U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-M-&S-, INC.

DATE: APR. 26, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner describes itself as a construction company that also imports and exports vehicle parts. It seeks to continue the Beneficiary's temporary employment as its chief executive officer (CEO) and manager 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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that: (1) the related foreign entity continues doing business; (2) the Petitioner will employ the Beneficiary in the United States in an executive capacity; and (3) the Petitioner is sufficiently staffed to support an executive position following the one-year "new office" period.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by disregarding evidence of eligibility and not giving sufficient consideration to the Petitioner's reliance on subcontractors.

Upon *de novo* review, we will dismiss the appeal. We will withdraw the first stated ground for denial, which the Petitioner has overcome by submitting evidence of the parent company's ongoing business activity, with income generated primarily through freight transportation.

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 the three years preceding the beneficiary's application

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for a one year period. 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.

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.*

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in the United States in an executive capacity. The Petitioner does not claim that it will employ the Beneficiary in a managerial capacity; therefore, our analysis will focus on the Petitioner's claim that the Beneficiary will be employed in an executive capacity under an extended petition.

"Executive capacity" means an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

Based on the statutory definition of executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). The Petitioner also must prove that the Beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

When examining the managerial or executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) examines the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Duties

The Petitioner submitted two versions of the Beneficiary's job description. The first version appeared on the petition form; the second was part of the Petitioner's response to a request for evidence:

First version	Second Version
30% – Supervise all day to day operational functions of the company; 5% – oversee sales and marketing; 10% – oversee execution of all contractor work; 10% – manage all employees; 10% – maximize value for stockholders; 10% – Implement strategies to maximize worker productivity; 5% – plan prioritizing customer and organizational goals; 10% – maintain an[d] monitor staffing; 10% – Drive performance measures (including efficiency versus effectiveness)	Negotiate with the members of the Board of Directors to set their expectations in relation to the desired results from [the petitioning company] in the short, mid and long range terms; 5% Establish the policies and initiatives required to ensure that [the petitioning company] will operate as a team working together toward the desired results. 5% Establishes the goals needed to reach the objectives of [the petitioning company] and to accomplish the expectations of the future Directors, Managers and other Members. 5% Coordinates the development and the implementation of the plans, programs, and strategies for generating resources, revenues, and profits for [the petitioning company] ensuring that they will reach the established goals and objectives for the company; 15% Directs employees by coordinating the activities of the different areas of [the petitioning company] and by ensuring that the work is done under the established policies, and focused on the desired and programmed results; 20%

	Reviews and presents activity reports and financial statements to the Board of Directors to determine and to show the progress and status while attaining goals and objectives, in accordance to what was planned for the current conditions; 30% Represents [the petitioning company] before the managers, employees, contractors, clients, potential clients, prospects, suppliers, partners, authorities, community leaders, civic groups, students, and the community in general. 20%

The two job descriptions are very different from one another, but both lack detail. 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). Reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Id.* Here, the Petitioner has not provided the necessary details; neither version of the job description provides much information about the actual tasks that the Beneficiary performs for the company.

In addition to the percentage breakdown reproduced above, the second version of the Beneficiary's job description indicated that he "is directly responsible for directing the General Manager, the Marketing Manager, the Planning and Development and the Operations Manager." None of those positions exist on the Petitioner's organizational chart. In fact, at the time of filing, the Beneficiary was one of only three employees at the petitioning company.

The Director found that the Beneficiary's duties are not primarily executive, and that the Beneficiary does not oversee lower-level managers within the company.[2] The Petitioner's appellate brief does not discuss the Beneficiary's duties except to state that he, "as an executive decision, focused [the company] towards construction projects."

The Petitioner submits a third job description on appeal, which resembles a general template. It states, for instance, that the Beneficiary is "[r]esponsible for the development and implementation of strategies and sets the overall direction of a certain area of the company or organization." It also

[2] We will further address staffing issues below.

contains a number of references to "other executives," which do not exist within the company. None of the three job descriptions provide substantive, verifiable details that can be reliably correlated to activities documented in the record.

The Petitioner has not established that the Beneficiary's duties are primarily executive in nature.

