



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

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

MATTER OF J-A-, LLC

DATE: MAY 19, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a produce wholesaler and distributor, seeks to temporarily employ the Beneficiary as the executive director 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 it would employ the Beneficiary in a managerial or executive capacity within one year.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in concluding that it will not support the Beneficiary in an 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 shall be accompanied by:

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- (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.

(b)(6)

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

The Director denied the petition based on a finding that the evidence of record 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 Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we restrict our analysis to whether the evidence establishes that the Beneficiary would be employed in an executive capacity within one year.

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 August 5, 2015. On the Form I-129, the Petitioner stated that it has three current employees in the United States and a gross annual income of \$1 million.

In a letter dated July 30, 2015, the Petitioner stated that the Beneficiary’s foreign employer, [REDACTED] is a wholesale distributor and exporter of avocados,” noting that it is “[REDACTED] in the Mexican ranking of exporters of avocados nationwide” and that it has “5% market share in the United States.” The Petitioner stated that the foreign employer has 155 employees and that it earned over \$45 million in revenue during the previous year.

The Petitioner explained that the foreign employer now plans to expand in the U.S. market and that it “opened a filial in California to increase sales and gain markets internationally, named [REDACTED] and that this company “was founded to import produce from Mexico and sell it to distributors in the U.S.” Further, the Petitioner stated that the foreign employer “strategically planned the creation of a joint venture in the U.S. to supply produce to groceries and supermarket chains in California” and that the Beneficiary “designed this plan and started to implement it in March 2015.”

(b)(6)

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The Petitioner explained that the foreign employer “contributed to the joint venture financing the produce (i.e. avocados) to [the Petitioner] through it[s] California’s [sic] affiliate [REDACTED]. The Petitioner indicated that it “received the produce and paid for it after 60 days” and “was then legally formed as a Limited Liability Corporation.”

The Petitioner explained that it had secured premises to distribute avocados, stating that it had “installed a walking freedge [sic] with capacity for 40 pallets” and “acquired 2 trucks and hired two employees.” The Petitioner indicated that it “made gross sales of about half-million dollars and has vendor contracts with chain 53 supermarkets, including Supermarkets [REDACTED] and [REDACTED].”

The Petitioner stated that the Beneficiary would act in an executive capacity, in which “she will direct the management of [the Petitioner], establishing the goals and policies of the organization, using her discretionary power,” and report only to the company’s two owners, [REDACTED] and [REDACTED]. The Petitioner stated that [REDACTED] will be in charge of “general management and administrative duties,” and its two current employees “are in charge of processing orders and shipping and handling.”

The Petitioner further stated that the Beneficiary will perform the following duties:

- 1) Setting company’s goals and policies, 40% of the time:
  - She will establish a roadmap of business grow[th] to compare results as the venture proceeds from paper to reality. She will get the commitment and participation of personnel with goals and policies. She will clarify and synchronize goals and strategies to achieve greater profitability, services and quality of produce sold. . . . she will set and improve company’s guidelines to ensure quality sales and brand building. She will deepen and refine all aspects of communications, from web presence to external relations with the goal of creating a stronger brand.
- 2) Directing the company’s marketing strategies and finances, 40% of the time:
  - She will communicate with target supermarkets’ leadership to promote relationships and sales. At present with count with 53 clients and the goals is to reach 100 clients by the year’s end. She will outsource advertising opportunities and oversee the campaign to expand local revenue generating. She will plan and oversee company’s presence at regional expositions in the U.S. . . . to gain new markets. She will review and approve preparation and finalization of monthly and annual financial reporting materials. She will oversee budgeting, financial forecasting, and cash flow for administration. She will manage one full-time accounting administrator; hire and retain support staff as needed in the future and coordinate all audit activities.
- 3) Liaising with Mexican company and other filials [sic], 15% of the time:

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- She will exchange information with sister companies the U.S. and abroad to improve customer satisfaction and overall profit. She will ensure financing and promote loans from sister companies, investors and founders . . . .
- 4) Securing managers and professions, 5% of the time:
- She will lead, coach, develop, and retain high-performance senior management team, ensure effective systems to track scaling progress, and regularly evaluate program components, so as to measure successes that can be effectively communicated to the members.

