



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

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

MATTER OF Y-R-E- CORP. (US)

DATE: JUNE 25, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a real estate investment and development company, seeks to temporarily employ the Beneficiary as its president/chief executive officer (CEO) under the L-1A nonimmigrant classification for intracompany transferees.¹ 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 Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity in the United States.

On appeal, the Petitioner submits additional evidence and contends that the Director failed to review the record in its totality, incorrectly applied elements of the definition of “managerial capacity” to the Beneficiary’s proposed executive position, failed to apply the preponderance of the evidence standard to the facts presented, and failed to consider an April 2017 Executive Order (“Buy American and Hire American”) by “disregard[ing] the efforts that the petitioner has made to the economy.”

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

¹ The Petitioner previously filed an L-1A “new office” petition on the Beneficiary’s behalf which was approved for the period December 6, 2016, until December 5, 2017. A “new office” is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The Petitioner later filed a petition to extend the Beneficiary’s L-1A status, which the Director of the California Service Center denied in December 2017. The Petitioner filed this new petition in July 2018.

employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(1)(3).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner established that it will employ the Beneficiary in an executive capacity in the United States. The Petitioner did not claim that the Beneficiary would be employed in a managerial 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). The Petitioner also 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 managerial or 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. *See* 8 C.F.R. § 214.2(1)(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.

A. Duties

At the time of filing, the Petitioner submitted a chart labeled “Proposed Job Duties of [the Beneficiary]” intended to provide a breakdown of how the Beneficiary would allocate his time as its president/CEO. The chart divided over 30 general job duties into four groups, and indicated that each group of responsibilities would require 25% of the Beneficiary's time. While lengthy, this breakdown was repetitive, vague, and could describe any senior position within any company, as it lacked references to specific tasks the Beneficiary would perform on a day-to-day basis within the context of the Petitioner's real estate development business. For example, the first grouping of duties includes “adjust U.S. company's policies, goals, and objectives”; “implement the strategic goals and objectives

of the organization”; “give direction and leadership toward the organization’s achievement”; and “monitors financial performance.” The second grouping included duties that were nearly indistinguishable, such as “exercises discretionary decisions on business strategies and overall direction”; “coordinate business activities to achieve company’s goals and objectives”; “carry out the strategic plans and policies”; “direct the management of the organization”; and various financial monitoring tasks. The description as a whole focused on the Beneficiary’s level of authority without providing insight into what he is expected to do on a daily basis as the president of a real estate investment company with projects still in the pre-building phase. 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. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

In a request for evidence (RFE), the Director advised the Petitioner that it did not sufficiently describe the specific tasks the Beneficiary would perform and the amount of time he would spend on individual tasks. In response, the Petitioner provided a revised breakdown of the Beneficiary’s duties, but did not follow the Director’s instructions to list the Beneficiary’s specific day-to-day duties and the amount of time to be spent on each task. In fact, most of the duties were taken directly from the description submitted at the time of filing and arranged into the same four groupings, with each group assigned 25% of the Beneficiary’s time.

The Petitioner made some minor additions to each area of responsibility, but as with the first description, the first two groupings of duties, requiring 50% of the Beneficiary’s time, contained a number of overlaps and many of the duties generally paraphrased the statutory definition of executive capacity. For example, the Petitioner once again asserted that he will adjust “policies, goals and objectives”; “oversee the implement [*sic*] the strategic goals and objectives of the organization”; “establish and adjust company’s financial and accounting policies, goals and objectives”; “coordinate business activities to achieve company’s goals and objectives” “carry out the strategic plans and policies”; “direct the management of the organization”; and make “discretionary decisions on business strategies and overall direction of U.S. company.” Further, it did not provide examples of specific policies or strategies that the Beneficiary would be expected to formulate and implement as part of his daily routine. Conclusory assertions regarding the Beneficiary’s employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner’s burden of proof. *Fedin Bros.*, 724 F. Supp. at 1108; *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The Petitioner indicated that the Beneficiary would allocate an additional 25% of his time to duties that include: establishing human resources policies and goals; selecting, hiring, and overseeing the performance of department managers; exercising hiring authority, approving personnel actions such as bonuses, benefits and training; reviewing the design and calculation of wage incentives; and overseeing insurance and health plans. However, it appears based on the nature and scope of the business that most of these duties would not need to be performed on a daily basis and, without further explanation, it is unclear how they would require 25% of the Beneficiary’s time.

The Petitioner indicates that the Beneficiary would spend the remaining 25% of his time on negotiating on behalf of the company, representing the company at industry conferences, approving major

investments, maintaining good relationships with “key customers, governments, and commercial banks,” maintaining a positive public image, managing public relations, and reviewing and approving business partners. However, the Petitioner did not identify any specific investment projects or opportunities he would pursue, or indicate that it had immediate plans to expand beyond the three real estate projects that were already in various stages of development. These duties were not described in sufficient detail to establish that this area of responsibility would involve primarily executive tasks.

