



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

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

MATTER OF DC-, LLC

DATE: OCT. 13, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an owner, lessor, and developer of commercial real estate, seeks to temporarily employ the Beneficiary as its "Owner/Administrative 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 concluding that the Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity in the United States.

The matter is now before us on appeal. In support of its appeal, the Petitioner disputes the Director's decision, asserting that it qualifies for classification as a new office, which the Director did not consider in determining that the Beneficiary's prospective employment in the United States would not be in a managerial or executive capacity.

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.

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity. The Petitioner does not claim that the Beneficiary will be employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in a managerial capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as "an assignment within an organization in which the employee primarily":

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not

considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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 December 1, 2015. On the Form I-129, the Petitioner indicated that it has two current employees and a net annual income of \$6,461.39.

In support of the Form I-129, the Petitioner provided a document titled, "Job Description," which lists the following job duties for the Beneficiary in his role as "Partner/Shareholder/Legal Representative":

1. Reviews and votes approval for the independent contractors that will work with the company and the price in exchange for their services.
2. Reviews and votes approval for the purchase price to be paid for real estate assets that are purchased.
3. Reviews and votes approval for the sales price for assets that are sold or leased.
4. Reviews and develops the creation of policy to be executed as managing director for the Administration and Finance, Real Estate Development, Project Management and Real Estate Sales or leases for the company.
5. Reviews the company [*sic*] financial and budgetary activities.
6. Develops and reviews strategic policies along with the other member of the board of directors in order to advance the mission and objectives of the company.
7. Represents the company with any person or business association, and before any type of local or federal, judicial or administrative authority.
8. Represents the company before all authorities regarding financial issues.
9. Reviews, grants, accepts, subscribes, endorses and utilize[s] any type of credit, bank account, funds transfer associated with the company.
10. Reviews and votes for approval reports on the status of ongoing projects, account balances and financial statements for the company.
11. Reviews the recommendations made by the Director of the Outsources Legal Department on lease contracts, [*sic*] for the company.
12. Reviews the recommendations made by the Director of Outsourcing Real Estate Department on Real Estate acquisitions and sales, costumer [*sic*] service, client outreach, advertising and pricing for the company.

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13. Reviews the recommendations made by the General Contractor of Project Management Department on engaging independent contractors for the projects with the company.
14. Gets together with Member, Government Authorities, General Contractor and Clients to discuss the situation about the projects, to be able to review and approve what needs to be done for the best of the company.
15. Promotes the projects from [REDACTED]

The Petitioner also submitted an organizational chart showing that it employed a building maintenance supervisor, in addition to the Beneficiary, at the time of filing.

After reviewing the Petitioner's supporting evidence, the Director determined that the record lacked sufficient evidence to establish eligibility. Therefore, the Director issued a request for evidence (RFE), instructing the Petitioner to submit, in part, evidence establishing that the Beneficiary will be employed in the United States in a managerial or executive capacity. The Director asked the Petitioner to provide an organizational chart depicting its organizational structure and staffing levels, information about the job duties the Petitioner's staff performs, and payroll documents.

In response to the RFE, the Petitioner submitted a statement containing the same list of job duties as those originally listed in the document submitted in support of the petition. To that list, the Petitioner added that the Beneficiary provides "strategic leadership . . . by working with other management to establish long-range goals, strategies, plans and policies." The Petitioner further stated that the Beneficiary would allocate 50% of his time to "directing, reviewing, and supervising contracts, meetings, [and] financials of the company" and the remaining 50% of his time to "overseeing the tenants, implementing company policies, issuing orders to newly hired staff members and approving any new recommendations from contractors and Real Estate developers." In a separate statement, the Petitioner stated that the Beneficiary has been its owner since 2013 and has "recently started running the business" in his capacity as the administrative manager. The Petitioner stated that it recently hired a full-time legal assistant and three part-time positions "to help with the daily ins and outs of the business." In support of this statement, the Petitioner provided a list of its current employees, showing the Beneficiary at the top of the hierarchy, followed by a full-time office assistant, a part-time advertising assistant, a part-time assistant, and a part-time building maintenance person, each of whom was hired approximately four weeks after the filing of the petition. Lastly, the Petitioner provided its 2014 corporate tax return showing \$68,695 collected in rental income.

