



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

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

MATTER OF L-E-, INC.

DATE: JAN. 27, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, which describes its business as providing “[t]ravel services [and] corporate representation in the U.S. for foreign companies,” seeks to extend the Beneficiary’s temporary employment as its president 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 evidence of record did not establish that the Beneficiary will be employed in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Beneficiary’s duties are primarily executive in nature, and that medical issues explain delays in staffing the petitioning company.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a managerial or executive capacity, or in a specialized knowledge capacity, for 1 continuous year within 3 years preceding the Beneficiary’s application for admission into the United States. 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. Section 101(a)(15)(L) of the Act.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

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

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, 8 U.S.C. § 1101(a)(44)(C).

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A. Duties

When examining the managerial or executive capacity of the Beneficiary, we will look first 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).

The definition of executive capacity has two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial 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.

The Petitioner filed the Form I-129 on November 20, 2015. The Petitioner stated that the company "was established in 2010 to engage in the business of travel services" and "has recently expanded and diversified its services to include the establishment of business relationships and partnerships that allow [the Petitioner] to act as a U.S. representative for additional Brazilian companies seeking to expand into the U.S. market."

On Form I-129, the Petitioner provided a brief job description for the Beneficiary:

Define, establish and implement corporate goals and policies. Responsible for all financial decisions and entitled to make all discretionary decisions, such as making investments on behalf of the U.S. entity, as well as soliciting investors into the U.S. entity. Review budgets of all departments; establish company expectations, projections and milestones; create annual budget; develop and maintain staff including hiring, firing, and discipline.

The Petitioner stated: "The following divisions operate under the [Petitioner's] umbrella . . . :"

Providing travel services for travelers via coordination and facilitation of hotel accommodations, rental cars, attraction tickets, vacation home rentals, and travel tours.

Providing transportation services to travelers in the Central Florida area via coordination of limo services, group transportation, car service and guided tours.

U.S. contact and support to customers and providers.

. . . [The Beneficiary] has developed the business concept for each division within [the petitioning company] and has been responsible for adjusting [the Petitioner's] business model and offerings based on market reactions and needs. . . . [The Beneficiary] exercises full discretion to make decisions in the best interests of the company.

A separate, unsigned and unattributed statement reads as follows:

DUTIES EVIDENCING DIRECTION AND MANAGEMENT OF THE ORGANIZATION:

- Manages and directs all strategic pursuits of the organization including, but not limited to: develop business contacts and relationships; meet and negotiate with business and commercial vendors for services and products; responsible for approval of all contracts.
- Analyzes tourism and travel trends to stay abreast of changes or developments impacting the business model and profitability and utilizes this information to establish or revise company goals and policies.
- Solely responsible for development and implementation of any new business offerings and endeavors.
- Responsible for development of marketing strategies.
- Acts as the primary company representative for all financial, business and commercial obligations.
- Responsible for all personnel decisions including hiring, firing, rate of pay, promotion, reprimand and requests for leave.
- Responsible for all discretionary decision making that impacts the U.S. enterprise.
- Meets regularly with contracted providers and contacts of business divisions to review ongoing issues or concerns and to determine the state of business operations.

TIME DISTRIBUTION

- Strategic pursuits: meet and negotiate with vendors, service providers; review contracts on behalf of the company 30% or 12 hrs/wk.
- Review current projects or issues with contracted providers; 10% or 4 hrs/wk.
- Act as company representative for all business obligations; 10% or 4 hrs/wk.
- Review and monitor markets and trends for business development and improvement of company policies and goals; 25% or 10 hrs/wk.

- Review tourism and travel trends and offerings; 15% or 6 hrs/wk.
- Marketing: 10% or 4 hrs/wk.
 - Analysis and development of marketing strategies;
 - Review and solicit marketing opportunities;
 - Negotiate marketing terms and contracts.

The six tasks listed under “Time Distribution” correspond partially, but not entirely, to the seven responsibilities listed above them.

The Director denied the petition, concluding that several of the Beneficiary’s described duties do not appear to be those of an executive, but rather those of “an employee who will be performing the tasks necessary to provide a service or to produce a product.”