Finally, we acknowledge that the Petitioner provided an hourly breakdown of the Beneficiary’s “typical daily tasks” in which it attempted to describe what he would do during an eight-hour workday. These tasks resembled those provided in other descriptions in the record and did not provide any additional insight into his specific proposed duties.

In general, the fact that a beneficiary will direct a business and exercise discretion over its day-to-day operations does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity. By statute, eligibility for this classification requires that the duties of a position be “primarily” executive or managerial in nature. Sections 101(A)(44) of the Act. As such, a detailed job description is critical in determining the nature of the employment; reciting the Beneficiary’s vague job responsibilities or broadly-cast business objectives is not sufficient. In order to meet its burden of proof, the Petitioner must identify the specific tasks the Beneficiary will perform or the services he will provide. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros.*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

The Petitioner has conveyed that the Beneficiary, as the company’s senior employee, would have authority to establish plans, policies, and objectives for the company, supervise any employees hired, and make major decisions regarding its finances and overall direction. However, the Petitioner must also establish that these types of responsibilities would primarily occupy the Beneficiary’s time from the date of filing. The job descriptions that the Petitioner has provided do not sufficiently delineate the Beneficiary’s actual proposed job duties within the context of a real estate company in its development stage, and therefore do not establish that his duties would be primarily executive in nature.

B. Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, we must 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.

The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. A beneficiary must also exercise “wide latitude in discretionary decision making” and receive only “general supervision

or direction from higher level executives, the board of directors, or stockholders of the organization.”
Id.

The Petitioner indicates that it is engaged in the development of residential and commercial real estate and that it has “actively deployed” real estate projects in [redacted] California. These projects include land purchases made in [redacted] California between October 2016 and July 2017. The Petitioner addressed the status of each project in response to the RFE, noting that it is still in various stages of obtaining city approval for its designs and plans. The Petitioner noted that it expects to obtain construction permits for the [redacted] project in March 2019, for the [redacted] project in November 2019, and for the [redacted] project in 2020. The Petitioner estimated that it would complete construction of its first project, a single-family residence in [redacted] in August 2019, more than one year after filing this petition.

The Petitioner established that it had 11 employees at the time of filing. Its organizational chart depicts the Beneficiary as President/CEO and shows four employees directly subordinate to him – an administration department manager, a chief designer/design department manager, a chief engineer/project department manager, and a chief market director/market department manager. Each department has one or two lower level staff, including an accountant, administrative assistant, draftsman, project supervisor, trainee architect, and two sales assistants. In response to the RFE, the Petitioner submitted a revised chart depicting additional staff - a project supervisor and maintenance employee in the project department, and a market surveyor in its markets department. The record also contains a “sub-employee” list which includes salary information and a brief summary of job duties for each employee.

On appeal, the Petitioner argues that the Director erred by concluding that the Beneficiary’s direct subordinates are not managerial personnel, and by requiring evidence that the lower-level staff are professionals, noting that supervision of professionals is not an element of the statutory definition of “executive capacity.” We agree that the Petitioner need not establish that its lower-level employees are professionals. However, the evidence as a whole must substantiate that the duties of a beneficiary and their subordinates correspond to their placement in an organization’s structural hierarchy. The Petitioner cannot meet its burden solely by submitting a chart showing tiers of subordinate employees with managerial job titles; job titles alone are not probative and will not establish that an organization is sufficiently complex to support an executive position.

The Petitioner has consistently stated that the Beneficiary will direct the management of the company through subordinate department managers, who oversee the employees performing the day-to-day work of the company. However, the brief job summaries the Petitioner provided for its department managers are vague and do not adequately establish what they actually do on a day-to-day basis. In fact, the duties for several of the employees appear to be speculative given the company’s stage of development at the time of filing. The Petitioner indicated that the chief designer is responsible for “the overall architectural design and management of the project” while the chief engineer is responsible for supervising and controlling “construction projects.” Given that all of the company’s projects were in the design and planning stage, and had not progressed to the point of obtaining construction permits, it is unclear what the members of the four-person “projects department” would be doing in the short-term. Further, although the Petitioner indicates that the chief designer is a full-

time employee, we note that his annual salary is lower than that of the administrative assistant, who earns \$15.00 per hour, which suggests that the Petitioner is not in fact paying him for full-time services.

