



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

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

MATTER OF R-, INC.

DATE: JUNE 27, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a restaurant, seeks to continue the Beneficiary's temporary employment as its executive restaurant manager under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) § 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 Beneficiary was employed abroad in a managerial or executive capacity; and (2) the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity.

On appeal, the Petitioner submits a brief and asserts that the Director erred by concluding that the Beneficiary's foreign and proposed U.S. positions are not managerial.¹

Upon *de novo* review, we find that the Petitioner has not established that it will employ the Beneficiary in a managerial capacity. Therefore, we will dismiss the appeal. Because of the dispositive effect of this finding, we will reserve the remaining issue.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). In addition, the beneficiary must seek to enter the United States temporarily to

¹ We note that the Petitioner first claimed in its support letter that the Beneficiary "spends all of his time performing executive duties" in the United States. The Petitioner also claimed on the Form I-129 itself that the Beneficiary would be working in an executive capacity. Then, in response to the Director's request for evidence (RFE), the Petitioner's counsel asserted that the proposed U.S. position would be in a managerial capacity; however, the Petitioner stated in a separate letter submitted at the same time that the proposed "position has both executive and managerial aspects."

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 CAPACITY

The issue to be discussed in this decision is whether the Petitioner established that the Beneficiary will be employed in a managerial capacity. The Petitioner claims on appeal that the Beneficiary will work in a managerial capacity and that “it categorized all of [the] Beneficiary’s duties as managerial”; therefore, we will not analyze whether the Beneficiary’s proposed position qualifies as an executive capacity position.

“Managerial capacity” means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; 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; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

When examining the managerial capacity of a given beneficiary, we will look to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(I)(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, its staffing levels and its organizational structure.

A. Duties

In a letter submitted in support of the petition, the Petitioner stated that the Beneficiary will be an executive restaurant manager and provided the following job description:

[T]he duties of this executive position include executive responsibility for directing and coordinating the activities of the restaurant’s kitchen to ensure optimum efficiency and economy of operations and to maximize profits. This entails the following duties: planning and directing the ordering of food and kitchen supplies; hiring, training, promoting and firing kitchen employees; supervising cooking and kitchen personnel and coordinating their assignments to ensure economical and timely food production; overseeing the development of menu changes; directing the preparation of all specialty Indian cuisine; establishing and enforcing nutrition and sanitation standards for the restaurant; maintaining time and payroll records for the kitchen staff; and assisting with the annual restaurant budget. He has executive

discretionary authority on all business decisions and spends all of his time performing executive duties.

In an RFE, the Director stated that the Petitioner had not sufficiently described the Beneficiary's duties. The Director asked the Petitioner to explain how the Beneficiary's position meets the requirements of managerial capacity. In response, the Petitioner stated that the Beneficiary has been employed with its company in [redacted] Texas, in the position of executive restaurant manager since June 2012. The Petitioner also stated that as executive restaurant manager, the Beneficiary has the ultimate responsibility for directing and coordinating the activities of the restaurant's kitchen and shares the responsibility for the restaurant overall to ensure optimum efficiency and economy of operations and to maximize profits. The Beneficiary's summarized job duties and approximate amount of time spent on each are as follows:

- Directing the preparation of all specialty Indian cuisine – 25%;
- Supervising cooking and kitchen personnel and coordinating their assignments to ensure economical and timely food production – 20%;
- Overseeing the development of menu changes – 20%;
- Hiring, training, promoting, and firing kitchen employees – 15%;
- Planning and directing the ordering of food and kitchen supplies – 5%;
- Maintaining time and payroll records for the kitchen staff – 5%;
- Assisting with the annual restaurant budget – 5%; and
- Establishing and enforcing nutrition and sanitation standards for the restaurant – 5%.

The Director denied the petition, finding that the Beneficiary's duties are not primarily managerial or executive and that the Beneficiary does not oversee lower-level managers within the company.²

On appeal, the Petitioner asserted that it has provided a description of the Beneficiary's duties at the U.S. entity sufficient to establish that his duties will be primarily related to the management of the Petitioner's operations and not to the performance of other non-managerial duties.