On appeal, the Petitioner disputes the Director’s conclusion, stating that most of the various elements listed above show that the Beneficiary has ultimate discretionary authority over the company. The Petitioner acknowledges that developing marketing strategy is not an executive task, but notes that this task occupies only a small percentage of the Beneficiary’s time, and therefore the Beneficiary still primarily performs executive tasks.

The Beneficiary’s level of discretionary authority is not in dispute, but the submitted job description does not provide enough detail to show that the Beneficiary’s duties were primarily executive in nature. Vague terms such as “development and implementation” do not tell us what, exactly, the Beneficiary does. Similarly, stating that the Beneficiary acts as the “company representative for all business obligations” tells us nothing of what this activity entails. Acting as the company representative does not appear to refer to participating in business negotiations, marketing, and project review, because the Petitioner listed those activities elsewhere in the job description. The Petitioner’s assertion that the Beneficiary is the “face of the brand” sheds no further light on the question. 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).

The “Time Distribution” chart is questionable. It indicates that the Beneficiary must “meet and negotiate with vendors [and] service providers [and] review contracts on behalf of the company” for 12 hours a week. The Petitioner has documented only a small number of contracts, executed over the course of several months. The record simply does not contain enough information to show the Beneficiary spends, on average, 30% of her time negotiating and reviewing contracts.

Furthermore, as we will discuss in the next section below, the Petitioner employed no subordinates under the Beneficiary at the time of filing, and only a fraction of the Petitioner’s services had been outsourced to contractors. The Petitioner has not shown that anyone other than the Beneficiary herself was present to provide those services, which would necessarily reduce the amount of time that the Beneficiary was able to devote to executive functions.

The Petitioner submits medical documentation showing that circumstances required the Beneficiary to work part-time for several months. The Director, however, did not deny the petition based on the length of the Beneficiary's work day. The submitted evidence does not address any stated basis for the denial of the petition.

B. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of 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.

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, 8 U.S.C. § 1101(a)(44)(B). 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 organization must have a subordinate level of managerial employees for a beneficiary to direct and a 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 an 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.*

We note that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa petition for classification as a multinational manager or executive. See section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See *e.g.*, *Family Inc.*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

At the time of filing, the Beneficiary was the company's only employee. The Petitioner asserts that it outsources many of its operational and administrative functions to outside companies, so that the

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Beneficiary does not have to perform those functions herself. Invoices from [REDACTED] show that the Petitioner had booked various vacation packages through that entity.¹

A Tourism Services Agreement between the Petitioner and [REDACTED] shows that the Petitioner contracted [REDACTED] “to render tourism services within [Brazil], negotiating, promoting and intermediating businesses especially related to the sales of [the Petitioner’s] Packages.” Under the agreement, [REDACTED] “shall centralize and control . . . confirmations of reservations and . . . the receipt of pre-payments of Packages sales performed by itself and by Clients,” defined as “Brazilians [who purchase tour packages from the Petitioner] either directly or through travel and tourism agencies in Brazil.” The agreement does not identify specific tourism services provided by the Petitioner rather than by [REDACTED] or other entities in Brazil.

A Website Access Agreement between the Petitioner and [REDACTED] describes the Petitioner as “an online agent/Operator [that] acts as a ‘B2B’ intermediary in the provision of certain travel services, including accommodation reservation services, excursion services, transfer services, representative services, ticket services, [and] group special offers.” This indicates that the Petitioner plays some operational role in booking the travel-related services.

In response to the RFE, the Petitioner submitted an organizational chart showing the following positions, with annotations as shown:

- President [the Beneficiary]
- Vice President [the Beneficiary’s spouse] (pending work authorization)
- Marketing/Web Designer (to be filled)
- Administrative Assistant (to be filled)
- Travel & Transport Manager (to be filled)
- Travel & Transport Agent (to be filled)
- Transportation Providers (outsourced)
- International Sales Representative (to be filled)
- U.S. Sales Agent (4) (to be filled)
- Accountant (outsourced)
- Bookkeeper (outsourced)

The Petitioner did not say who was performing the duties corresponding to the many unfilled positions listed above. The Beneficiary’s spouse has signed some documents in the record under the title of vice president, but his acknowledged lack of employment authorization means that he could not lawfully perform any duties for the company.

