



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

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

MATTER OF S-C-USA LLC

DATE: JUNE 15, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

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

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary has been employed by its foreign affiliate in a managerial or executive capacity.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief and additional supporting materials, and asserts that the Director incorrectly applied the law and arbitrarily concluded that the Petitioner did not meet the requirements for the requested classification.

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.

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## II. FOREIGN EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary has been employed by the Petitioner's foreign affiliate in a managerial or executive capacity. The Petitioner does not claim that the Beneficiary has been employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary has been employed in an executive capacity.

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 March 4, 2015. The Petitioner stated on the Form I-129 that the Beneficiary has been employed as the president/CEO of its Canadian affiliate, [REDACTED] since April 2013. The record reflects that [REDACTED] provides business coaching and planning services to entrepreneurs and small businesses and also operates as a franchisor of these services.

In a letter dated February 24, 2015, the Petitioner described the Beneficiary's current duties as follows:

[The Beneficiary] completes all marketing and expansion efforts, including establishing a pro-active business development, marketing program and franchise materials to assure attainment of continued international company growth, franchise sales, stability and continuity objectives. He manages the day-to-day operations of the company and its personnel while managing and directing business affairs of the

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company. It is his responsibility to oversee, direct and control sales, franchising, and purchasing operations. He also establishes company goals and administrative policies while directing and implementing marketing activities, franchising activities and other public relations campaigns.

[The Beneficiary] has worked with hundreds of entrepreneurs and small business owners developing business plans, marketing strategies, goals, streamlining internal processes, managing employees, and over all increasing their business productivity and profitability. He manages all aspects of the sales cycle including: marketing, prospecting, presentations, and closings. [The Beneficiary] developed sales presentation materials and seminar content for over 25 different topics which has been translated into his trademarked [REDACTED]. He is now responsible for the growth of the [REDACTED] across Canada and the United States. With the sales of franchises, he provides training and support to new and current franchisees.

The Director issued a request for evidence (RFE) advising the Petitioner that the initial evidence was insufficient to establish that the foreign entity employed the Beneficiary in a managerial or executive capacity. The Director requested a more detailed statement from the foreign entity describing the position in detail, along with a description of the duties and percentages of time spent on each duty, an organizational chart detailing the foreign entity's structure, and the duties, salaries and educational level of any subordinates supervised by the Beneficiary.

In response, the Petitioner submitted a letter indicating that the Beneficiary has been the president/CEO of the foreign entity since 2008 and resubmitted a list of job duties nearly identical to those described above.

The Petitioner also submitted the foreign entity's organizational chart depicting the Beneficiary as CEO, overseeing three direct reports identified as follows: SEO/Web Marketing [REDACTED], Administration [REDACTED] and Business Coach Sales & Support, as needed [REDACTED]. The chart shows five franchisees reporting to the Beneficiary. The Petitioner did not provide position descriptions for the subordinates. With respect to the franchisees, the Petitioner submitted evidence pertaining to only three of the five persons named on the organizational chart, two who signed franchise agreements with the foreign entity in 2013, and one who signed an agreement in 2014.

In a letter accompanying the RFE response, the Petitioner stated that the Beneficiary "has a very successful one-on-one coaching business which includes 14 clients." The Petitioner submitted copies of invoices issued to these clients by the foreign entity as a "monthly business coaching retainer."

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<sup>1</sup> The organizational chart spells the last name as [REDACTED] however, based on other evidence in the record, it appears that the last name is actually [REDACTED].

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The Director denied the petition noting that the evidence submitted regarding the Beneficiary's position abroad did not establish that the Beneficiary primarily performs executive or managerial duties. The Director explained that the duties described are more indicative of an employee performing marketing and sales tasks rather than overseeing them. The Director also noted that the Petitioner did not submit percentages of time spent on each duty, and therefore, it is unclear which of the listed duties the Beneficiary primarily performed.

On appeal, the Petitioner submits a letter from the foreign entity dated October 27, 2015, which includes an additional list of job duties with percentages of time devoted to each duty as follows:

- Establishing the goals, mission, vision and policies of the company, including: choosing new markets to enter (in Canada and United States); formulating strategies to increase [the Petitioner's] brand awareness throughout Canada and the United States; meeting with potential business partners throughout North America to benefit the company's franchisees and to advance the [Petitioner's] brand; and establishing administrative policies for support staff, franchisees, and coaches. [15%]
- Hiring team to steer day-to-day operations of the company and managing and controlling the support team, which includes supervising the following individuals:
  - [REDACTED] who provides franchisee support; manages the telemarketing team; oversees programming enhancements to the company's client tracking system; and reviews and edits Franchise Training Manuals [15%];
  - [REDACTED] [*sic*], the company's Marketing Professional, who provides Search Engine Optimization services and Social Media Marketing Services to various clients of the company on an as needed basis [15%]; and
  - [REDACTED] Administrative Assistant, who performs administrative duties for the company, including: organizing [the Beneficiary's] seminars; putting together initial "Franchise Interest" packages for any of [the Beneficiary's] Canadian franchise prospects, and mailing the packets; providing first level support to Franchisees, Scheduling appointments for coaching prospects; and researching and developing lists of prospects. [20%].
- Overseeing, directing and controlling all sales, franchising, and purchasing operations of the company; ensuring compliance with relevant laws; managing the company's financial and physical resources; and setting budgets. [20%]
- Speaking/Coaching at seminars and providing business development training in order to develop national partnerships for the benefit of the franchisees and betterment of the [Petitioner's] brand. [10%]

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- Responding to advanced questions from Franchisees, franchise prospects, or other inquiries that have been escalated from support staff. [5%]

The Petitioner explains that the first three tasks establish that the Beneficiary primarily performs executive duties involving the goals, policies, and objectives of the company.

