



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

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

MATTER OF I-A-N-T-D-, INC.

DATE: JULY 18, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which prepares training materials for divers, seeks to continue the Beneficiary's temporary employment as its chief operating officer under the L-1A nonimmigrant classification for intracompany transferees. 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 of the California Service Center denied the petition, concluding that the record did not establish, as required, that: (1) the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity; and (2) the Beneficiary's former employer continues to do business.

The matter is now before us on appeal. On appeal, the Petitioner submits further evidence intended to show the foreign entity's business activity, and asserts that the Director did not give sufficient weight to its job description.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," 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 or executive capacity. *Id.*

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

The Director found that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner does not claim that the Beneficiary will be employed

in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

“Executive capacity” means an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

Based on the statutory definition of executive capacity, the Petitioner must first 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 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.

When examining the claimed executive capacity of a given beneficiary, we will look to the petitioner’s description of the job duties. The petitioner’s description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine 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.

Accordingly, we will discuss evidence regarding the Beneficiary’s job duties along with evidence of the nature of the Petitioner’s business and its staffing levels.

Initially, the Petitioner stated:

Currently, [the Beneficiary] plans, organizes, directs and controls all the company’s major functions such as directing the training and hiring of diving instruct[or]s, sales representatives, diving trainers, and subcontractors to make diving materials and instructional materials. [The Beneficiary] supervises the work of five regional Sales Representatives [The Beneficiary] oversees their sales, their commission[s], and supervises all sales reports. As Chief Operating Officer, [the Beneficiary] further manages all activities of the entire company, reports directly to the Board of Directors, develops the overall budget for the entire company, develops business objectives and implements programs for the entire company, and hires staff. His executive and supervisory Job Duties also include the following:

- Overseeing and managing the design of all promotional and educational materials (10% [of the Beneficiary’s time])

- Reviewing and analyzing marketing materials and all decisions on marketing (10%)
- Supervising, hiring and training all new employees, sales representatives, managers, trainers, and instructors. (10%)
- Supervising, hiring and training production teams to create instructional DVDs. (10%)
- Managing, directing, and organizing all facility and remote resources to support all production staff. (20%)
- Creating, updating, and ensuring proper implementation of all operational procedure manuals. (10%)
- Overseeing and directing financial planning, budget management, and cost estimate activities based on subordinates['] reports and recommendations. (20%)
- Managing relationships with key internal and external clients. (5%)
- Building and maintaining a strong network of contacts throughout the industry. (5%)

The Petitioner submitted an organizational chart indicating that the Beneficiary has authority over the following positions:

- Board of Advisors
- Training Consultant
- Training Director
- Dive Businesses
- Educators (Instructors, Instructor Trainers, Instructor Trainer Trainers)
- Order Handling and Shipping Workers
- Worldwide Licensees
- Bookkeeper
- Certified Public Accountant
- Computer Hardware Worker
- Computer Database Worker
- Web Designer
- Editor
- Social Media Manager/Editor
- Five Regional Sales Managers, including a Director of Sales
- Seven printing companies

In its introductory letter, however, the Petitioner indicated that it “has five (5) employees.” Others shown on the chart are contractors, licensees, and part-time volunteers. Copies of sales representative agreements show that the representatives are not employees, but rather contractors working on commission.

The Director issued a request for evidence (RFE), stating: “The support letters indicated that the beneficiary is primarily performing duties in sales, budgeting, marketing materials, sourcing, and

managing relationships with . . . clients. It does not appear that the Beneficiary primarily performed tasks consistent with an executive position.”

In response, the Beneficiary provided a new breakdown of his working time, which conflicts with the first version:

Twenty-five (25) percent of my time is spent directing the . . . Training Department, including the work of [the] Training Consultant and the Training Director. . . . My duties . . . involve[] proposing new directions in training . . . [and] reviewing training proposals

Twenty-five (25) percent of my time is spent directing the 23 . . . Licensees worldwide. This work involves providing direction and feedback to our . . . Licensees on issues that arise in the course of their dive instruction. . . . As an example, I spent a great deal of time this year mediating and directing the buyout of one of our licensees of the ownership of another licensee. . . .

