



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

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

MATTER OF A-R-E- INC

DATE: OCT. 7, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a commercial real estate company, seeks to extend the Beneficiary's temporary employment as its president under the L-1A nonimmigrant classification for intracompany transferees. See Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner had not established: (1) a qualifying relationship with the Beneficiary's claimed foreign employer; (2) that the Beneficiary had one continuous year of full-time employment in a qualifying capacity with a qualifying foreign employer prior to his admission to the United States; and (3) that the Beneficiary will be employed in a managerial or executive position under the extended petition. The Petitioner subsequently filed a motion to reconsider. Upon review of the motion, the Director withdrew her decision on the issue of the Beneficiary's proposed employment in a managerial or executive capacity for the U.S. entity and affirmed her decision on the remaining two issues.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the evidence of record demonstrates the Beneficiary's eligibility for this visa classification under the pertinent regulations.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the proposed 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)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. QUALIFYING RELATIONSHIP

The Director denied the petition, in part, based on a finding that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, a petitioner must show that a beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

Here, the Director's adverse decision was based on a finding that the Petitioner is operating and doing business as a [REDACTED] and that based on the terms of the submitted membership agreement with [REDACTED] it did not establish that it has "control over the hotel as the [REDACTED] controls the actions to be taken with the hotel and the relationship can be cancelled if certain conditions are not fulfilled by [the Petitioner]." For this reason, the Director found that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's claimed foreign employer, [REDACTED].

Upon review, the Director's analysis focused solely on the Petitioner's operation of a chain or franchise business rather than on the documentation provided to show the actual ownership and control of the U.S. company. We note that the operation of a branded business under a membership or franchise agreement, like any operational or contractual agreement, will list certain terms and conditions as requirements for each party. However, the branded business's contractual conditions regarding the use of its brand name do not establish its ownership or control over the legal entity that operates the branded hotel. To the contrary, as a submitted letter from [REDACTED] states, [REDACTED] only licenses the use of the [REDACTED] name and logo, operates a cooperative reservation system, and engages in advertising on behalf of its members; it does not own, operate, or control individual hotels. The membership agreement in this matter is a licensing contract and does not convey control of the Petitioner's corporate operations. [REDACTED] does not claim and the record does not include evidence that [REDACTED] has any ownership or control over the petitioning organization.

The Director here did not examine the evidence supporting the foreign entity's actual ownership and control of the Petitioner. For this reason, the Director's decision on this issue must be withdrawn. However, we note that while the record includes the Petitioner's stock certificate and ledger showing one share has been issued to [REDACTED] the Petitioner's 2014 IRS Form 1120, U.S. Corporation Income Tax Return, on Schedule G, identifies the Beneficiary as the foreign entity's 100 percent owner. Because of this discrepancy, we cannot conclude that the Petitioner is a subsidiary of the Beneficiary's claimed foreign employer through its ownership of this one share. The Petitioner has not established a qualifying relationship between the two entities as defined by the regulations. However, as the Director did not provide the Petitioner with notice of this deficiency, the matter will be remanded to the Director, who will be instructed to request additional evidence pertaining to the Petitioner's ownership.

III. ONE YEAR OF FOREIGN EMPLOYMENT REQUIREMENT

The Director also denied the petition finding that the Petitioner did not establish that the Beneficiary had one year of continuous full-time employment with the foreign entity in a managerial or executive capacity, as defined at section 101(a)(44) of the Act, during the relevant three-year time period. The Petitioner must establish: (1) the Beneficiary's continuous full-time employment for the foreign entity for one year during the three years preceding admission into the United States; and (2) that the employment was in a qualifying managerial or executive capacity.

The Director, noting that the record indicated that the Beneficiary had been involved in the startup of several foreign entities since establishing the Petitioner's claimed parent company in 2006, found that the Petitioner's evidence was not sufficient "to demonstrate that the Beneficiary was physically employed and performing daily activities associated with executive duties with the foreign entity." In reviewing the Petitioner's claim that the Beneficiary did not draw a salary from the foreign entity, the Director stated:¹

While it may not be usual for an individual not to receive compensation for working at a specific company, it is unusual for an individual to continuously work for the company without compensation, benefits and insurance. Having profits from a company transferred to a personal bank account is not sufficient to show that the beneficiary was physically working for the company; rather than owning the company.

Upon review, the Director's analysis focused upon only one factor, the lack of a salary paid to the Beneficiary. While the Beneficiary's lack of a salary may be a factor to consider when determining the Beneficiary's role as an employee within an organization, the Director must consider the totality of the record when adjudicating the petition. It is unclear based on the reasons given for denial whether the Director determined that the Beneficiary, as the majority owner of the foreign entity, does not have an employer-employee relationship with that entity, or whether she simply found insufficient evidence of his employment.² Accordingly, we will also withdraw the Director's

¹ In her initial decision dated December 7, 2015, the Director acknowledged that the Beneficiary's bank statements showed that he received funds transfers, identified as "company profits," from [REDACTED] a United Arab Emirates company in which the Beneficiary owns a 25% interest. The Petitioner had claimed that [REDACTED] paid the Beneficiary "out of [REDACTED] profits as part of his employment benefits," but has not shown that these funds originated with [REDACTED].