The Director denied the petition on February 11, 2016, concluding that the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity. In denying the petition, the Director found that the Petitioner offered a vague job description. The Director also pointed out that the four employees the Petitioner named in its organizational chart were all hired after the petition was filed.

On appeal, the Petitioner submits an appeal brief asserting that it merits treatment as a “new office” based on the claim that it has been doing business for less than one year. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F) for definition of “new office.” The Petitioner contends that the date the Petitioner commenced doing business, not the date of the Petitioner’s incorporation, should determine whether the Petitioner qualifies as a new office. The Petitioner further asserts that the Beneficiary would be employed in a managerial capacity as a “functional manager” who would oversee the company’s sales, administration, and company objectives as well as company employees. In addition, the Petitioner provides the following additional list of the Beneficiary’s proposed job duties:

- Authority to hire/fire personnel as necessary depending on the contracts for services as well as disciplinary action’
- Decision making authority to decide on suppliers after price negotiations . . . and authority to enter into contracts on behalf of the company;
- Liaison with the parent company finance Director and General Director on financial information; business goals; resolution to problems;
- Development and implementation of the company’s procedures, production and efficiency for maximum use of personnel and finances;
- Establishment and execution of marketing strategies and plans to insure profitability for the company;
- Supervision of any current or future employees to address issues of client needs and the decision/authority to subcontract work as necessary.

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 (1) it is a new office and (2) that it would employ the Beneficiary in the United States in a managerial capacity, specifically as a function manager.

1. New Office

As a threshold matter, we will first determine whether the Petitioner qualifies as a new office. We find that the evidence in the record does not support the Petitioner’s contentions.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) defines the term “new office” as any organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) states that an entity is deemed as “doing business” if it provides goods and/or services on a regular, systematic, and continuous basis.

Here, the Petitioner assumes that the Director’s finding that it is not a new office was focused solely on the Petitioner’s date of incorporation. While we agree that the date the Petitioner was established as a limited liability company does not determine the date the Petitioner commenced business

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operations, the record in the present matter contains monthly invoices, which show that the Petitioner has been collecting rent from [REDACTED] on a monthly basis since, July 1, 2014, thus indicating that the Petitioner has been earning a rental income from property it owns for approximately 17 months prior to the filing of the instant petition. As mentioned above, the record also contains the Petitioner's 2014 tax return, which corroborates the information conveyed in the Petitioner's 2014 invoices with regard to its rental income.

In sum, the monthly invoices indicate that (1) the Petitioner was, in fact, providing a good, i.e., renting out property that it owns, and (2) the Petitioner was engaged in this business activity on a regular, systematic, and continuous basis such that it can be deemed as having been doing business since July 2014 when its first invoice was issued. Given that the date the Petitioner commenced doing business preceded the filing of the instant petition by more than one year, we find that the Director was correct in declining to treat the Petitioner under the provisions that apply to a new office petitioner.

2. Managerial Capacity

When examining the managerial capacity of the Beneficiary, we will look first to the Petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The Petitioner's description of the job duties must clearly describe the duties the Beneficiary would perform and indicate whether such duties are in either a managerial capacity. *Id.*

As indicated in the Director's decision, the definition of managerial capacity has two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World, Inc. v. INS*, 940 F.2d 1533.

In the matter at hand, the Petitioner initially offered a job description that provided an overview of the Beneficiary's general responsibilities and his overall level of discretionary authority. However, broadly stating that the Beneficiary develops policies, reviews and approves use of funds, and reviews status reports regarding ongoing projects and account balances is not sufficient to fully convey the Beneficiary's actual role within the organization. Moreover, given that the Petitioner only claimed two employees, including the Beneficiary, at the time the petition was filed, it is unclear who would carry out the policies the Beneficiary will develop, who would carry out the underlying tasks of purchasing and selling real estate, or who would generate reports regarding project status and account balances.