The Petitioner also submits letters from [REDACTED] and [REDACTED] states that he responds to franchisee questions, oversees a telemarketing team of two people, works with the company's computer programmer on a [REDACTED] and reviews and edits the franchise training manuals. He indicates that he works between 19-26 hours per week. [REDACTED] states that she performs marketing and search engine optimization services for the company as needed and provides social media marketing services approximately eight hours per month. The Petitioner indicates that these individuals are independent contractors and provides copies of invoices for services provided by [REDACTED] and [REDACTED]. The invoices show that all three subordinates work on a part-time basis ranging from eight hours per month to twenty hours per week.

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 has been employed by the foreign entity in an executive capacity.

When examining the managerial or executive capacity of the Beneficiary, we 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 performed by the Beneficiary and indicate whether such duties are in either 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 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.

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.*

Here, the Petitioner emphasizes that the Beneficiary’s role as chief executive officer is evidence of his performance of qualifying executive duties for the foreign entity. However, we do not evaluate a position based on job title alone, and as discussed below, the Petitioner’s description of the Beneficiary’s duties, considered within the totality of evidence, does not support a finding that he primarily focuses on the broad goals and policies of the organization, rather than on its day-to-day operations.

Many of the Beneficiary’s duties consist of vague statements that shed little light on the actual tasks he performs. For example, the Petitioner stated that the Beneficiary “manages the day-to-day operations of the company and its personnel while managing and directing business affairs of the company” and “establishes company goals and administrative policies while directing and implementing marketing activities, franchising activities and other public relations campaigns.” These are general statements that do not reveal what the Beneficiary does on a day to day basis.

The Petitioner’s initial position description suggested that the Beneficiary performs sales, franchising, operations, and market research functions, while also holding authority to recruit and hire staff. In fact, many of the stated duties suggest that the Beneficiary spends a significant portion of his time engaged in non-qualifying operational tasks. For example, the Petitioner stated that the Beneficiary “managed all aspects of the sales cycle including: marketing, prospecting, presentations, and closings.” Additionally, the Petitioner stated that the Beneficiary develops sales presentation materials and seminar content, along with providing training and support to new franchisees. These are sales and operational duties necessary to provide the services of the company and they are performed by the Beneficiary rather than by his subordinates. The actual duties themselves 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). While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a beneficiary as long as those tasks are not the majority of the Beneficiary’s duties, the Petitioner still has the burden of establishing that the Beneficiary is “primarily” performing managerial or executive duties. Section 101(a)(44) of the Act.

On appeal, the Petitioner submits a different set of job duties with percentages of time spent on each duty. While many of the duties are similar to those previously provided, we note that the Petitioner initially stated that the Beneficiary provided franchise support and training to new and current franchisees throughout North America, however, this duty was not included in the list of duties submitted on appeal. On appeal, the Petitioner states that 15% of the Beneficiary’s time will be establishing the goals, mission, vision and policies of the company, and 20% of his time overseeing and directing all sales, franchising, and purchasing operations. The job description indicates that the Beneficiary oversees the sales, franchising and purchasing operations therefore, we must look to the

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overall company structure to determine who performs the day-to-day functions of sales and purchasing operations allowing the Beneficiary to “direct the management” and “establish the goals and policies” of the organization. The job duties submitted on appeal also indicate that the Beneficiary spends 50% of his time “managing and controlling the support team, including supervising three individuals.” Again, there is no mention of the Beneficiary’s responsibilities for support and training for franchisees in the second version of job duties submitted.

As noted by the Petitioner, a company’s size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C) of the Act. In reviewing the relevance of the number of employees a company has, federal courts have generally agreed that USCIS “may properly consider an organization’s small size as one factor in assessing whether its operations are substantial enough to support a manager.” *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of a company in conjunction with other relevant factors, such as a company’s personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a “shell company” that does not conduct business in a regular and continuous manner. See, e.g., *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The record shows that the Beneficiary oversees three part-time contract employees. While the Petitioner has submitted evidence that the subordinate contract employees do provide some support services to the foreign entity, it remains unclear how this staff relieves the Beneficiary from substantial involvement in non-executive duties necessary for the day-to-day operations of the foreign company. The SEO/web marketing role is only eight hours per month and the administration subordinate works 20 hours per week. Furthermore, the business coach sales & support subordinate indicates that he “works with the company’s computer programmer”; however, the organizational chart does not indicate that the foreign entity employs a computer programmer. Similarly, [REDACTED] indicates that he oversees the telemarketing team of two people; however, there is insufficient evidence that the foreign entity employs or contracts these workers. While there is no requirement that the Beneficiary have a full-time staff, the Petitioner must show that the subordinates relieve the Beneficiary from performing the day-to-day tasks of running the business thereby allowing him to primarily perform qualifying executive duties. While we do not doubt the Beneficiary’s authority to oversee these contracted employees, the record does not establish that supervision of this team requires 50% of his time.

