



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

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

MATTER OF N-T-USA, INC.

DATE: SEPT. 7, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a Texas corporation, is looking to open and operate a dry cleaning business. Accordingly, the Petitioner seeks to temporarily employ the Beneficiary as an "Accountant/General Manager" of its new office 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 a managerial or executive capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not submit sufficient evidence to establish that the Beneficiary has been or would be employed in a managerial or executive capacity. The Petitioner subsequently filed a motion to reopen and reconsider. The Director reviewed the Petitioner's submissions and affirmed the original decision, finding that the Petitioner did not overcome the original basis for denial.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director did not properly assess the supporting documents, which the Petitioner claims substantiate the claim that the Beneficiary would be employed in an executive capacity.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter to the Director 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 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states 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, 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.

## II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on the finding that the Petitioner did not establish that the Beneficiary “has been and would be employed in a primarily executive or managerial capacity or that your organization can currently support such a position.”

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.

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.

In the instant matter, the Petitioner indicated at Section 1, Item 5 of the Form I-129 Supplement L that the Beneficiary has been employed abroad since January 2011 and continued to be employed abroad through the date the petition was filed. This information is consistent with the foreign entity's employee report, which identifies the Beneficiary as the foreign entity's accountant and indicates that he is currently employed abroad with that organization. Section 1, Item 12 of the Form I-129 Supplement L indicated that the Beneficiary is coming to the United States to open a new office. In support of the petition, the Petitioner provided a job description for the Beneficiary's current position with the foreign entity as well as a description of the Beneficiary's proposed employment. The Petitioner also submitted a business plan discussing its hiring plan, as well as its expense and revenue projections during its first three years of operation. The Petitioner's supporting exhibits further included the foreign entity's organizational chart and a proposed organizational chart for the U.S. organization, showing the entities' respective hierarchical structures.

Upon review, we find that the Director's decision did not clearly articulate the grounds for denial. Therefore, the Director's decision dated October 13, 2015, will be withdrawn and the matter will be remanded to the Director for further review and issuance of a new decision.

In her decision on the Petitioner's motion, the Director found that the Beneficiary has not been and will not be employed in a managerial or executive capacity. However, throughout the analysis the Director focused solely on the evidence presented for the Beneficiary's proposed employment in the United States. The Director did not address or discuss the Beneficiary's foreign employment, but nonetheless concluded that the Beneficiary has not been employed abroad in a managerial or executive capacity.

Furthermore, despite the Petitioner's claim and submission of supporting documents, all of which indicate that the Beneficiary would be coming to the United States to open the new office, the Director's analysis does not examine the proposed position in light of the new office regulations. The Director did not address the Petitioner's business plan and proposed organizational chart, or provide an analysis of the proposed position description within the scope of either document to determine whether the Petitioner provided sufficient evidence to establish that it would support the Beneficiary in a managerial or executive position within one year of the petition's approval.

Therefore, we find that the Director's decision was deficient in that the Director did not address the Beneficiary's duties abroad or provide an analysis of his proposed duties in the United States within the scope of a new office petition, nor did the Director identify how the evidence provided falls short of demonstrating that the Beneficiary has been or will be employed in a managerial or executive capacity. As the Director provided an unclear discussion of the Beneficiary's current and proposed

employment and an incomplete analysis of the evidence presented in support of this petition, we are remanding this matter to the Director for a new and complete decision.

Notwithstanding the Director's deficient analysis, we note that the record as presently constituted does not establish that the Beneficiary was employed abroad in a managerial or executive capacity or that within one year of the petition's approval he will be employed in the United States in an executive capacity.<sup>1</sup>

When examining the managerial or executive capacity of the Beneficiary, we look first to the Petitioner's description of the job duties. See 8 C.F.R. § 214.2(1)(3)(ii). The Petitioner's description of the job duties must clearly describe the duties performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *Id.* The definitions of managerial and executive capacity each have two parts. First, the Petitioner must show that the Beneficiary performs and 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 is and will be *primarily* engaged in managerial or executive 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*, 940 F.2d 1533.

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (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 a beneficiary's subordinate employees, the presence of other employees to relieve a 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.

Regarding the Beneficiary's foreign employment, the information provided is not sufficient to establish that the Beneficiary was employed abroad in a managerial or executive capacity. The Petitioner provided a description of the Beneficiary's duties and responsibilities in his current position with the foreign entity in its response to the Director's request for evidence. According to the description provided in the RFE response, the Beneficiary's position as the foreign entity's accountant includes preparing and reconciling financial statements, handling the company's general ledger and balance sheet and analyzing its statement of income, and "closing the company's books at year's end after yearly audits are complete." These non-qualifying job duties indicate that the Beneficiary provides accounting services to its current employer. 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). Moreover, it is unclear who currently carries out the "accounting processes," such as the inventory

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<sup>1</sup> The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, going forward the analysis may be restricted to whether the Beneficiary will be employed in an executive capacity.

process and purchase order management, and who executes the company's annual audits, which are directly related to the Beneficiary's responsibility to "close the company's books." Without such information, it is unclear whether the foreign entity has sufficient staff to perform these duties and support the Beneficiary in a managerial or executive role.

