U.S. Citizenship and Immigration Services

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

MATTER OF S-USAA- LLC

DATE: APR. 2, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a marketing and event planning company, seeks to temporarily employ the Beneficiary[1] as its chief executive officer (CEO) 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 the Beneficiary would be employed in a managerial or executive capacity. On appeal, the Petitioner asserts that it has established by a preponderance of the evidence that the Beneficiary will be employed in an executive capacity.

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 AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner established that the Beneficiary will be employed in an executive capacity. The Petitioner did not claim that the Beneficiary would be

[1] The Beneficiary was previously granted L-1A nonimmigrant status, valid from December 24, 2016, to December 23, 2017, to open a new office for the Petitioner in the United Stated in the capacity of CEO. Her subsequent L-1A nonimmigrant visa extension petition was denied. The current petition seeks a new, temporary two-year period of admission for the Beneficiary.

employed in a managerial capacity; therefore, our analysis will address only the Petitioner's claim that the Beneficiary's proposed position would be in an executive capacity.

The term "executive capacity" is defined as 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 must also 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 executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. *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, its staffing levels, and its organizational structure.

A. Duties

According to the Petitioner, it is "a part of the advertising and event planning industries" and provides the following services:

- Advertising: marketing strategy, social media marketing, analytics, trade marketing, and digital strategies; and
- Event and branding services: trade shows, graphic design, tailored events, post-event follow up, on-site management.

The Petitioner provided a description of the Beneficiary's duties as CEO as follows:

- Establishes the goals and policies of the Company - 10%
    - Works on the development of short and long-term goals and policies concerning what the Company needs to achieve during a specific period of time by defining company cultures and objectives.

  - Establishes guidelines for organizational management of the Company, the Sales Director, and for the delivery and performances of the services rendered by the Company.
- Oversees design, marketing, promotion, delivery and quality of programs, products and services developed by the Sales Director in Conjunction with the Accounting and Legal Department – 10%
  - Reviews, approves and modifies the delivery of the marketing and promotion of services and marketing reports developed by the Sales Director. Ensures that the Sales Director consults with the Legal Department to prevent violation of US Law.
  - Reviews, approves and modifies the campaign strategies and visual communication presented by the Executive Producer. Ensures that the brand standards are being maintained and offers recommendations for progression of the company.
- Analyzes and approves the budgets prepared by the General Manager in conjunction with the Accounting and Legal Department and prudently manages the Company's resources within those budget guidelines according to current laws and regulations – 10%
  - Reviews, approves and modifies the budgets to ensure that the companies [*sic*] resources are being used appropriately and effectively.
  - Creates budget forecast with short term and long-term financial goals for the company based on budget guidelines.
- Directs and oversees the delivery of services by the General Manager and the Executive Producer to ensure the Company's objectives are being accomplished mission – 10%
  - Evaluates the performance of the General Manager and the Executive Producer on a daily basis.
- Directs and oversees the General Manager to ensure the Company's compliance with legal guidelines and internal policies – 10%
  - Evaluates performance of the General Manager in implementing internal guidelines.
- Oversees the Sales Director to accomplish sales goals of the Company – 10%
  - Communicates with the Sales Director and reviews her performance to ensure that she is targeting prospective customers.
- Evaluates the reports prepared by the General Manager and Accounting Division to determines feasibility and return on investment for capital expenditures – 10%
  - Review, approves and modifies the reports prepared by the General Manager with the Assistance of the Accounting division to establish cost cutting measures as needed to ensure that the business is as profitable as it can be.
  - Periodically checks up on capital expenditures to ensure effective and proper use.
  - Develops company's annual budget based on reports prepared by the General Manager and the Accounting Division to show profit/loss and help visualize the company's spending on a large scale.
- Establishes the Company's mission[2] and exercises wide latitude in selecting adequate policies that adhere to her standards – 10%

[2] The record indicates that the company's mission has already been established.

- Defines what [redacted] is about, why it exists, and communicates this to the Company's employees.
- Creates standards for each of the Company's employees and relays them to the General Manager to ensure that the employees adhere to these standards.