² Section 101(a)(44), 8 U.S.C. § 1101(a)(44), defines both managerial and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties. The Supreme Court has determined that where the applicable federal law does not define "employee," the term should be construed as "intend[ing] to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) ("*Darden*") (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) ("*C.C.N.V.*"). In *Clackamas*, the Supreme Court articulated the following factors to be weighed in determining whether an individual with an ownership interest is an employee:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.

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decision on this issue and remand with instructions for the Director to more fully explain the grounds for denial and request any evidence deemed necessary to determine whether the Beneficiary has been employed by the foreign parent during the relevant three-year period.

In addition, the record as presently constituted does not contain sufficient evidence of the Beneficiary's full-time, continuous employment with the Petitioner's claimed parent company. The Petitioner claims that the Beneficiary's qualifying year of employment with [REDACTED] in South Sudan took place between April 2011 and April 2013. While the Petitioner claims that [REDACTED] has employed the Beneficiary as its president since 2006, it also acknowledges that, in April 2013, the Beneficiary began residing and working in UAE for [REDACTED] a company in which the Beneficiary (the majority owner of [REDACTED] owns only a minority interest, and remained in [REDACTED] until his transfer to the United States in L-1 status.

We note that Department of State records show that when the Beneficiary applied for a B1/B2 visa at the U.S. Consulate in [REDACTED] in March 2014, he stated that he had been employed in UAE for [REDACTED] since 2009, and had previous been employed by [REDACTED] in [REDACTED] UAE" since 2007. This information raises questions regarding the Petitioner's assertions that he lived and worked in South Sudan for [REDACTED] on a full-time basis between April 2011 and April 2013. In light of this apparent discrepancy, additional evidence is needed to identify which entity or entities served as the Beneficiary's employer during this period, and also to clarify where the Beneficiary resided at this time.

As the record does not include consistent evidence of the Beneficiary's full-time continuous employment for one year for the parent company during the three years prior to his transfer to the United States in 2014, the petition, as presently constituted, cannot be approved.³

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- Whether and, if so, to what extent the individual is able to influence the organization.
 - Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
 - Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-450 (deferring to the factors enumerated in the Equal Employment Opportunity Commission's *Compliance Manual* § 605:0009 (EEOC 2000) (currently cited as § 2-III(A)(1)(d)) for determining "whether [a partner, officer, member of a board of directors, or major shareholder] acts independently and participates in managing the organization, or whether the individual is subject to the organization's control," and accordingly whether the individual qualifies as an employee).

³ We acknowledge the Petitioner's reference to USCIS approval of the new office petition and that in matters relating to an extension of nonimmigrant visa petition validity involving the same petitioner, beneficiary, and underlying facts, USCIS will generally give some deference to a prior determination of eligibility. However, the mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *See, e.g., Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm'r 1988). Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

Thirdly, the Director did not provide a thorough analysis of the evidence relevant to the Beneficiary's employment in a managerial or executive capacity.

While the Beneficiary's majority ownership and control of the foreign entity and his top-most placement within the Petitioner's family of companies make it likely that he directed the management of the organization, establishment of its goals and policies, and had the authority to make discretionary business decisions at all times, the record does not establish that the underlying job duties that the Beneficiary had and performed on a daily basis are primarily managerial or executive in nature. The Beneficiary will not be deemed an executive based solely on his executive title or his authority to "direct" the enterprise as its owner or sole "executive" or "manager." Instead, the Petitioner must establish that the daily duties the Beneficiary primarily performed for the foreign entity were in a managerial or executive capacity as defined by the Act and its implementing regulations. 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.

Here, the Petitioner's brief and general description of the Beneficiary's daily duties does not include sufficient information to establish that the Beneficiary engaged in a managerial or executive capacity. The description provided is broad and vague and does not paint a clear picture of where the Beneficiary's duties lie. The Petitioner does not provide any detail or clarification as to how the general tasks listed translate into managerial or executive duties. 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).

Based on the deficiencies discussed above, the petition may not be approved. However, the Director's limited analysis of this issue did not provide the Petitioner the opportunity to file a meaningful appeal. For this reason, the Director's decision on this issue will be withdrawn and the matter will be remanded for a new decision on this issue as well.

IV. CONCLUSION

At this time, we take no position on whether the Beneficiary qualifies for the classification sought. We will remand this matter to the Director for a new decision. The Director should request any additional evidence deemed warranted and allow the Petitioner to submit such evidence within a reasonable period of time.

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).

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

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Cite as *Matter of A-R-E- Inc*, ID# 10683 (AAO Oct. 7, 2016)