



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

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

MATTER OF H-Z-Y-USA, INC.

DATE: JULY 26, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a real estate development and investment company, seeks to temporarily employ the Beneficiary as the chief executive officer (CEO) of its new office 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, California Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity within one year of the approval of the petition.

The matter is now before us on appeal. In its appeal, the Petitioner contends that it has submitted “substantial evidence” of its first year plans demonstrating that the Beneficiary will act in a managerial or executive capacity within one year.

Upon *de novo* review, we will dismiss the appeal.

#### 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.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides 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 in the United States, 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 (l)(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.

## II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

As indicated above, the Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity in the United States within one year of approval of the new office petition.

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.

A. Evidence of Record

The Petitioner filed the Form I-129 on October 19, 2015. On the Form I-129, the Petitioner indicated that it has three current employees in the United States and that it had not yet earned any revenue.

On the Form I-129, the Petitioner explained the Beneficiary's proposed duties in the United States as follows:

To set up the new office. Hiring U.S. employees who has [*sic*] U.S. real estate broker dealer and sales agent license. Market research for property investment and property developments in the U.S. Coordinate [*sic*] promotional events for properties for sale in China provided by the parent company. Making major corporate decisions, managing the overall operations and resources of the company, and acting as the main point of communication between the board of directors and the corporate operations.

The Petitioner also provided a "Certificate of Assignment" from the Beneficiary's foreign employer explaining her proposed role in the United States as follows:

[The Beneficiary] shall be responsible for the recruitment, team construction, personnel management, real estate development and sales in the United States to set up a solid foundation for the Company's business development in the United States, to build a development mode suitable for the United States, to determine the development direction of the US company, to formulate the management system and annual plan for the US company, to management investment fund and the use of Company fund. The United States has the most developed market system and largest customer market in the world, and it has a free and fair investment environment. In the meantime, the Company's entry into the United States will give it a bigger room for improvement in building brand name real estate projects, establishing service system, improving its competitive edge, and international reputation and notability.

The Petitioner also provided a copy of its "Corporation License Application" it had submitted to the California Bureau of Real Estate on October 2, 2015.

The Director later issued a request for evidence (RFE) stating that the foreign employer's assignment letter lacked sufficient detail to demonstrate that the Beneficiary would act in a managerial or executive capacity within one year. The Director requested that the Petitioner submit a letter from the foreign employer indicating the proposed number of employees the new company would hire and the positions these employees would hold, the amount of the investment in the new venture, and how the foreign employer would support the Beneficiary in a managerial or executive capacity within one

(b)(6)

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year. The Director asked the Petitioner to provide a business plan, including a timetable for its proposed actions during the first year. Further, the Director requested that the Petitioner submit an organizational chart reflecting all of its proposed positions, their duties, and expected education levels. Lastly, the Director asked the Petitioner to provide documentary evidence of the foreign employer's capital contribution to the company, including wire transfers, bank records, foreign employer financial documentation, or other corroborating evidence.

In response, the Petitioner provided an affidavit from [REDACTED] a shareholder of the foreign employer, who stated that the company had invested \$100,000 in the Petitioner. [REDACTED] explained that due to a \$50,000 foreign exchange quota an additional amount was wired through another shareholder [REDACTED]. The Petitioner submitted evidence of wire transfers made to the Beneficiary from [REDACTED] and [REDACTED] which totaled \$100,000.

The Petitioner submitted an employment contract dated August 1, 2015, stating that the Beneficiary would act as the president of the company working 40 hours per week and earning \$4,000 per month. The employment contract did not provide additional detail as to the Beneficiary's proposed duties and the Petitioner resubmitted the duty description previously provided in support of the petition.

The Petitioner also provided a proposed organizational chart reflecting that the Beneficiary would act as "general manager," supervising a project supervisor, an administrative supervisor, a sales supervisor, and a financial supervisor identified as [REDACTED]. The chart indicated that each of these employees would supervise subordinate employees and identified 13 additional positions, including a project manager, civil engineer, installation engineer, an administration/HR manager, a sales manager, a salesman, a receptionist, a driver, an administrative clerk, an accounting manager, an accountant, and a cashier.

