



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

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

MATTER OF G-M- CORP.

DATE: MAY 2, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR NONIMMIGRANT WORKER

The Petitioner, an import, export and distribution firm, seeks to extend the Beneficiary's temporary employment as its U.S. operations development manager 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 an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity in the United States.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by mischaracterizing the requirements for a function manager role and by failing to give due consideration to all evidence submitted.

Upon *de novo* review, we will withdraw the Director's decision and remand the petition to the Director for further review and entry of a new decision.

I. LAW

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

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

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(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.

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

The primary issue on appeal is whether the evidence of record establishes that the Beneficiary will be employed in a qualifying managerial or executive capacity, as defined at section 101(a)(44) of the Act, under the extended petition.

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In denying the petition, the Director found that the evidence demonstrated that the Beneficiary would primarily perform non-qualifying duties rather than managing an essential function of the organization as asserted. The Director stated that the record suggested that the Petitioner only employed the Beneficiary and three other employees performing duties for both the Petitioner and a claimed subsidiary, [REDACTED] (also doing business as [REDACTED]). Further, the Director pointed to evidence indicating that the Beneficiary was performing non-qualifying operational tasks, including interacting with customers and performing other sales related duties. The Director emphasized that the Petitioner did not demonstrate that the Beneficiary would oversee other supervisory, professional, or managerial employees. The Director pointed to evidence reflecting that the Beneficiary would perform managerial duties for companies other than the Petitioner, thereby leaving question as to the amount of time the Beneficiary would devote to the petitioning company.

On appeal, the Petitioner asserts that the Director erred in concluding that the Beneficiary will not act in a qualifying managerial or executive capacity. The Petitioner contends that the Director erroneously found that the Beneficiary had only one subordinate and did not consider eleven other subordinates who work for the Petitioner's claimed subsidiary, [REDACTED] and over which the Beneficiary exercises supervisory control. The Petitioner further states that the Director mischaracterized the nature of a function manager's role, noting that the regulations do not require that a function manager oversee managerial, supervisory or professional subordinates. The Petitioner asserts that the Beneficiary will manage an essential function of the organization, namely "implementing the Petitioner's objectives, policies, and strategies necessary to develop more substantial import, export and distribution processes in the United States." The Petitioner contends that given the size of its operations and the supporting evidence related thereto that it is clear that the Director did not adjudicate the matter according to the preponderance of the evidence standard.

Upon review, the Petitioner's assertions are persuasive, in part, and we will withdraw the Director's decision dated February 12, 2015. First, the Director did not properly consider and analyze whether the Petitioner acquired the company [REDACTED] and whether the Beneficiary's oversight of this acquired company qualified him as a manager or executive according to the regulations. In addition, the Director overemphasized the Beneficiary's apparent lack of managerial or professional subordinates and did not focus on the Petitioner's primary claim that the Beneficiary qualifies as a function manager.

Although the Director's decision will be withdrawn, we cannot conclude that the evidence of record establishes that the Beneficiary will be employed in a qualifying managerial or executive capacity. Accordingly, the matter will be remanded to the Director for further review in accordance with our discussion below.

As noted, a primary basis of the Petitioner's claim is that it developed sufficiently during the first year of operations by acquiring a 51% interest in [REDACTED] a "wholesale liquidation firm." The Petitioner submitted evidence that this company earned over \$2 million in revenue from January to September 2014 and its most recent IRS Form 941 Employer's Quarterly

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Federal Tax Return from the third quarter of 2014 reflected that the company employed eleven individuals. Otherwise, the Petitioner submitted little evidence that it had developed operations of its own during the first year. In fact, the Petitioner acknowledged that the company had earned little to no revenue during its first year and evidence provided indicated that the Beneficiary had been using the Petitioner as a means to investigate a number of different investment opportunities during the first year. As such, in order to conclude that the Petitioner has developed sufficiently during the first year to support the Beneficiary in a qualifying managerial capacity, we must analyze whether Petitioner established by a preponderance of the evidence that it acquired a majority interest in [REDACTED]

Upon review, the Petitioner has not submitted sufficient evidence to establish that it acquired a majority, controlling interest in [REDACTED]

The Petitioner contends that it acquired a 51% controlling interest in the [REDACTED] for \$400,000. However, the evidence submitted on the record does not adequately support this assertion. First, the Petitioner has not submitted copies of stock certificates or a stock ledger to corroborate its acquisition of ownership in [REDACTED]. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The Petitioner did submit the following evidence related to the claimed stock acquisition:

- Copy, undated Articles of Incorporation for [REDACTED] indicating that the shares of the company are owned as follows: the Petitioner 51%, [REDACTED] 24.5%, and [REDACTED] 24.5%. The Articles of Incorporation do not indicate the amount of consideration that these claimed owners paid for their shares of the company where this information is called for in the document.
- Copy, "Consent to Action Taken in Lieu of the Annual Meeting of the Directors of [REDACTED] dated September 26, 2014, that includes a Schedule A "Consideration Received for Shares." This document does not reflect the amount of consideration the shareholders paid for their ownership interests in the company. It states that the company is authorized to issue 10,000 shares with \$1.00 par value.
- Copy, Minutes of [REDACTED] meeting of Directors dated June 15, 2014. This document lists the above-referenced owners, but does not reflect an agreed upon amount of consideration paid for stock where this information was to be provided in the minutes.
- Copy, "Subscription Agreement" executed on September 26, 2014, indicating the Petitioner's purchase of shares in [REDACTED], but not the amount paid for these shares.

Although the Petitioner provided a bank statement for [REDACTED] for the period August 1 through August 29, 2014, indicating a \$400,000 deposit, there is no indication from the supporting corporate documentation that this deposit reflects payment for a 51% ownership interest in [REDACTED] by the Petitioner. Further, this deposit preceded the execution of the

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above-referenced subscription agreement by more than one month. Further, it is unclear why the [REDACTED], a company established in Florida in [REDACTED] would execute new Articles of Incorporation in [REDACTED] rather than amending its existing Articles of Incorporation.

Based on these discrepancies and omissions, the evidence of record as presently constituted is insufficient to establish that the Petitioner has a controlling interest in [REDACTED] at the time of filing, and in turn, whether the Petitioner had sufficient operations after one year to support the Beneficiary in a qualifying managerial capacity. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

At this time, we take no position on whether the Beneficiary meets this regulatory requirement. We will remand this matter to the Director for a new decision, particularly since the Director did not appropriately analyze whether the Petitioner had successfully acquired [REDACTED]. The Director should request any additional evidence deemed warranted to address the deficiencies noted with respect to the Petitioner's operations and whether they are sufficient to support the Beneficiary in a qualifying managerial or executive capacity. The burden of proof rests with the Petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

III. DOING BUSINESS

Beyond the decision of the Director, the record as presently constituted does not establish that the Petitioner is doing business and has been doing business for at least one year, as required by the regulations. Accordingly, we will instruct the Director to review this issue on remand and request any additional evidence deemed necessary.

The regulations define a qualifying organization as one doing business as an employer in the United States. *See* 8 C.F.R. § 214.2(l)(1)(ii)(2). "Doing business," is defined as the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H). In addition, a petitioner seeking to extend a petition that involved a new office must submit evidence that it has been doing business for the previous year. 8 C.F.R. § 214.2(l)(14)(ii)(B).

As noted, the Petitioner asserts that its operations are largely based upon its acquisition of [REDACTED], a company with 11 employees and substantial revenue. However, as addressed above, the Petitioner has not established with the evidence submitted that it acquired a controlling interest in [REDACTED] and it did not provide evidence of other business operations during the previous year. Indeed, the Petitioner submitted an "Income Statement" dated July 31, 2014, reflecting that the company had earned no revenue as of that date and paid no salaries other than to the Beneficiary.

The Petitioner is also shown to use the same address as [REDACTED] leaving question as to whether it can be shown to have operations independent of its claimed acquisition. Beyond the

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operations of [REDACTED] the Petitioner submits little evidence that it is regularly providing goods and services, except for evidence reflecting the Beneficiary has been investigating a number of investment opportunities in the United States, in a number of cases through separate legal entities which have no documented ties to the Petitioner.

As such, this issue will be remanded to the Director and she should request additional evidence to clarify whether the Petitioner was doing business as of the date of the filing of the petition and had been doing business for the prior year. Again, the burden of proof rests with the Petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

IV. CONCLUSION

Based on the foregoing discussion, although the Director's decision will be withdrawn, the evidence of record as presently constituted does not establish the Beneficiary's eligibility for the benefit sought. Accordingly, we will remand this matter to the Director for further action and entry of a new decision.

ORDER: The decision of the Director, Vermont Service Center, is withdrawn. The petition 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 G-M- Corp.*, ID# 14124 (AAO May 2, 2016)