¹ The name [REDACTED] appears on vouchers for various hotels and car rental companies, although there is no evidence that any corporation exists by that name. Instead, [REDACTED] is a fictitious name under which the Petitioner does business.

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The Petitioner submitted invoices and related documents concerning the outsourced functions. With respect to outsourced "Transportation Providers," the Petitioner submitted copies of an invoice from [REDACTED] dated November 15, 2015, and monthly receipts from [REDACTED] dated between January and June 2016. Only the [REDACTED] invoice predates the filing of the petition. There is no evidence that the Petitioner had an arrangement with [REDACTED] in 2015, and the Petitioner's initial filing contained no mention of [REDACTED]. The [REDACTED] documents from 2016 do not show that the company provided transportation services to the Petitioner at the time of filing in November 2015. *See Michelin Tire Corp.*, 17 I&N Dec. 249.

The [REDACTED] invoice described arrangements to pick up a group of passengers, and specified that the vehicle "must [hold] 61 passengers." It appears that the Petitioner made a one-time arrangement with [REDACTED] to pick up an unusually large number of passengers; there is no evidence that the Petitioner made any transportation arrangements with [REDACTED] before or after November 15, 2015.

The Petitioner had previously submitted an Affiliate Contract Agreement between the Petitioner and [REDACTED], dated December 16, 2014. The agreement includes instructions to "drivers" and "contractors," and includes specifications for "all vehicles sent on [REDACTED] jobs." This indicates that [REDACTED] licenses its name to contracted drivers. The Petitioner has not submitted any evidence to show that it has outsourced this responsibility to third parties. Instead, the agreement, on its face, indicates that the Petitioner operates vehicles under the [REDACTED] name. Invoices in the record, billable to [REDACTED] and showing the logo of [REDACTED] include information about passengers, pickup and drop-off points, and fares, and identify the Petitioner under "Affiliate Name." The invoices are dated between April and September of 2015. The Petitioner does not say who in the petitioning company drove the limousines on those occasions. At the time of filing, the Petitioner did not mention [REDACTED]. Therefore, the record strongly indicates that the Petitioner provided transportation services rather than outsourced them, except on one occasion where the size of the traveling group required a larger vehicle.

In the denial notice, the Director found that the vacancy of all subordinate positions at the time of filing suggested that the Beneficiary was performing the duties of those subordinates.

On appeal, the Petitioner states that it "began recruitment to fill its first subordinate positions in the summer of 2016." As we have observed, the regulation at 8 C.F.R. § 103.2(b)(1) requires eligibility at the time of filing. The Petitioner had no subordinate staff at the time of filing to relieve her from performing non-qualifying tasks that she could otherwise have delegated to them. *See Michelin Tire Corp.*, 17 I&N Dec. 249. In the absence of any subordinate staff, the Petitioner maintains that "the business remained operational and . . . was still able to diversify business offerings." The Petitioner does not say who, other than the Beneficiary, operated the business at the time of filing.

Based on the deficiencies discussed above, the Petitioner has not established that it will employ the Beneficiary in an executive capacity in the United States.

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III. QUALIFYING RELATIONSHIP

Beyond the Director's decision, the record does not establish that the Petitioner 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 pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

.....

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

On Form I-129, the Petitioner indicated that it is a wholly owned subsidiary of [REDACTED]. The Petitioner submitted no evidence to support this assertion, stating that the evidence had accompanied an earlier petition. However, the record raises questions which the Petitioner would have to answer in the absence of other grounds for denial.

The IRS Form 1120 tax return asks, in several places, for information about foreign ownership. The Petitioner, on its return, gave no indication of foreign ownership, and repeatedly denied it. On Schedule K, question 3 asked whether the Petitioner was a subsidiary of another company, and questions 4 and 7 asked about foreign ownership and indicated that the Petitioner had to file additional forms to describe the foreign ownership. The Petitioner answered "no" to all these questions and did not submit the related forms. Therefore, the Petitioner's own income tax return consistently contradicts the Petitioner's claim to be a wholly-owned subsidiary of a foreign corporation.

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The Petitioner has not demonstrated that it has a qualifying relationship with the Beneficiary's foreign employer, and for this additional reason, the appeal will be dismissed.

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of L-E-, Inc.*, ID# 154456 (AAO Jan. 27, 2017)