The Petitioner submitted a lease agreement demonstrating that it had secured a 2,482 square foot warehouse space in [REDACTED]. The Petitioner provided pay stubs indicating that during the first two weeks of July 2015, it had two employees who worked 15 hours per week at an hourly wage of \$12.00. The Petitioner also submitted 15 invoices indicating that it had paid its claimed affiliate company, [REDACTED] substantial sums for shipments of avocados from April through July 2015. The Petitioner further provided a "Vendor Maintenance Form" indicating that it registered as a new vendor for [REDACTED] on April 15, 2015.

The Director later issued a request for evidence (RFE) stating that the Petitioner did not sufficiently explain the Beneficiary's proposed position, the company's proposed organizational structure, or its financial ability to compensate the Beneficiary. As such, the Director requested that the Petitioner submit a letter describing its proposed number of employees and their positions, the amount of investment in the company, and how the venture will support the Beneficiary in a managerial or executive capacity within one year. The Director asked the Petitioner to provide an organizational chart reflecting all proposed positions, their duties, and expected education levels. In addition, the Director requested that the Petitioner submit a business plan, including timetables for each proposed action during the first year, along with evidence of the foreign employer's capital contribution to the company.

In response, the Petitioner submitted a support letter signed by the foreign entity's general accountant, which largely reiterating its previous assertions regarding the petitioning company's first year plans. The letter stated that the Petitioner had "moved to a bigger warehouse with walk-in refrigeration, bought two trucks and hired two employees." The foreign entity explained that "in eight months [the Petitioner] has been able to sell approximately \$600,000 to its clientele, and repay the product to [REDACTED]. Finally, the foreign entity stated that the Petitioner has "60 wholesaler clients who are buying about a truck load of avocados per week."

The foreign entity's letter indicated that "the short time goal for [the Petitioner] is to hire 3 more employees and 2 more truck drivers by the end of 2015, reaching an annual gross sale of 1 million dollar" and for 2016 "to add 10 small trucks, hire 2 to 4 employees for administration and sales and generate \$4 to \$6 million dollars sales."

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Further, the Petitioner submitted a proposed organizational chart reflecting the Beneficiary in the position of “manager” reporting to the two partners of the company and overseeing “accounting,” a “warehouse manager,” and “sales.” The chart showed 10 deliverymen reporting to “sales.”

The Petitioner also provided an investment letter, also from the foreign employer’s general accountant, stating the following:

As an officer of [the foreign employer], I certified that our company sent to our new founded filial [the Petitioner] approximately 22 loads trucks [*sic*] of avocado with 397,760 tons of avocados with the approximate value of \$697,357.00 from January 2015 to September 2015. [The Petitioner] was obligated to pay for the produce. However, [the foreign employer] financed the product at “zero” interest to start up the filial. [The Petitioner] slowly started paying back the produce to the Mexican company as it was able to collect from its customers.

Our filial in [REDACTED] was in charged of [*sic*] importing and transporting the product from [the foreign employer] to [the Petitioner] in [REDACTED]

The Petitioner provided supporting documentation reflecting the transaction of avocados between the foreign employer and [REDACTED] and related shipping documentation. Finally, the Petitioner submitted monthly profit and loss statements for the period from January through July 2015 reflecting that the company had earned \$506,898 in revenue.

In denying the petition, the Director stated that the Petitioner had identified only two employees out of the fifteen listed in its proposed organizational chart, including the Beneficiary and the owners of the company. The Director pointed to the lack of evidence to demonstrate that the Petitioner employed or will employ “supportive personnel.” The Director further found that the Petitioner did not provide sufficient detail regarding the foreign employer’s capital contribution to the new venture. Accordingly, the Director concluded that the record did not contain sufficient information to establish that the new office would be able to support the Beneficiary in a managerial or executive capacity within one year.

In its appeal, the Petitioner states that the foreign employer transferred avocados valued at nearly \$700,000, representing a substantial investment in the company. The Petitioner contends that the Director was mistaken regarding its employees, indicating that the evidence reflected that it had employees on its payroll since July 2015. The Petitioner asserts that it has provided substantial evidence that it will garner significant revenue during the first year of operations and that it will hire as many as thirteen employees.

