U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-, INC.

DATE: APR. 16, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology and software services business, seeks to temporarily employ the Beneficiary as the "CEO, CTO, President" of its new office 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 record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity within one year.

On appeal, the Petitioner maintains that the evidence of record is sufficient to establish that the Beneficiary would be employed in a managerial or executive capacity within one year.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, 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 continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.*

The petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope

[1] 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 regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation one year within the date of approval of the petition to support an executive or managerial position.

of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

II. DEFINITIONS

"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.

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 *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision).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

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

The sole issue to be addressed is whether the Petitioner established that the new office would support a managerial or executive position within one year of approval of the petition.

In the case of a new office petition, we review a beneficiary's proposed job duties as well as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial or executive capacity. A petitioner has the burden to establish that it would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the evidence must be considered in analyzing whether the proposed managerial or executive position is plausible considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

A. Duties

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that the Beneficiary will perform the following duties as chief executive officer (CEO) and chief technology officer (CTO):

> Oversee the strategic and day to day operations of the company, formulate business development plans and execute the implementation of same. Will actively prospect and qualify new business. He will produce and/or review sales contracts, rate agreements, handle inquiry calls and provide client proposals. He will be responsible for hiring and firing the company personnel. He will also be responsible for formulating technology innovation plans and implement them.

In a letter in supporting letter, the Petitioner noted that the Beneficiary will be "leading the development of the company's strategic plan of development and the annual operating plans."

In response to a request for evidence (RFE), the Petitioner reiterated the same duties and added that the Beneficiary will be "developing high quality business strategies and plans, leading and motivating subordinates, managing "various internal departments and outside services," and setting the company's goals and "targets to be achieved."

The Petitioner's descriptions of the Beneficiary's proposed duties are overly broad as it has not listed the specific tasks the Beneficiary would perform on a day-to-day basis during the first year of operations and beyond. Many of the listed duties focus on the Beneficiary's authority to staff the company and set its policies, plans and strategies. While such responsibilities are consistent with the Petitioner's claim that he will be the senior employee in the new office, it has not established how these types of duties would require a significant portion of his time on a regular and ongoing basis by the end of the first year. For example, as discussed further below, the Petitioner indicates that the company will operate with a staff of three employees (including the Beneficiary) during its first three years, so it is unclear how he would spend a significant portion of his time on hiring and personnel decisions. Specifics are clearly an important indication of whether a beneficiary's duties will be 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).

Further, while the Beneficiary's stated responsibilities for prospecting and qualifying new business, producing sales contracts and agreements, providing client proposals, and handling inquiry calls are more specific, the Petitioner did not establish that such duties will be managerial or executive in nature or that he would delegate these and related non-qualifying tasks to proposed subordinates within one year. The Petitioner bears the burden of documenting what portion of the Beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991).

We acknowledge that the Beneficiary, as the Petitioner'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 overall direction. However, the position description alone is insufficient to establish that a beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as a petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the proposed position. As noted, a petitioner has the burden to establish that it would realistically develop to the point where it would require the beneficiary to primarily perform duties

that are managerial or executive in nature within one year. Here, for the reasons discussed further below, the Petitioner has not established that these higher-level managerial or executive duties would primarily occupy the Beneficiary's time within one year.

B. Nature of Business, Projected Staffing and Business Plan

If staffing levels are used as a factor in determining whether an individual will be 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. Accordingly, in a petition involving a new office, we evaluate the totality of the evidence to determine whether the proposed duties are plausible considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

As noted, the Petitioner intends to operate an IT and software consulting company focused on web design, branding, front end development, digital marketing, UX/UI design, cloud-based services, and business process, application, and infrastructure services. The Petitioner's business plan includes a proposed organizational chart which indicates that the Beneficiary would supervise a chief operating officer, project management officer, chief information officer, a business acquisition department, and a business operations department. The chart also identifies positions for systems administrators, an administrative assistant, network and infrastructure staff, IT operations staff, an IT support center, an enterprise application employee or team, marketing and sales staff, and accounting and finance staff. However, the business plan did not include a specific hiring or personnel plan, nor did the Petitioner otherwise indicate which positions would be filled during the company's initial year of operations.

In response to the Director's request for evidence, the Petitioner submitted a revised business plan which included more detailed information regarding the company's hiring plan for the first five year of operations. Based on this information, the Petitioner intends to employ the Beneficiary, a chief operating officer, and an IT support employee during its first three years of operation. The submitted evidence indicates that the Petitioner would later add a second IT support employee, an IT developer, a network analyst, and a sales/marketing employee in its fourth year, as well as a chief information officer, systems administrator and bookkeeper in its fifth year. The Petitioner did not provide position descriptions for the proposed subordinate staff.

In the denial decision, the Director determined that the Petitioner did not establish how a staff of two subordinate employees would sufficiently relieve the Beneficiary from significant involvement in the day-to-day operations of selling and providing IT and software consulting services. Therefore, the Director determined that the Petitioner did not demonstrate that it would have a structure in place that would support a managerial or executive position within one year.