- Evaluates requests for capital expenditures to determine feasibility and return on investment – 10%
  - Reviews requests by the Sales Director, Executive Assistant, and Event Coordinator against cost-cutting measures pre-established and approves or denies request for expenditures.
- Represents the company before third parties by interacting with other companies, financial institutions, and media representatives, as required – 5%
  - Appears as spokesperson before banks, heads of other [*sic*] and the media companies to ensure [*sic*].
  - Acts like the goodwill ambassador of the Company.
- Communicating on behalf of the Company, with the parent company, [redacted] and keeping shareholders informed about the Company's needs and growth – 5%
  - Communicates with Shareholders of [redacted] via Skype, telephone conferences, emails and/or in person concerning the financial needs of the Company to obtain additional financing and resources.[3]

In her decision, the Director determined that the proffered position is primarily involved in the routine operational activities of the Petitioner. She also determined that the Beneficiary could not be deemed a function manager because the Petitioner did not establish that she managed an essential function within its organization. Thus, she found that the Beneficiary will not be employed in a primarily managerial or executive capacity in the United States.

On appeal, the Petitioner restates the Beneficiary's job duties set forth in its RFE response and asserts that the Beneficiary will primarily perform high-level duties and will not spend most of her time on day-to-day duties. It states that the Beneficiary is "responsible for overseeing and directing the implementation of the parent company's long short-term plans for the U.S. entity;" that she "directs the management and major components of the organization;" that she establishes the goals and policies of the company; that she has wide latitude in decision-making; and that she receives "only general supervision from higher level executives in the company." The Petitioner asserts that based on the preponderance of the evidence standard, it has established that the Beneficiary will be employed in an executive capacity.

The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 11, 2018. The Petitioner stated in its response to the RFE that it employed a general manager until the end of 2017, and that it is waiting for the Beneficiary to enter the U.S. to hire a new general manager because the position "is so important for the company." However, a petitioner must establish that all eligibility

[3] The Petitioner is a Florida limited liability company with two members, [redacted] S.A. (60%) and the Beneficiary (40%).

requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). The job duties of the proffered position must be reasonable in light of the staffing and organization that existed when the petition was filed. In this case, the majority of the CEO's duties rely on the existence of a general manager, including analyzing and approving budgets prepared by the general manager; directing and overseeing the delivery of services by the general manager; evaluating the performance of the general manager; reviewing, approving, and modifying the reports prepared by the general manager; developing the company's annual budget based on reports prepared by the general manager; and relaying employee standards to the general manager. Without a general manager, it is unclear what duties the Beneficiary will actually perform. It appears that the Petitioner listed its future plans rather than giving an accurate description of the company and the job duties as they existed at the time of filing the petition.

The description of the proffered job also included duplicative and overlapping duties. For example, it states that the Beneficiary will spend 10% of her time analyzing and approving the company's budgets, and will spend an additional 10% of her time evaluating financial reports, including developing the company's annual budget. It is not clear how these job duties substantially differ. In addition, two separate categories indicate that she will direct and oversee the general manager, for a combined total of 20% of her time. The repetitive nature of the duties provided raises questions about the accuracy of the time percentages assigned to each duty. Also, as noted above, the company does not have a general manager, raising further questions about veracity of the duties provided.

The Petitioner's CEO job description also includes duties that, in the absence of additional information or clarification, do not appear to be executive in nature. For example, the Petitioner states that the Beneficiary reviews, approves, and modifies marketing deliverables, reports, and campaign strategies, but does not explain how reviewing and modifying marketing reports and strategies is an executive duty. The Petitioner also states that the Beneficiary reviews, approves, and modifies reports to establish cost cutting measures, and reviews, approves, and modifies the budgets and creates budget forecasts, but it does not explain or demonstrate how these duties fall within the definition of executive capacity.

The job description contains still other incomplete and non-executive duties, such as appearing "as spokesperson before banks, heads of other [*sic*] and the media companies to ensure [*sic*];" acts as a "goodwill ambassador;" "checks up on capital expenditures;" and "approves or denies request for expenditures." The Petitioner did not explain how these duties fall within the definition of "executive capacity." Although the presence of non-qualifying duties is not disqualifying, the Petitioner must demonstrate that the Beneficiary is primarily engaged in executive duties.

For the reasons discussed above, the Petitioner has not established that the proffered position is primarily executive in nature. The record does not sufficiently describe the nature of the Beneficiary's duties in the course of her daily routine, and, to the extent that it did include specific tasks, it is not clear how those tasks would be performed in the absence of a general manager.