The Petitioner also submits additional evidence including another support letter from the foreign employer emphasizing its contribution of avocados to the Petitioner and the U.S. company’s sales amounting to over \$500,000. The Petitioner again states that it has 60 clients to whom it sells a truckload of avocados per week. The Petitioner notes that its “plans for the future include opening offices in the northeast and southeast, as well as representation in other countries.”

The Petitioner provides an updated “current organizational chart” depicting the Beneficiary as executive director, reporting to the two owners of the company, and supervising an accounting and bookkeeping employee, a warehouse manager, and a sales manager. The employee listed as the sales manager is one of the owners of the company. The warehouse manager is shown to oversee a delivery man. The Petitioner provides a California quarterly wage report reflecting that it paid both the warehouse manager and deliveryman \$2,160 during the third quarter of 2015. Finally, the Petitioner submits a number of other documents reflecting the commencement of its operations, specifically a list of expenses amounting to approximately \$57,000 for auto repair and tires, office supplies, refrigeration installation, and payment of local business fees.

## 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 an executive capacity within one year of the approval of the petition.

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 managerial or executive position.

The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to “direct[] the management” and “establish[] the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. 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.*

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). Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner’s proposed organizational structure, the duties of the beneficiary’s proposed subordinate employees, the petitioner’s timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner’s

business, and any other factors that will contribute to a understanding a beneficiary's actual duties and role in a business.

In the present matter, the Petitioner's description of the Beneficiary's proposed duties did not sufficiently detail her proposed qualifying tasks. For instance, the Petitioner stated that the Beneficiary would perform a number of general duties which might be performed by any executive with any company in any industry, such as setting the company's goals, policies and financial strategies, getting the commitment of personnel as to goals and policies, clarifying and synchronizing goals and strategies to achieve greater profitability, setting and improving the company's guidelines to ensure quality sales, refining all aspects of communication, and leading, coaching, developing, and retaining a senior management team. However, in each case, the Petitioner did not submit details to substantiate how the Beneficiary would primarily focus on these broad duties, such as an explanation of the goals, policies, strategies, and guidelines she would implement, how she would establish a senior management team, and who would make up this team.

While some of these broadly described responsibilities indicate the Beneficiary's level of authority within the company, they offer little insight into what she will actually do within the context of the petitioning business on a day-to-day basis during the first year of operations and beyond. Conclusory assertions regarding a beneficiary's proposed 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).

Indeed, to the extent that the Petitioner provides detail regarding the Beneficiary's proposed duties they were more reflective of the performance of non-qualifying sales tasks such as communicating with supermarkets regarding sales opportunities, expanding clients, and attending a regional sales exposition. In short, the Petitioner did not clearly articulate how the Beneficiary's duties would be primarily qualifying within one year or describe the nature of these specific qualifying tasks within the context of the Petitioner's proposed staffing structure.

Overall, the position description alone is insufficient to establish that the Beneficiary's duties would be primarily in an executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the Petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the Beneficiary in the intended managerial or executive capacity. As discussed, the Petitioner has the burden to establish that the new office 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 the Petitioner's anticipated staffing levels and stage of development within a one-year period. *See generally*, 8 C.F.R. § 214.2(l)(3)(v)(C).

In the RFE, the Director requested that the Petitioner submit a detailed organizational chart reflecting each projected employee, their position titles, duties, expected educational qualifications and their projected salaries. However, in response, the Petitioner submitted no such organizational chart or specific evidence as to its projected hiring plans, evidence which is crucial to demonstrating

that the Beneficiary will be primarily relieved from involvement in the day-to-day operations of the business within one year. Likewise, the Director asked the Petitioner to provide a business plan explaining the specific actions it would take to start up the company and a timetable for each of these proposed actions. Again, although the Petitioner provided some unsupported statements regarding its future plans, it did not explain how these would be accomplished or provide specific timetables for when these actions would be accomplished. 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). 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)).