The Petitioner's job description grouped the Beneficiary's activities into three categories – operations, human resource management, and finance. The business and operational category primarily focused on the Beneficiary's leadership role with respect to the company's business operations, noting that the Beneficiary's duties "include executive responsibility for directing and coordinating the activities of the restaurant's kitchen to ensure optimum efficiency and economy of operations and to maximize profits." The Petitioner claimed that the Beneficiary duties as restaurant manager is to ensure that the food is "produced correctly and to our own high standards," but it did not elaborate on how he would ensure that food is produced correctly, nor did it explain what is meant by "our own high standards." The Petitioner also stated that the Beneficiary along with the Executive Chef must learn at least 30 dishes per day for 30 days ("30-item-30-day concept") for a total of 900 dishes; however, the Petitioner did not explain their respective roles in this process. Further, the Petitioner claimed that the Beneficiary "must always keep in mind health code requirements as well as our restaurant's own nutrition standards while he is executing his duties," however, it did not explain what the Beneficiary

² We will further address staffing issues below.

will do in meeting and exceeding the City of []'s requirements for health and cleanliness, and it did not provide the context of its "nutrition standards" or explain how "nutrition standards" applies within the scope of its restaurant operations.

The category titled human resource management was comprised of another set of broadly stated activities, which focused on the Beneficiary's discretionary authority, noting that he ensures "the kitchen staff is properly trained and executing their duties correctly and diligently" and that the Beneficiary oversees "new employee training" and "the staff's progress . . . and is the person to ultimately approve the hiring, promotion, or firing of a kitchen employee." However, the record neither explained nor identified the Petitioner's "new employee training" or "training" curriculum. Further, the record does not contain performance appraisals or any other documentation corroborating that the Beneficiary oversees "the staff's progress" and is ultimately responsible for "hiring, promotion, or firing" of kitchen personnel. The Petitioner also claimed that the Beneficiary will maintain "time and payroll records for the kitchen staff," however, the Petitioner's staffing chart does not indicate that any of the Petitioner's kitchen staff beyond the Beneficiary performs these duties. It is not clear how the Beneficiary will maintain the Petitioner's kitchen staff's time and payroll records without subordinate personnel to perform the day-to-day tasks. It appears that the Beneficiary is responsible for the kitchen staff's time and payroll records and day-to-day tasks, which are non-qualifying responsibilities.

The third and final category itemizes activities in the finance category. The Petitioner vaguely stated that "staffing and procurement decisions must be made in accordance with what the restaurant can comfortably support" and "this duty is performed in cooperation with the supervisor and with the assistance of the service manager, the catering supervisor, and the executive chef." However, the Petitioner's staffing chart indicated that of the Beneficiary's three subordinates who are claimed to assist him with the restaurant's budget, the supervisor, *B.T.*, is the only one who in fact has duties commensurate with budget responsibilities. It is not clear how this employee will provide the Beneficiary with adequate cooperation to realize the Petitioner's staffing and procurement decisions. The remainder of the duties described under this area of responsibility were overly broad and stated that the Beneficiary "must always keep in mind the constraints of our restaurant's budget" as well as overseeing and approving "the orders as needed in his position of executive restaurant manager." The Petitioner did not, for example, describe the constraints of the "restaurant's budget" the Beneficiary will always keep in mind or "the orders" he will oversee and approve.

For these reasons, we find that the Beneficiary's proposed duties are insufficient to establish that he would be primarily employed in a managerial capacity.

B. Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we 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 a letter submitted in support of the petition, the Petitioner stated that the Beneficiary as executive restaurant manager will be responsible for directing and coordinating the activities of the restaurant's kitchen. The Petitioner claimed 23 U.S. employees at the time of filing.

In the RFE, the Director requested more information about the Beneficiary's subordinates. In response, the Petitioner provided: (1) an organizational chart depicting the Petitioner's staffing; (2) a staffing chart for the Petitioner's employees identifying their names and job titles, education/training and experience, employment status, and responsibilities; and (3) the Petitioner's Texas Workforce Commission, State Quarterly Wage Report, for second-quarter 2018, the quarter preceding the instant petition's filing date.

The organizational chart submitted in response to the Director's RFE differs from the one that was initially submitted. Specifically, the first organizational chart lists the Beneficiary as executive restaurant manager in a position over the Petitioner's storekeeping, catering, and serving, while *B.T.*, a supervisor, is in a position over kitchen operations. Conversely, the second organizational chart shows the Beneficiary as executive restaurant manager over kitchen operations and *B.T.*, as supervisor, over the Petitioner's kitchen and storekeeping, catering, and serving operations. The Petitioner explained in its RFE response that the organizational chart was revised for "clarity." We note that only the Beneficiary and *B.T.*'s roles were swapped on the latter organizational chart. The organizational chart submitted in response to the RFE identified the following structure:

- CEO [*R.L.*]
 - Supervisor [*B.T.*]
 - Service Manager [*H.T.*]
 - Storekeeper [*S.M.*]
 - Storekeeper Helper [*N.E.*]
 - Storekeeper Helper [*S.G.*]
 - Catering Supervisor [*Y.T.*]
 - Catering Planner [*H.T.*]
 - Caterer Helper [*A.R.*]
 - Head Server [*R.R.*]
 - Curry Server [*Z.Z.*]
 - Dessert Server [*M.U.*]
 - Appetizer Server [*R.M.*]
 - Veg. Server [*I.Y.*]
 - Beverage Server [*L.N.*]
 - Pickle Server [*A.V.*]
 - Executive Restaurant Manager [the Beneficiary]
 - Executive Chef [*S.K.*]
 - Appetizer Chef [*B.S.*]
 - Appetizer Helper [*B.S.*]
 - Appetizer Helper [*J.C.*]
 - Sauce Chef [*J.T.*]
 - Sauce Chef Helper [*R.T.*]
 - Pastry Chef [*C.T.*]
 - Pastry Chef Helper [*A.M.*]
 - Bread and Confectionary Chef [*N.F.*]
 - Confectionary Helper [*K.S.*]
 - Confectionary Helper [*J.T.*]

In denying the petition, the Director acknowledged the Petitioner's submission of an organizational chart, but found that the Petitioner did not provide an explanation of how the Beneficiary's subordinates' relieve him from performing non-qualifying duties. The Director concluded that the Petitioner did not show that it currently employs individuals that would relieve the Beneficiary from non-qualifying duties.

On appeal, the Petitioner asserted that the Beneficiary oversees the kitchen, consisting of lower-level supervisory or managerial employees. The Petitioner also stated that the kitchen has sufficient staff to support the day-to-day operational needs of this department.

The Petitioner claims on appeal that the Beneficiary will oversee two Executive Chefs, *S.K.*, and a more experienced chef, *M.L.* However, we note that although *M.L.* is listed on a staffing chart, neither organizational chart lists *M.L.*, and the staffing chart does not distinguish the roles of *M.L.* and *S.K.* *M.L.*'s role does not appear to be explained elsewhere in the record. The Petitioner must resolve this discrepancy in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, the Petitioner's organizational chart shows three tiers of employees below the Beneficiary – (1) the Executive Chef, *S.K.*, (2) Appetizer, Sauce, Pastry, and “Bread & Confectionary” Chefs, and (3) Helpers under each of the Appetizer, Sauce, Pastry, and “Bread & Confectionary” Chefs. Not only is there insufficient evidence regarding the role(s) of the claimed Executive Chef(s), there is also insufficient evidence in the record distinguishing the roles of the various chefs under the Executive Chef(s) and their respective helpers. Despite showing a tiered organizational chart, the record does not support a finding that the Executive Chef(s) are supervisory, professional, or managerial employees. Section 101(a)(44)(A) of the Act.

We also observe that the Petitioner's organizational chart identified *N.F.* as Bread & Confectionary Chef in a position over *K.S.* and *J.T.* as Confectionary Helpers, however, the Petitioner's Texas State Quarterly Wage Report for second-quarter 2018 indicated that *N.F.* as Bread & Confectionary chef received wages, tips, and other compensation of \$3,587.90 for this quarter, while her subordinates, *K.S.* and *J.T.*, received higher wages, tips, and other compensation for this quarter. The record contains other discrepancies as it relates to subordinate employees receiving higher wages, tips, and other compensation in relation to their superior counterparts. The Petitioner's organizational chart identified *H.T.* as Service Manager, *N.E.* as Storekeeper Helper, *L.N.* as Beverage Server, *A.V.* as Pickle Server, *J.C.* as Appetizer Helper, and *A.M.* as Pastry Chef Helper; however, the Petitioner's Texas State Quarterly Wage Report for second-quarter 2018 does not reference these individuals as employees. Also, the Petitioner's organizational chart identified *R.L.* as CEO in a position over the Beneficiary as executive restaurant manager and *B.T.* as supervisor, however, the Petitioner's Texas State Quarterly Wage Report for second-quarter 2018 indicated that *R.L.* as CEO received wages, tips, and other compensation of \$8,000.00 for this quarter, while his subordinates, the Beneficiary, as executive restaurant manager, and *B.T.*, as supervisor, received wages, tips, and other compensation of \$12,000.00 and \$0,³ respectively, for this quarter. The record neither clarified nor explained these discrepancies as it relates to the Petitioner's corporate structure.

³ The Petitioner's Texas State Quarterly Wage Report for second-quarter 2018 does not identify *B.T.* as an employee.

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In light of the anomalies and deficiencies described above, the Petitioner has not established that it has sufficient staffing to relieve the Beneficiary from having to primarily perform non-managerial job duties.

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary will be employed in a managerial capacity.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons. 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 R-, Inc.*, ID# 3816080 (AAO June 27, 2019)