In denying the petition, the Director stated that the Petitioner did not provide the percentages of time the Beneficiary would devote to her duties or timeframes for when she would perform her duties. The Director indicated that the Petitioner had also not provided timeframes for the hiring of its proposed employees as requested. The Director found that the Petitioner did not submit information on the proposed nature of its new office, its scope, organizational structure, or financial goals, and noted that the Petitioner did not sufficiently explain the nature of the intended business. The Director concluded that the Petitioner had provided insufficient evidence to demonstrate that the new office would support the Beneficiary in a managerial or executive capacity within one year.

In its appeal, the Petitioner submits a letter from [REDACTED] who states:

Our companies had submitted substantial evidences to show our intend [sic] of the business expansion, our goal and vision, the qualification of the transferee and a total capital investment of \$100,000 USD. This amount does not include expenses on salary of the intended to hire positions. This proposed Subsidiary company organization chart was based on the current Parent Company Organization Chart, the

parent company currently employs 18 full-time employees and we would like to manage the business and grow towards that direction. We are currently under negotiations with a few developers for partnership in California. In China, the parent company is coordinating seminars of new properties, designing and printing new catalogs for new properties. The U.S. subsidiary company will also promote the properties in China and in the same time, prepare promotional materials coordinate seminars in China to promote these properties in China. At this moment we are mainly exploring the U.S. Real Estate Market and introducing the China Real Estate investment opportunity to foreigners. Our goal is to provide services to investors in China and United States to get the best results of their investment.

## 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 the Beneficiary would be employed in a managerial or executive capacity in the United States within one year of approval of the new office petition.

When a new business is first established and commences operations, the regulations recognize that a designated manager or executive may be responsible for setting up operations and that often the full range of managerial responsibility cannot be performed in the first year. In turn, a beneficiary setting up a “new office” could be engaged in a variety of low level activities not normally considered qualifying consistent with the regulations. The “new office” regulations allow a newly established petitioner one year to develop to a point that it can support the employment of the beneficiary in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a “new office,” it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See* 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a “new office,” a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, a petitioner must describe the nature of its business, its proposed organizational structure, financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary, all evidence meant to establish that a petitioner will commence doing business immediately in the United States. *Id.*

When examining the managerial or executive 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 a managerial or executive capacity. *Id.*

The definitions of managerial and executive capacity each have two parts. First, the Petitioner must show that the Beneficiary will perform 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 will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. See *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

In the current matter, the Petitioner has submitted a vague duty description that does not sufficiently articulate the Beneficiary's proposed tasks during the first year. Further, the duties are not specific as to how the Beneficiary will primarily perform qualifying duties within the first year. For instance, the Petitioner submitted duties that could apply to any manager or executive launching any business indicating that she will be responsible for "recruitment, team construction and personnel management," and "business development." The Petitioner further stated that the Beneficiary will be responsible for "real estate development," "sales," "development direction," formulating "the management system and annual plan" and management of an "investment fund." However, the Petitioner does not provide detail regarding the duties that would make up these general goals and objectives, such as the actions she will take during the first year to foster real estate development, what she will sell, management systems or annual plans she will implement, or investment funds she will manage. 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. Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. 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).

Further, the Petitioner has not clearly defined the Beneficiary's title and expected role with the company, as it has referred to her as "CEO," "president" and "general manager," but has provided only one description of her duties despite the Director's request for a more detailed account of the tasks she would perform during the first year of operations. In its appeal, the Petitioner states that it has been "under negotiations with a few developers for partnership," presumably negotiations it asserts are being led by the Beneficiary in the United States. However, the Petitioner does not identify these developers, the nature of the business they are involved in, the prospects these developers have on its future business, nor does it provide supporting documentation to substantiate these negotiations. Otherwise, there is no detail on the record regarding what qualifying tasks the Beneficiary would be performing within one year. 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) (quoting *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