Twenty-five (25) percent of my time is spent directing the work of our sales department. This includes directing the work of our Sales Director who supervises 5 sales managers. I direct the Sales Director’s hiring, training, and supervision of sales managers. . . .

Ten (10) percent of my time is spent directing the work of [the entity in] Brazil. The major portion of this work involves directing the work of our Chief Operating Officer . . . , and to a lesser extent the work of [the] Training Director. . . .

Finally, the remaining fifteen (15) percent of my time is broken down by the [previously submitted] letter.

With respect to the reduction of the initial duties to 15% of the Beneficiary’s time, the initial letter, for example, indicated that the Beneficiary devotes 20% of his time to overseeing financial matters. The Beneficiary’s letter in response to the RFE indicated that he spends 2.25% of his time on that function.

The Beneficiary asserted that his “only supervision comes from [the] CEO, who is 79 years old, and has been much less active in the organization” and who “defers to my decision-making on most issues.” The Beneficiary added that he and the CEO “are the only members of the Board of Directors.”

The individuals whom the Petitioner identified as the sales director and regional sales managers all executed sales representative agreements with the Petitioner. The agreements stipulated that the representatives are independent contractors, not to be considered employees “for any purpose.”

In a separate letter, the Petitioner indicated that the training consultant “serves on a voluntary basis,” as did the training director before the latter person left the position. The Petitioner stated that the company’s clerk was an employee who “recently left the company.” The Petitioner stated that the company “has a bookkeeper,” but did not specify whether the bookkeeper is an employee, contractor,

or volunteer. Tax documents indicate that the bookkeeper is a contractor who earned \$3528 in 2017, an amount that does not indicate that the Petitioner is the bookkeeper's only or primary client.

In 2017, the Petitioner paid four employees: The Beneficiary, the clerk, the CEO, and a fourth individual, not shown on the organizational chart. Also in 2017, the Petitioner paid the sales director \$5689 as a contractor. The other sales representatives each received less than \$1600. The sales representatives have companies of their own, and the low annual commissions do not indicate that they devote a significant proportion of their time to activities on the Petitioner's behalf.

In denying the petition, the Director made the following findings and conclusions with respect to the Beneficiary's duties:

- The Beneficiary claimed to devote 25% of his time to running the Petitioner's "Training Department," but "it does not appear that the petitioning organization has a training department";
- The initial job description did not mention "directing licensees," and many of the tasks within that category appeared to be operational or administrative rather than executive;
- The organization has no in-house sales department, instead relying on third parties whose sales activity is not exclusive to the Petitioner;
- The Petitioner did not sufficiently establish that the entity in Brazil continues to do business, and therefore to require executive direction;
- Several duties described "are operational in nature"; and
- The Petitioner did not establish that an organization with four employees can support an executive position.

The Petitioner addresses each of these issues on appeal. We will address the issue of the foreign entity's business activity further below, because it also formed the basis for a separate ground for denial. First, we discuss the other cited issues.

A. Training Department

On appeal, the Petitioner acknowledges that "there are no paid employees in the Training Department," but adds: "That does not mean there is no training department." The Petitioner asserts that the Director did not acknowledge the presence of a volunteer training director and volunteer training consultant, "contract training centers that provide trainings to instructors, and nearly 1500 active . . . instructors that pay [the Petitioner] to receive trainings and certifications developed and maintained by the Training Department." The training centers and instructors are not the Petitioner's employees or contractors. Rather, they are licensees, essentially customers who, the Petitioner acknowledges, "pay the company to be trained, as well as for access to this company's standards, training and brand." The Petitioner controls its standards and its training materials, but this does not translate into executive authority over its customers. The Petitioner's activity is limited to the promulgation of training and certification standards; its licensees' use of those standards does not place those licensees under the Petitioner's executive control.

B. Directing Licensees

The Petitioner asserts that its original organizational chart “demonstrated that [the] Beneficiary had supervisory authority over [the Petitioner’s] international licensees,” and therefore the Director erred in stating that the Petitioner did not initially include this responsibility in the Beneficiary’s job description. The job description itself, however, did not mention licensees in this way. Instead, the initial description indicated that the Beneficiary was “directing the training and hiring of diving instruct[or]s, sales representatives, [and] diving trainers.” Subsequent submissions do not establish that the Beneficiary has authority over licensees’ hiring decisions or their training of employees. Control over the Petitioner’s brand does not translate into the level of control initially described.