We have similar questions regarding the Petitioner's "markets department," given that the Petitioner indicated that it would be more than a year from the date of filing before it could complete construction of its first project, a single family home. The Petitioner stated that the "chief markets director" is managing and coordinating marketing activities, developing pricing strategies, liaising with the media and advertising, and evaluating customer and market reports, but these duties are not consistent with the nature of the business or its current stage of development. Likewise, the Petitioner indicates that the sales assistants rent, buy, or sell property for clients, advise clients about market conditions, conduct walkthroughs, and "provide guidance and assistance through the process of buying, selling, or leasing properties." However, the Petitioner does not have any properties to sell or lease and, without further explanation, the job descriptions for the entire markets department appear to be speculative.

Finally, the Petitioner indicates that the administration manager performs primarily finance-related duties, some of which appear to overlap with the Beneficiary's own responsibilities in this area, and some of which are non-managerial in nature. Overall, while the Petitioner submitted an organizational chart depicting the Beneficiary's oversight of the organization as a whole through four department managers, the record does not adequately address how the company currently supports this level of organizational complexity or some of the tasks attributed to the subordinate managers and their staff. Without sufficient information about the actual tasks performed by the Beneficiary's support staff we are unable to determine the extent to which they would effectively relieve the Beneficiary from having to engage in the performance of non-executive job duties.

The Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in denying a visa petition for classification as an L-1A intracompany transferee. *See* section 101(a)(44)(C) of the Act. The Petitioner also cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1574 (N.D. Ga. 1988) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act primarily in a managerial or executive capacity. Here, there is no indication that the Director denied this petition based on the size of the company, nor are we basing our decision on the size of the company.

However, as discussed, the position descriptions provided for the Beneficiary and the claimed subordinate managers are vague and do not describe the individual employees' actual job duties within the context of the Petitioner's business. Further, two of the Petitioner's four departments are claimed to be performing work that is not consistent with the company's current stage of development as described and documented in the record. Therefore, while the Petitioner has documented that it employs 11 staff who would be subordinate to the Beneficiary, we cannot determine based on the information submitted what many of these employees would be doing, or to what extent this staff would be able to relieve the Beneficiary from significant involvement in the day-to-day activities of the company.

As emphasized by the Petitioner on appeal, it must establish that it meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). In other words, a petitioner must show that what it claims is “more likely than not” or “probably” true. To determine whether a petitioner has met its burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm’r 1989). Here, the Petitioner’s descriptions of its employees’ duties were so general that they lack probative value and are further deficient since the duties attributed to two of the departments are inconsistent with the company’s current stage of development and appear to be speculative in nature.

Finally, the Petitioner contends that the Director did not consider the congressional intent in creating the L-1 visa category and also points to the current U.S. policy to “Buy American Hire American.” We note, however, that an immigration benefit cannot be granted to a petitioner that has not established that it meets the eligibility requirements for the benefit being sought at the time of filing. The Petitioner indicates that it will eventually create more than 100 jobs, but it must still meet its burden to establish how it is able to support an executive position while its projects are in their planning stages.

The Petitioner asserts that the Beneficiary will be the highest ranking figure at the petitioning company; however, the issue is not the extent of the Beneficiary’s authority, but whether all relevant factors, taken together show that the Beneficiary will be employed in a *primarily* executive capacity. For the reasons cited above, we find that the Petitioner has not met this threshold.

III. DOING BUSINESS

Although not addressed in the Director’s decision, we find that the Petitioner has not established that it is doing business as defined in the regulations. *Doing business* means the regular, systematic, and continuous provision of goods and/or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H).

The Petitioner indicates that it intends to design and construct commercial and residential properties for sale or lease. In response to the Director’s RFE, the Petitioner explained that “[a]s a real estate development company, the general time lines for a project in the U.S. are ranging from 24 months (two years) to 54 months (4.5 years).” The Petitioner stated that it had been doing business for at least one year because it began the purchasing process for its properties “as early as September 2016.” The Petitioner acknowledges that it had not offered any commercial or residential properties for sale or lease at the time of filing. Nor has it reached the construction phase for any of its three projects, as it had not yet obtained any building permits at the time of filing or when it responded to the RFE.

The Petitioner’s explanation that a lengthy development stage is consistent with real estate industry standards is noted. However, the regulatory definition of “doing business” does not vary from industry to industry, nor does it make an exception for industries in which it takes longer to reach the stage of actually engaging in the regular, systematic, and continuous provision of goods and/or services. The Petitioner cannot modify the definition of “doing business” to accommodate the nature of the company’s activities and the external conditions under which it operates.

We find that the Petitioner, as a real estate developer that is still in the process of obtaining permits, and is not yet able to engage in revenue-producing activity such as selling or renting its properties, is not yet doing business according to the regulatory definition. The record establishes that the company has been incurring expenses and purchasing services related to the planning and permitting stage, but is not yet earning income by providing goods or services. For this additional reason, the petition cannot be approved.

IV. 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 Y-R-E- Corp. (US)*, ID# 4028569 (AAO June 25, 2019)