On appeal, the Petitioner disputes the Director's reference to the previously provided job description as broad. The Petitioner asserts that it previously provided a list of the Beneficiary's job duties and "include[d] the percentage of time spent on each detail" However, the job description the

Petitioner provided in its RFE response is virtually identical to the description provided earlier in support of the petition. The percentage breakdown that the Petitioner now refers on appeal broadly states that the Beneficiary “spends 50% of his time in [*sic*] directing, reviewing, and supervising contracts, meetings, financials of the company” and “[t]he other 50% of his time is spend [*sic*] overseeing the tenants, implementing company policies, issuing orders to newly hired staff members and approving new recommendations from contractors and Real Estate developers.” This job description cannot be deemed a detailed delineation of tasks, nor does the Petitioner’s vague 50/50 breakdown, which was assigned to two groups comprised of multiple job responsibilities, serve as a meaningful way of showing how the Beneficiary’s time would be allocated or, more importantly, that his time would be primarily allocated to tasks of a managerial nature. Reciting the Beneficiary’s vague job responsibilities or broadly-cast business objectives is not sufficient and does not meet the regulatory provisions at 8 C.F.R. § 214.2(l)(3)(ii), which require a detailed description of the services to be provided. 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).

Also on appeal, the Petitioner contends that “[a]s owner and functional manager, [the Beneficiary] supervises sales, administration, and objectives for the company – and supervises ALL employees.” Although the Petitioner offers a second job description in support of this claim, the job duties listed remain broadly focused on the Beneficiary’s discretionary authority and continue to lack a substantive account of the specific daily tasks the Beneficiary would perform in his claimed role as function manager.

The term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an “essential function” within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term “essential function” is not defined by statute or regulation. If a petitioner claims that the beneficiary will manage an essential function, a petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary’s daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner’s description of a beneficiary’s daily duties must demonstrate that the beneficiary will manage the function rather than performs the duties related to the function.

In the instant matter, the Petitioner has not provided evidence to establish that the Beneficiary manages an essential function. Rather, the Petitioner generally claims that the Beneficiary would hire and fire personnel, have authority to enter into contracts and negotiate prices with suppliers, develop and implement procedures, establish and execute marketing strategies, and supervise employees. However, the Petitioner does not identify a specific essential function or provide a detailed account of the Beneficiary’s specific daily tasks to establish that the Beneficiary would not allocate his time primarily to nonmanagerial job duties. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting

the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

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 company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

After evaluating the Petitioner's assertions within the context of its real estate business and staffing structure at the time the petition was filed, we cannot conclude that the Beneficiary's time would only be allocated to the items listed in the job description, as there is no evidence that the Petitioner employed anyone other than a building maintenance supervisor at the time of filing. This general lack of support personnel leads us to question the Petitioner's ability to relieve the Beneficiary from having to allocate his time primarily to performing the daily operational and administrative tasks. In other words, the record shows that at the time of filing the Petitioner was comprised of a two-person staff, including the Beneficiary and one other employee. While the Petitioner's RFE response includes evidence of additional employees, the evidence shows that such employees were not hired until after the petition was filed. As such, the subsequently hired employees were not available to assist the Petitioner in relieving the Beneficiary from having to perform various nonmanagerial tasks at the time of filing.

Moreover, the Beneficiary's job description refers to an outsourcing legal department, an outsourcing real estate department, an outsourced CPA, and a general contractor of project management. However, the record does not contain evidence establishing that the Petitioner retained any outsourced labor to carry out its operational and administrative tasks. As such, it is unclear who would be responsible for these duties, and given that the Beneficiary is one of two employees, it is likely that the Beneficiary may be required to perform these nonqualifying tasks. 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 California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, the Petitioner's claim that the Beneficiary would both establish and execute marketing strategies indicates that the Beneficiary would actually carry out the underlying marketing tasks. The lack of any discussion of sales and marketing personnel increases the likelihood that the Beneficiary would both oversee and carry out these nonmanagerial tasks, which are undoubtedly critical for the purpose of promoting the Petitioner's business and acquiring clientele to whom the Beneficiary would sell and/or lease the Petitioner's real estate. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See also*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