Finally, although the job description indicates that the Beneficiary has the discretionary authority to hire, promote, and dismiss employees; the foreign entity's organizational chart indicates that the Beneficiary's only direct subordinate is a finance manager, who is charged with overseeing two finance assistants, three sales people, and one computer operator. It is unclear whom the Beneficiary hires and fires or how his position as an accountant is related to these lower-level positions, which are directly subordinate to the foreign entity's finance manager.

Concerning the proposed U.S. employment, the evidence of record does not corroborate the claim that the Petitioner would support the Beneficiary in an executive capacity within one year of the petition's approval. When a new business is 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 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 order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. While the Director incorrectly focused on whether the Petitioner could currently support the Beneficiary in an executive position, we note that the proposed duties provided by the Petitioner on the Form I-129 Supplement L, including reviewing end-of-the-month financial statements, conducting expense and revenue analysis, and performing cash management, appear to be largely non-qualifying operational tasks. Although the Beneficiary may perform these non-qualifying tasks in the first year, the Petitioner must demonstrate that the Beneficiary would be relieved from primarily performing operational tasks within one year of approval. The Petitioner has not explained who these non-qualifying duties would be transitioned to, or provided evidence that there would be sufficient staff at the end of the new office period, to allow the Beneficiary to primarily devote his time to performing executive duties.

Further, the Petitioner's business plan does not substantiate the claim that the Petitioner would support the Beneficiary in an executive capacity within one year of the petition's approval. Namely, the Petitioner provided inconsistent information pertaining to the initial investment that will be used to fund its operation and did not provide sufficient evidence to substantiate the claim that it would act as a dry cleaning and alterations service provider. With regard to the issue of start-up funding, the Petitioner indicated that it would need \$50,000 in initial start-up funding, claiming that the company owner would contribute \$20,000 and that an additional \$40,000 would be in the form of a

bank loan to be secured by "fixed assets." Aside from the fact that the sum of the investor contribution and bank loan exceeds \$50,000 by \$10,000, the Petitioner does not provide evidence to establish that steps have been taken towards obtaining a bank loan or explain how it plans to secure that loan. While section 2.2 of the Petitioner's business plan only refers to "long-term assets," the plan does not specify what those assets actually are. In section 7.1 of the business plan, the Petitioner claims that one of its owners would contribute \$25,000 while another owner would contribute \$15,000, thus indicating that a total of \$40,000 would be provided in investment contributions. These financial figures are inconsistent with the above claim, which indicates that the Petitioner's start-up funding would be comprised of one investor's contribution and a bank loan. As such, the Petitioner has not established precisely how much money it would need for the start-up of its operation, the amount of money it would actually receive, and who would actually be the source of the start-up funds. Further, in reviewing the Petitioner's liabilities, the Petitioner did not account for a \$40,000 bank loan it planned to obtain to help with its initial start-up expenses. 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).

Regarding the issue of the Petitioner's dry-cleaning and alterations service, the Petitioner did not provide any evidence or information to establish who will provide the alterations service it claims it would offer to its customers. Despite the claim that it would attain \$22,729 in income from the provision of alterations services, the Petitioner's hiring plan does not include personnel who would perform alterations services, nor does its plan to lease and purchase equipment include any plan to acquire sewing machines or any other equipment and/or supplies needed to perform alterations. The Petitioner also did not explain how it would physically provide alterations services within the scope of its delivery-based dry cleaning business, which would not include a retail facility. In other words, it is unclear where customer fittings and alterations would actually take place if the dry cleaning business would be entirely completed on a delivery basis, as the Petitioner claims. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

By remanding this matter, we do not find that the Beneficiary is eligible for the classification sought. Rather, we remand the matter because the Director denied the petition without: 1) considering the Beneficiary's foreign job duties; 2) without considering the proposed job duties within the proper scope of a new office petition; and 3) without analyzing the Petitioner's business plan. Absent proper consideration of these factors, the Director's analysis is incomplete. In any further decision, the Director should distinguish between factors that pertain to the Beneficiary's employment abroad and those concerning his proposed employment in the United States within the scope of a new office.

*Matter of N-T-USA, Inc.*

### III. QUALIFYING RELATIONSHIP

Beyond the issues identified by the Director, we also find that the record lacks sufficient consistent evidence establishing that a qualifying relationship exists between the Petitioner and the Beneficiary's current employer abroad. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *See Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982).

In the present matter, the Petitioner provided inconsistent evidence regarding its ownership. Namely, the Petitioner provided its stock certificate numbers 1000, 1001, and 1002 assigning 37,000 shares to [REDACTED] 7500 shares to [REDACTED] and 5000 shares to [REDACTED] respectively. However, the ownership breakdown that is conveyed through the stock certificates is inconsistent with the Form I-129, where the Petitioner claimed to be a branch of the foreign entity and indicated that its ownership is evenly divided between [REDACTED] and [REDACTED]. As with the other discrepancies discussed above, the Petitioner has not resolved these inconsistencies regarding its ownership with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591-92. In any future action, the Director should instruct the Petitioner to resolve the above described discrepancies and provide consistent evidence to establish that it has a qualifying relationship with the Beneficiary's employer abroad.

### IV. CONCLUSION

We will remand this matter to the Director for a new decision. The Director shall 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.

Cite as *Matter of N-T-USA, Inc.*, ID# 18191 (AAO Sept. 7, 2016)