Further, the record shows that the foreign entity provides services that have not been attributed to any of its subordinate staff. In response to the RFE, the Petitioner emphasized that in addition to the franchise operations, the Beneficiary “has a very successful one-on-one coaching business which includes 14 clients.” Based on the company’s marketing materials, its business coaches are expected to spend approximately four hours per month with each individual client, and provide additional support as needed by phone and e-mail. As the Petitioner has not stated that any of the foreign

entity's staff provide any services to clients (as opposed to franchisees), it appears that responsibility for these clients falls to the Beneficiary. Although it appears that such responsibility would require the Beneficiary to spend more than 50 hours per month providing these services, the Petitioner did not include such duties in his position description. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, we are left to question whether the Petitioner has provided an accurate and complete description of his actual job duties.

The Petitioner has repeatedly stated throughout the record that the Beneficiary was responsible for sales, franchising, and market research functions. It is unclear who performs these functions on a daily basis since the foreign entity employs part-time or intermittent contractors and their roles are not clearly defined. Therefore, we find that the Petitioner has not established that the foreign entity has an organizational structure sufficient to support the Beneficiary in a position that is primarily executive in nature or a sufficient subordinate staff to relieve the Beneficiary of non-qualifying duties.

We acknowledge that the Beneficiary is the highest-level employee of the foreign entity; however, as noted above, this alone is not sufficient to establish that he is *primarily* employed in an executive capacity. The designation hinges on whether or not the Petitioner demonstrates that the foreign entity had the requisite level of subordinate staff capable of carrying out the duties associated with the day to day operation of the business.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary has been employed in an executive capacity abroad.

### III. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY WITHIN ONE YEAR

Beyond the decision of the Director, we find that the Petitioner has not established that the Beneficiary would be employed in the United States in a managerial or executive capacity within one year of the petition's approval.

When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. The "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of a 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. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves

away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally* 8 C.F.R. § 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

In the instant matter, the Petitioner has submitted two business plans each containing differing projections for the Petitioner's anticipated revenue and expenses in its first year of operation. The first business plan submitted at the time of filing included a very brief explanation of the Petitioner's anticipated revenue and expenses for its initial year. The Petitioner projected revenues of \$128,500 and expenses of \$44,200, a figure which included no salaries or payments to contractors. The minimal information provided suggested that the Beneficiary would be operating the business as its sole employee throughout the entire first year.

In response to the RFE, the Petitioner submitted a second business plan that included a hiring timetable and accounted for salary expenses paid to employees. In this version, the Petitioner indicated that it anticipated revenue of approximately \$200,000, expenses totaling \$113,651, and the hiring of two full-time employees, an administrative assistant and a franchise sales person, within the first 12 months. The Petitioner did not explain why it submitted two different business plans despite the considerable discrepancies, thus casting doubt on the reliability of the Petitioner's statements and its ability to grow sufficiently within its first year of operation to support a manager or executive within the one-year timeframe. We cannot determine the Petitioner's actual plans and projections for its initial year.

Further, the Beneficiary's proposed duties in the United States are essentially the same as those he currently performs in Canada, and for the reasons discussed above, the record does not show how he will perform primarily managerial or executive duties. While the Petitioner claimed in response to the RFE that the new office would support the Beneficiary and two full-time employees within one year, we note that the foreign entity is still at a stage of development after several years where it relies on part-time contractors. Given the discrepancies and deficiencies in the record, the Petitioner has not established that it would grow to where it can support a qualifying managerial or executive position within one year.

#### IV. PHYSICAL PREMISES

Beyond the Director's decision, the Petitioner has not established that it has secured sufficient physical premises to house its new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

The Petitioner submitted an "Intelligent Office Membership Agreement" which allows, at most, 16 hours of office use per month. While the business may not require a large space, the submitted agreement is not a lease and does not provide the Petitioner with physical premises on a full-time basis. Further, the Petitioner's initial business plan and final projections indicated that the company

did not anticipate any additional rent expenses during its first twelve months of operations beyond this agreement allowing minimal office use.

For these reasons, the evidence of record does not establish that the Petitioner has secured sufficient physical premises for its new office as required by the regulations.

#### V. BENEFICIARY'S TEMPORARY SERVICES

Beyond the decision of the Director, because the Beneficiary is also the sole owner/operator of the foreign entity, it remains to be determined that the Beneficiary's proposed services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if a beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. The Petitioner has not identified any full-time or payroll employees who will run the Canadian business in the Beneficiary's absence. In the absence of persuasive evidence, it cannot be concluded that the Beneficiary's services in this matter are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

#### VI. 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 S-C-USA LLC*, ID# 16996 (AAO June 15, 2016)