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While the Petitioner states that we must take into account its reasonable needs in light of its overall purpose and stage of development, this argument appears to be premised on the Petitioner's belief that it is a new office and therefore must be accorded treatment under the regulations that govern new office petitions. However, as previously discussed, the evidence of record indicates that the Petitioner does not fit the definition of a new office and therefore must establish that it had the ability to employ the Beneficiary in a managerial capacity as of the date the petition was filed. A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See, e.g., Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Here, while the record shows that the Petitioner was operating at an early stage of development at the time of filing, this factor will not supersede the Petitioner's burden of having to establish its eligibility at the time it filed the instant petition. Given that the Petitioner was doing business for longer than one year prior to filing this petition, it must demonstrate that it had the ability to employ the Beneficiary in a managerial capacity at the time of filing.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a primarily managerial capacity.

III. EMPLOYMENT ABROAD

Beyond the Director's decision, we find that the Petitioner did not establish that the Beneficiary was employed abroad in a managerial or executive capacity for one continuous year prior to the filing of the instant petition.

A. Continuous Employment Abroad for One Year

The record shows that when asked to provide the Beneficiary's dates of employment abroad by the Petitioner's parent entity, the Petitioner stated on Form I-129, L Classification Supplement, section 1(5), that the Beneficiary's dates of employment were from April 2013 to the present.¹ The Petitioner further noted the following: "Owned but not directly involved with operations until now." In response to the RFE, the Petitioner also submitted the Beneficiary's résumé, which identified a total of three entities – the Petitioner, its foreign parent entity, and [REDACTED] – where the Beneficiary assumed the role of "Partner" between the years 2013 and 2015. The Petitioner did not discuss how the Beneficiary was able to maintain a full-time position with [REDACTED] the Beneficiary's claimed employer abroad and parent to the Petitioner, while simultaneously assuming

¹ While not dispositive in this matter, we note that government records indicate that the Beneficiary first entered the U.S. in L-1 status on or about December 27, 2013, contrary to the information reported on the I-129 supplement which reports that the Beneficiary entered the United States on August 10, 2015. The petitioner must provide accurate and complete information about the Beneficiary's prior time in the United States in any subsequent filing in order to establish that the Beneficiary has the requisite time period of continuous employment abroad in a managerial or executive capacity.

the role of partner at two other entities. The Petitioner also did not explain what was meant by its statement in the petition, claiming that the Beneficiary was “not directly involved with operations until now.” As such, it is unclear whether the Beneficiary was actively performing services for the foreign entity for one continuous year on a full-time basis during the three years prior to filing the instant petition.²

B. Employment Abroad in a Managerial or Executive Capacity

A determination of the Beneficiary’s managerial or executive employment abroad calls for review the totality of the record, including first and foremost the Beneficiary’s job duties, the foreign entity’s organizational structure, the duties the Beneficiary performed during his employment abroad, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a Beneficiary’s actual duties and role within the foreign entity’s organization. As previously stated, a detailed job description is critical to our assessment of eligibility, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In the present matter, the Petitioner offered a description of the Beneficiary’s employment abroad in support of the Petition. A review of that description shows that its components are nearly identical to those that comprised the Beneficiary’s proposed job description with the Petitioner. We note that the job description was not accompanied by any information pertaining to the foreign entity’s staffing or organizational hierarchy. As such, we are precluded from being able to fully evaluate the list of job duties within the context of the foreign entity’s organizational structure.

Applying our earlier findings to the matter at hand, the job description alone is not sufficient to establish that the Beneficiary was employed abroad in a managerial or executive capacity, as it does not explain who within the foreign entity actually carried out the daily operational and administrative tasks. As previously stated, 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. The record in the present matter does not contain sufficient evidence to support the finding that the Beneficiary was employed abroad in a managerial or executive capacity.

IV. 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, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the

² The Petitioner’s response at Part 9(14) of the petition indicates that the Beneficiary is currently in the United States on an approved L-1 visa, which was filed by the Beneficiary’s prior employer, not by the Petitioner in the matter at hand. In light of this information, it appears that the Beneficiary came to the United States on August 10, 2015 (as shown at Part 3(5) of the Form I-129) to be employed by an entity other than the Petitioner.

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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 DC-, LLC*, ID# 20539 (AAO Oct. 13, 2016)