Moreover, given the overlapping duties and the number of non-qualifying duties, the Petitioner's description of the Beneficiary's job duties does not clearly delineate what proportion of the position is executive in nature and what proportion is non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The fact that the Beneficiary will direct a business as its senior employee does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(44)(B) of the Act. Whether the Beneficiary is an executive employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" executive. Here, the Petitioner has not established by a preponderance of the evidence that the Beneficiary's actual duties are 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 a managerial or executive 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. It is appropriate 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. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when we note discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

As noted above, the Petitioner must establish eligibility at the time of filing, continuing through adjudication. 8 C.F.R. § 103.2(b)(1). Therefore, the staffing at the time the petition was filed is an important part of determining whether or not the Petitioner has demonstrated that the proffered position is that of an executive. The Petitioner stated on the petition that it had four employees at the time of filing on June 11, 2018.[4] In its supporting letter, the Petitioner stated that it has hired four employees in its first year and will hire additional employees in the following years. The submission included position descriptions for the "employees who would be working under [the Beneficiary]," including:

- a full-time general manager (who has not been hired yet);
- a full-time sales director;
- a full-time executive producer; and
- a full-time executive administrative assistant.

In its organizational chart, the Petitioner showed that the Beneficiary would directly oversee the yet-to-be-hired general manager, the sales director, the executive producer, and the executive

[4] In the second quarter of 2018, which includes the filing date, the Petitioner's quarterly federal tax return confirms that the Petitioner employed four employees – a sales director; an executive producer; an executive administrative assistant; and an event coordinator.

administrative assistant. The chart shows that the general manager would oversee the accounting and legal departments (which are independent contractors) and that the sales director would oversee an event coordinator.

The Director determined that the "positions of the Beneficiary's subordinates are insufficient to elevate the beneficiary to an executive capacity for the U.S. position." On appeal, the Petitioner asserts that the Beneficiary primarily performs high-level duties and does not spend most of her time on day-to-day duties because the Petitioner is adequately staffed with a manager and subordinates who perform the non-executive functions. The Petitioner states that it employs a general manager, sales director, executive producer, event coordinator, and executive administrative assistant to relieve the Beneficiary form non-qualifying duties; and that it contracts an accounting firm and law firm to handle its accounting and legal work. It states that the sales director handles sales and client development; that the executive director is responsible for "executing the advertising needs of the company and visualizing the client's needs;" that the event coordinator "is responsible for performing successful marketing plans, strategic planning, and is responsible for the management and execution of the details of the events executed by [the Petitioner] on behalf of its clients;" that the event coordinator supervises the contractors hired for each event; that the executive administrative assistant handles the administrative duties for the Petitioner; and that the general manager oversees "the daily operational functions of the company." The Petitioner asserts that the Director erred in concluding that the Beneficiary's subordinates do not have any subordinates to supervise and control. It states that the Beneficiary directs the management of the organization or a major component or function of the organization and therefore qualifies as an executive.

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, and they 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.*

Here, although the Petitioner indicates that it has sufficient lower-level staff to allow the Beneficiary to primarily focus on the broad policies and goals of the organization, and to remove her from significant involvement in the day-to-day operations of the company, the record does not support that claim. We must evaluate this claim by taking into account the totality of the evidence, including the duties of the subordinate staff, and the ability of those staff to relieve the Beneficiary from involvement in the day-to-day operations of the business. The Beneficiary's claimed duties, and the operation of the Petitioner's business, rely largely on the presence of a general manager. Without a general manager, the description of the proffered position is not an accurate representation of the

company at the time of filing. It is also not clear who is covering the duties of the general manager[5] in the absence of an individual to fill that role. Rather than focusing on the broad policies and goals of the organization, it appears that the proffered position is involved in the operational day-to-day duties of the company because the general manager, who is supposed to perform such duties, including human resources, budgeting, and administrative duties, does not exist.

A petitioner must establish that the beneficiary's position "primarily" consists of executive duties and that at the time of filing, it had sufficient personnel to relieve a beneficiary from performing operational and administrative tasks. Based on its documented staffing levels at the time of filing, the Petitioner has not shown that it requires the Beneficiary to primarily perform the higher-level planning, policy-making, and business development duties attributed to her. Accordingly, the Petitioner has not established that the Beneficiary will be employed in an executive capacity.

## III. CONCLUSION

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 S-USAA- LLC*, ID# 02288354 (AAO Apr. 2, 2019)

[5] The general manager duties include: determine staffing requirements; hire and train new staff; apply strategic planning to determine objectives; set employee goals and objectives; develop staff; monitor staff performance including performance reviews; evaluate current business processes and systems; plan and implement procedures and systems; establish and maintain controls; coordinate financial and budget activities; and facilitate preparation and analysis of reports.