet its burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

Thus, either the Beneficiary himself is performing the sales, marketing, and finance functions or he does not actually manage these functions as claimed by the Petitioner. In either case, we are left to question the validity of the Petitioner's claim that the Beneficiary would be relieved of performing nonqualifying duties and the accuracy of the remainder of the Beneficiary's duties as described by the Petitioner. Doubt cast on any aspect of the Petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). As noted, if the Beneficiary is will perform the sales, marketing, and finance functions, and therefore will primarily perform the tasks necessary to produce a product or to provide services, he is not considered to be "primarily" employed in a managerial or executive capacity. *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604.

Based on the deficiencies discussed above, we cannot conclude that the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States. For this reason, the petition cannot be approved at this time.

IV. CONCLUSION

For the reasons discussed above, we will withdraw the Director's decision finding that the Petitioner and the Beneficiary's foreign employer are not qualifying organizations.

Further, to properly analyze the issue of whether the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States (as well as any other issues that are material to the case), the petition will be remanded to the Director for review and issuance of a new decision in accordance with the applicable statutory and regulatory provisions. The Director may request any additional evidence considered pertinent for its determination.

ORDER: The decision of the Director, Vermont Service Center, is withdrawn. The matter is remanded to the Director, Vermont Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of C-T-D-F- LLC*, ID# 17336 (AAO July 18, 2016)