C. Sales Department

The Petitioner asserts that the “Beneficiary worked to direct the Sales Director, namely in hiring, training, and supervision of sales staff,” and that the Director erred by finding that “directing a Sales Director and his team that operate on a commission basis is not directing management.” As noted above, the sales representatives are contractors who do not receive a level of compensation commensurate with full-time employment. The Sales Representative Agreement between the Petitioner and the individual identified as the sales director requires the contractor to “conduct all levels of training . . . consistent with TRAINING AGENCY philosophy and standards,” and to “assure that any store or resort with which he/she has a teaching contract . . . will comply with and abide by all training standards,” but the document does not give the individual authority over other sales representatives in other regions. (The sales director’s designated territory is the State of Florida; the other representatives cover other territories.) The agreements signed by the other sales representatives do not indicate that those representatives are under the authority of the sales director. The Petitioner has control over its intellectual property, but has not established that it exerts a managerial level of control over its contracted sales representatives.

D. Nature of Duties

The Petitioner states “the law does not require that all tasks be executive In this case, Beneficiary’s primary functions . . . are in an executive capacity.” The Petitioner does not elaborate further on this point. As discussed above, the Petitioner has submitted divergent descriptions of the Beneficiary’s duties, and the record does not credibly and consistently establish that the Beneficiary devotes the bulk of his time to executive-level tasks.

E. Size of the Organization

On appeal, the Petitioner asserts that the size of the petitioning organization requires executive leadership, even if most of the people associated with the organization are volunteers, contractors, and licensees rather than employees. While the Petitioner has relationships with instructors and others around the world, the record does not establish that this network amounts to an organization that requires, and is subject to, the Beneficiary’s full-time executive oversight.

The Petitioner states that it has hundreds of active certified instructors in the United States, and that “[t]hese . . . certified instructors, as well as the training facilities, and the instructor trainers who train

the instructors are not employees of [the petitioning entity],” but rather are “bound contractually to [the Petitioner] and the respective . . . licensee, if applicable.” This information is incompatible with the Petitioner’s initial claim that the Beneficiary spends 10% of his time “[s]upervising, hiring and training *all* new employees, sales representatives, managers, *trainers*, and *instructors*” (emphasis added). The Petitioner’s subsequent revision of this claim does not explain why the Petitioner made such a claim in the first place.

The record also does not touch on areas described as being under the Beneficiary’s control, such as “[s]upervising, hiring and training production teams to create instructional DVDs,” and “[o]verseeing and managing the design of all promotional and educational materials.” The Petitioner does not employ individuals in the capacities described, and they do not appear to be among the individuals and entities that received payment as contractors in 2017. Therefore, it is not evident how much time, if any, the Beneficiary actually dedicates to those activities.

The Beneficiary appears to be primarily engaged in brand management rather than executive control of an entity engaged full-time in the provision of goods or services.

III. FOREIGN ENTITY DOING BUSINESS

The Director found that the Petitioner had not shown that the Beneficiary’s foreign employer continues doing business, defined as the regular, systematic, and continuous provision of goods, services, or both. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H). This finding is relevant because both the U.S. and foreign employers must be doing business in order to remain qualifying organizations as defined at 8 C.F.R. § 214.2(l)(1)(ii)(G).

The Petitioner stated that the foreign entity, IANTD Brasil, “is still an operating and functioning business,” which the Beneficiary continues to oversee while lower-level officials manage its day-to-day operations. The supporting evidence, however, referred to a different company name. The Director found that the Petitioner had not shown that IANTD Brasil continues to do business (and thereby maintain a qualifying relationship with the petitioning entity).