On appeal, the Petitioner emphasizes that the Beneficiary will act in an executive capacity because he will "direct the management of major components of functions of the organization" and establish its policies and goals. The Petitioner explains that the major functions of the business include customer services such as system integration, network support, consulting, IT development, and web design, and states that the Beneficiary will direct operating plans related to these areas. The Petitioner also emphasizes that the Beneficiary will be "developing a high performing managerial team" that includes a chief operating officer, who will be responsible for implementing financial planning and annual

operating plans, and a chief information officer "during the first four years." The Petitioner further states that the Beneficiary would, in the alternative, manage the company's essential functions in a managerial capacity.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

The Petitioner defines the company's "essential functions" as customer services such as system integration, network support, consulting, IT development, and web design, but it has not established that the Beneficiary would be primarily managing these activities, rather than being directly involved in the provision of services. As noted, the Petitioner indicates that it intends to employ a chief operating officer and one IT support employee who, based on the position's proposed salary, may be hired on a part-time basis. The Petitioner states that the COO will be "implementing essential functions of the company such as financial planning and annual operating plans," but does not further explain the proposed duties of the position or indicate that this employee would be involved in providing the Petitioner's services. The Beneficiary's resume indicates that he has years of experience in various programming languages, website design, and other technical skills, and would be qualified to provide the Petitioner's services until it adds additional technical staff in its fourth year.

Further, as noted, the Petitioner's initial description of the Beneficiary's duties indicated that he would be performing customer-facing tasks, such as prospecting and qualifying new business, producing sales contracts and agreements, providing client proposals, and handling inquiry calls. The Petitioner does not intend to hire any sales or marketing staff, or any other staff besides the COO and one IT support worker, during the first three years of operations, therefore it is evident that the Beneficiary would be the individual responsible for business development activities, including sales and marketing. If the Beneficiary will be performing these functions, as well as being involved in the provision of services to clients, then the record does not establish how his primary duties within one year would be managing or directing one or more essential functions of the business in a qualifying managerial or executive capacity.

The Petitioner refers to an unpublished decision in which we determined that a beneficiary met the requirements of serving as a function manager even though he was the sole employee. The Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Further, this decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy.

The Petitioner also claims that the Beneficiary will qualify as a personnel manager within one year. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional."[2] *Id.* If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

While the Petitioner indicates that the Beneficiary will have the authority to hire and fire employees, it did not establish that he would be primarily performing managerial duties or that he would otherwise qualify as a personnel manager within one year. The Petitioner did not submit position descriptions or its educational requirements for the two staff to be hired during the first year in support of its claim that the Beneficiary would be supervising subordinate managers, supervisors or professionals

Further, the Petitioner's personnel manager claim, as articulated on appeal, appears to be based on the company's projected staffing levels in its fourth or fifth year, rather than based on the two-person staff the Petitioner intends to employ during its first three years. For example, the Petitioner emphasizes that the Beneficiary would rely on the COO and CIO "during the first four years," and would oversee 10 employees within five years. However, the Petitioner's business plan indicates that the CIO would be hired in the company's fifth year of operations. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows a "new office" operation one year within the date of approval of the petition to support an executive or managerial position; we will not consider the Petitioner's projected staffing levels beyond the first year of operations in determining whether the company would support a managerial position.

As noted, the Petitioner indicated, in the alternative, that the Beneficiary would be employed in an executive capacity. 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, 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 the owner or sole managerial employee.

As noted, the Petitioner submitted a broad description of the Beneficiary's responsibilities that appeared to include a number of non-qualifying client-facing sales and business development duties. It has neither defined his actual proposed duties in sufficient detail, nor has it established that the two

[2] To determine whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

employees expected to be hired within the first year would be able to relieve the Beneficiary from operational and administrative tasks associated with marketing, selling and providing its IT and software services. The Petitioner has not explained how the Beneficiary would be able to primarily focus on the broad goals and policies of the company within a one-year timeframe, rather than participating in the day-to-day operations of the company.

C. Investment in the New Office

In determining whether a new office would support a managerial or executive position, we also consider the information the Petitioner provides regarding the size of the United States investment and the financial ability of the foreign entity to remunerate the Beneficiary and to commence doing business in the United States.

In the denial decision, the Director acknowledged that the Petitioner was expecting a total investment of $70,000 from the Beneficiary's foreign employer, but noted that the Petitioner had only $15,199 in its checking account as of April 2018. Noting that the Petitioner indicated that it has projected expenses of $135,720 alone during its initial year of operations, the Director found that the Petitioner did not establish that it has the funding needed to commence business operations.

On appeal, the Petitioner emphasizes that its new office is expected to achieve sales of $324,000 in sales in its first year, and that its sales, along with the $70,000 investment, would be sufficient to allow the company to carry out its business plan and support a managerial or executive position.

The Petitioner's business plan identifies only $1,000 in start-up costs, which it has designated for "furniture, fixtures and equipment." The Petitioner identified no other costs associated with starting up the business; however, we cannot determine that the stated start-up costs are realistic. For example, the business plan indicates that the Petitioner will spend $0 on marketing in its first year. Yet, its revenue projection of $324,000 is predicated on an assumption that it will complete nearly 40 medium- and large-scale IT projects for customers during the initial year. As noted above, the Petitioner also indicates that it intends to provide these IT services with only one IT support employee who would be earning $22,000 and would likely be working part-time. It is unclear how the company intends to reach the projected level of sales revenue based on its personnel plan, even if the Beneficiary actively participates in the provision of services and delivery of these IT projects. The business plan does not contain sufficient information to support the projected income figures. For this additional reason, the Petitioner has not sufficiently established that it would develop to the point where it can support a managerial or executive position within one year.

IV. 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 F-, Inc.*, ID# 1860086 (AAO Apr. 16, 2019)