For these reasons, the position description alone is insufficient to establish that the Beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as a petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial or executive capacity. A petitioner has the burden to establish that it would realistically

develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

Here, the Petitioner has provided little supporting evidence to demonstrate that it is likely to support the Beneficiary in a managerial or executive capacity within one year. First, although the Petitioner claimed to have three current employees at the time of filing, it did not provide supporting evidence to indicate that it has hired any staff. Further, in the RFE, the Director requested that the Petitioner submit a detailed organizational chart reflecting the duties and expected qualifications of its projected employees and a business plan indicating how the company will support the Beneficiary during the first year including timetables for each proposed action it will take to launch the business. However, the Petitioner did not provide any additional detail regarding its business or hiring plans. Although the Petitioner provided an organizational chart reflecting sixteen subordinate employees underneath the Beneficiary, including several managers, the Petitioner did not provide duty descriptions for these positions, the expected education levels for the proposed employees nor did it indicate when it planned on hiring these employees. More importantly, the Petitioner did not state which employees it planned to hire during the first year as necessary to determine whether the Beneficiary would be sufficiently relieved from performing non-qualifying operational tasks during the first year. In addition, the Petitioner did not specifically articulate how it planned on growing its business to sixteen employees nor did it provide a financial projection for its business. 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). As noted by the Director, the Petitioner has provided little information and evidence regarding the proposed nature of the office describing the nature and scope of the entity, its organizational structure, and its financial goals. 8 C.F.R. § 214.2(l)(3)(v)(C)(I).

Without a detailed description of the Beneficiary's proposed duties or the required information regarding the anticipated nature, scope, structure, and financial objectives of the new office, we cannot determine whether the Beneficiary would be employed in a managerial or executive capacity within one year. Specifically, the Petitioner has not demonstrated that the Beneficiary, as a personnel manager, would be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or managing an essential function of the organization within one year. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the Petitioner has not established that it will employ staff that would relieve the Beneficiary from performing non-qualifying duties so that the Beneficiary may primarily engage in managerial or executive duties within that timeframe. Further, regardless of the Beneficiary's position title, the record is not persuasive that the Beneficiary will function at a senior level within an organizational hierarchy or that she will primarily spend her time on the broad policies and goals and directing the management of the organization rather than on its day-to-day operations within one year. *See generally*, section 101(a)(44)(B) of the Act.

On appeal, the Petitioner provides little to remedy these referenced evidentiary deficiencies. The Petitioner merely states that it has provided “substantial evidence” and referenced the foreign entity’s claimed \$100,000 investment in the new venture. However, it does not indicate what “substantial evidence” it has submitted nor does it articulate an error on the part of the Director in her decision. A petitioner filing an appeal is required to provide a statement that specifically identifies an erroneous conclusion of law or fact in the decision being appealed. 8 C.F.R. § 103.3(a)(1)(v)

We acknowledge that demonstrating an investment by the foreign entity in the new company in the United States is a regulatory requirement for an L-1 new office petition, but providing evidence of such investment, without more, is not sufficient to establish that a Beneficiary will act in a managerial or executive capacity within the first year. The Petitioner has not articulated how it will use this investment to launch the business during the first year, explained how it will grow during the first year, or provided a single substantiated detail as to the type of business it will conduct beyond vague references to real estate investment or development. The Petitioner states on appeal that the foreign employer employs “18 full-time employees” and that it would like to “grow towards that direction.” However, the record suggests that these represent long term goals of the company and it has not demonstrated with detail and supporting evidence that such growth is likely to occur during the first year.

Further, as noted, the Petitioner states that it has been in negotiations with developers in the United States, but provided no supporting evidence to substantiate this assertion. The Petitioner also indicates that the foreign employer has been “coordinating seminars of new properties, designing and printing new catalogs for the new properties.” However, it does not describe these “new properties,” how they relate to its development during the first year, nor provided any supporting documentation to corroborate these properties or the actions of the foreign employer in supporting the Petitioner. The Petitioner explains on appeal that it will introduce “China Real Estate investment” opportunities to “foreigners” and that it will “provide services to investors in China and [the] United States.” However, it does not describe how it will introduce Chinese real estate investment to the U.S. market, how this will garner revenue, or the services it will provide to “investors.” This leaves significant questions as to whether it will commence doing business immediately and succeed and rapidly expand to support the Beneficiary in a managerial or executive capacity primarily performing qualifying duties. Again, 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. at 165.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States within one year of approval of the new office petition.

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### III. CONCLUSION

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains 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 H-Z-Y-USA, Inc.*, ID# 17847 (AAO July 26, 2016)