In sum, the Petitioner provides an incomplete picture of how it will develop during the first year to support the Beneficiary in a qualifying managerial or executive capacity. The Petitioner emphasizes that it has already acquired substantial goods, in the form of avocados from its affiliated companies, and earned over \$600,000 in selling this produce. While such evidence establishes that the Petitioner is already doing business, it does not necessarily establish that the Beneficiary will be employed in a qualifying executive capacity within one year or that the company will employ workers to relieve the Beneficiary from involvement in the day-to-day operations of the business. The Petitioner is required to explain the nature of the office and describe the scope of the entity, its organizational structure, and its financial goals for the first year. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(1).

As noted, the Petitioner was requested to submit details regarding the job titles and duties, salaries, and expected hiring timeline for the Beneficiary's proposed subordinates, but did not provide this corroborating evidence in response to the RFE. Indeed, on appeal, the Petitioner does not rectify this lack of evidence. Instead, the Petitioner indicates that one of the partners of the company holding a 50% ownership interest will report to the Beneficiary, despite indicating on both submitted organizational charts that the Beneficiary will actually report to this same individual. The Petitioner has not provided an explanation for this discrepancy, nor has it explained why it did not identify the owner/managing member of the company as a subordinate sales manager prior to the denial of the petition if that is his actual role in the company. Further, the Petitioner did not provide a description of the duties to be performed by its sales manager. Previously, the Petitioner stated that its managing member would be responsible for "general management and administrative matters."

Likewise, the Petitioner stated in support of the petition that it had hired two employees and acquired two trucks. It provided payroll documentation indicated that these two part-time employees were earning \$12 per hour. Given the operational aspects of the Petitioner's business, such as shipping, receiving, and delivering its avocados, it is reasonable to conclude that these two employees, making the same salary, were responsible for these tasks. In fact, the Petitioner indicated that these employees would be "in charge of processing orders and shipping and handling." However, on appeal, the Petitioner modified the organizational chart, elevating one of these operational

employees to the position of warehouse manager overseeing his colleague earning the same salary.<sup>1</sup> Further, the Petitioner has not substantiated the employment of its two other claimed employees, the accounting and bookkeeping employee and sales manager. Although a new office petition allows for development over time, the above discrepancies suggest that changes were made to the organizational chart simply to make the petition compliant with USCIS requirements, rather than reflecting the company's development to date. As such, this modification leaves us to question whether the Beneficiary will be supported in a qualifying executive capacity within one year. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). 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).

In addition, the Petitioner has provided little detail regarding its future hiring plans, such as the duties and expected credentials and salaries of those it plans to hire and the timing of these proposed hires. The Petitioner only vaguely mentions that it will hire several deliverymen in the future and add up to 13 employees. On appeal, the Petitioner asserts that the evidence reflects that it has had two employees since July 2015. However, the Petitioner does not explain how this establishes the Beneficiary's eligibility. The fact that the Petitioner had two part-time employees at the time of filing does not support a finding that the company will grow to the point where it will put in place subordinate staff that would relieve the Beneficiary from significant involvement in the day-to-day operations of the business and support the Beneficiary's asserted executive position within one year or that, such that she could focus primarily on its broad policies and goals. 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.

For the foregoing reasons, the Petitioner has not demonstrated that the Beneficiary would be employed in a qualifying executive capacity within one year. First, as discussed, the Petitioner submitted a vague duty description that does not include sufficient detail or supporting evidence with respect to the Beneficiary's proposed executive duties, such as the specific goals and policies she will be tasked with establishing or what qualifying duties she will primarily perform by the end of the first year. Further, as noted, the Petitioner has not sufficiently described or documented that it will hire subordinates to allow the Beneficiary to act primarily in an executive capacity. It is the Petitioner's burden to clearly articulate how the Beneficiary will act in a qualifying executive capacity within one year. Here, the Petitioner has focused on the new office's activities to date, rather than its future plans and the Beneficiary's asserted executive position therein.

Accordingly, the Petitioner has not demonstrated that the Beneficiary will be employed in a qualifying executive capacity within one year.

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<sup>1</sup> The Petitioner provided evidence that both of its employees earned \$2,160 during the third quarter of 2015, consistent with an average of 14 hours per week at their stated salaries of \$12.00 per hour.

### III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely 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 J-A-, LLC*, ID# 16670 (AAO May 19, 2016)