On appeal, the Petitioner protests that the Director did not raise this issue in the RFE. (The Director acknowledged as much in the denial notice.) Issuance of an RFE is discretionary, and the Director’s omission of a particular deficiency from the RFE does not permanently bar the Director from citing that deficiency as a basis for denial. A petitioner must meet all eligibility requirements at the time of filing, and continuing through the adjudication of the petition. *See* 8 C.F.R. § 103.2(b)(1). This underlying requirement cannot be waived, and a deficient petition cannot properly be approved.

In this case, the appeal process is the Petitioner’s first opportunity to remedy a newly-identified deficiency, and we will consider evidence submitted on appeal for that purpose.

Documents submitted on appeal show that tax documents under both company names show the same CNPJ (Cadastro Nacional da Pessoa Jurídica) identification number, indicating that both names refer to the same company. The Petitioner has thus resolved the issue of IANTD Brasil’s identity, but other concerns remain.

The pay receipts show that the foreign company has only one employee. The mere presence of an agent or office does not constitute doing business. 8 C.F.R. § 214.2(l)(1)(ii)(H). The Petitioner does not adequately establish what this one employee has been doing in Brazil. Bank statements show deposits into the foreign entity's account, but the sources of those deposits, and the reasons for them, are not apparent. Therefore, the Petitioner has not established that the deposits are the result of the regular, systematic, and continuous provision of goods, services, or both. The Petitioner has submitted only capsule translations rather than the complete translations required by 8 C.F.R. § 103.2(b)(3), which limits our ability to analyze the documents. Any document in a foreign language must be accompanied by a full English language translation. 8 C.F.R. § 103.2(b)(3). The translator must certify that the English language translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.*

The Petitioner also submitted printouts from IANTD Brasil's Facebook posts from December 2017 to January 2019, and an online article describing an annual gathering in Brazil in which IANTD Brasil's employee participated. The Facebook posts are untranslated, and the translation of the magazine article is an uncertified machine translation by Google Translate. These materials attest to IANTD Brasil's continued existence and some degree of activity, but do not suffice to show that it is engaged in the regular, systematic, and continuous provision of goods, services, or both. An annual meeting is not a continuous activity, and social media posts are not goods or services.

For the above reasons, the Petitioner has not established the IANTD Brasil continues doing business as the regulations define that term.

IV. QUALIFYING RELATIONSHIP

Beyond the Director's decision, review of the record also indicates that the Petitioner has not satisfactorily established 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 the 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).

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 Int'l*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

On the petition form, the Petitioner stated that its CEO owns 85% of that entity, while the Beneficiary owns the remaining 15%. The Petitioner claimed to own 50% of IANTD Brasil, while the Beneficiary owns the other 50%, making IANTD Brasil the Petitioner's subsidiary. The Petitioner submitted copies of share certificates to show the ownership of the petitioning U.S. entity, but no comparable

documentation of IANTD Brasil's ownership. Income tax returns for 2015-2017 refer to the Petitioner's claimed ownership of 50% of IANTD Brasil, but tax returns are not primary evidence of corporate ownership. We note that the Petitioner amended at least one of those tax returns to add information relating to the claimed ownership.

In subsequent correspondence, the Petitioner and the Beneficiary each referred to IANTD Brasil as one of "23 International Licensee Agencies." The appellate brief also refers to "23 contractual licensee agencies." A contractual licensing agreement does not create or imply a qualifying relationship between the licensor and the licensee.

Because of the lack of primary evidence of IANTD Brasil's ownership and control, coupled with the Petitioner's own reference to the foreign entity as one of many contracted licensees, the Petitioner has not established by a preponderance of the evidence that a qualifying relationship has existed, and continues to exist, between the U.S. and Brazilian entities. The timing of the claimed acquisition, coincident with the filing of the first petition on the Beneficiary's behalf, suggests that the Petitioner acquired (or purported to acquire) the foreign entity in order to facilitate the Beneficiary's immigration to the United States. (While L-1A status is inherently temporary, and a petitioner must attest to the temporary nature of the employment when the beneficiary is a major shareholder,¹ the Petitioner's introductory letter stated the company's intention to employ the Beneficiary permanently.)

V. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of I-A-N-T-D-, Inc.*, ID# 4409376 (AAO July 18, 2019)

¹ See 8 C.F.R. § 214.2(1)(3)(vii).