B. Staffing

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

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the 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.*

In the present matter, two grounds for denial relate to the Petitioner's staffing. The Director found that the company did not employ sufficient staff to relieve the Beneficiary from performing non-executive tasks, and that the Petitioner had not met the staffing goals articulated in the new office petition. Because these issues are closely interrelated in this case, both relating to the sufficiency of staffing, we will consider them together.

1. Employees

The Petitioner's organizational chart showed two subordinates who reported to the Beneficiary: a secretary and a manager. The secretary's duties are largely administrative and operational. The Petitioner listed the manager's responsibilities:

- Assist the Chief Executive Officer in formulating and implementing the administrative and operational policies and procedures; 25%
- Responsible for the results from all the activities; directing all the Management and operational aspects of the Operations Division; coordinating the several levels of subcontractors and their employees; exercising authority delegated by the CEO;

Supervise and exercise direction over subordinate employees and subcontractors who perform the day-to-day; [*sic*] 25%

- Responsible for the financial and administrative activities of the company; responsible for controlling and reporting the financial status of the corporation; responsible for official documents of the company; 25%
- Responsible for the sales goals and objectives; directing all the management and operational aspects of the Marketing Division; contacting Clients; promoting sales; exercising authority delegated by the CEO. 25%

The manager's listed job duties are vague, general, and unsupported by documentary evidence showing, for instance, that the manager has authority over subcontractors. The three-person organizational chart did not show an operations division or a marketing division, and the Petitioner has not identified any contractors to whom it has delegated those responsibilities. Contacting clients and promoting sales appear to be first-line operational duties rather than the responsibilities of a manager.

The Petitioner contends that the manager holds a professional position, but she either works part-time or earns minimum wage. (She earned $1288 per month in 2016, which is slightly lower than Florida's 2016 minimum wage for a 37-hour work week.)

The Director found that neither of the Beneficiary's subordinates appear to be managers, and that "the record does not clearly indicate who is responsible for performing the duties associated with maintenance, sales, shipping, etc." The Director also found that the small size of the company did not appear to warrant the organizational structure claimed, in which one of the three employees is an executive and another is a manager. On appeal, the Petitioner states that the company has grown from three employees to six, and submits job descriptions for the six employees.

The Petitioner neither claims nor demonstrates that the three new employees – an assistant, a jobsite inspector, and a collections agent – worked for the company at the time of filing. The initial documentation consistently indicated that the Petitioner had only three employees. While a new office petition can rely on expected growth after the filing date, the new office provisions do not apply to a subsequent petition to extend the Beneficiary's L-1A status. In the current proceeding, the Petitioner must establish that it was already eligible at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Therefore, we need not closely analyze the three newly claimed positions.

We will note, however, that the assistant's job description clearly pertains to a retail store rather than to an import/export firm or construction company. According to that description, the assistant "[t]rains store staff," consults "with [the] retail store manager," and "[a]ttracts customers by originating display ideas." This job description is plainly inapplicable to the Petitioner's claimed business activity, and there is no reason for us to presume that the other five job descriptions contained in the same anonymously prepared document are any more accurate or reliable. (Even if

the Petitioner had shown that it now operates a retail store, and therefore has a legitimate need for the position described, the Petitioner had no such store at the time of filing and therefore the opening of the store would amount to a substantial change of material circumstances, warranting the filing of a new petition that could properly take the new facts into account.)

The Petitioner has not shown that its in-house employment structure warrants an executive position. The Petitioner asserts, on appeal, that it "relies on sub-contractors to complete [its] projects." We will address this assertion below.

2. Subcontractors

Apart from the two employees, the Petitioner's organizational chart also listed subcontractors who performed the following tasks, as described by the Petitioner:

- Tile and Laminate Installation
- Shower Doors and Blinds
- Granite Supplier and Installation
- Air Conditioning
- Appliances Repair
- Carpet Cleaning
- Painting
- Wallpaper Installation

The listed subcontractors performed a wide range of construction-related functions, but not all such functions. A June 2016 invoice lists only one item: "Change roof, $17,000." None of the named contractors are identified as roofers or carpenters. Other invoices list additional tasks, such as plumbing and pressure washing, for which the Petitioner has not identified subcontractors.

In the denial notice, the Director acknowledged the Petitioner's assertion that it relies on subcontractors, but found that the Petitioner had not established that subcontractors relieve the Beneficiary and his subordinate manager from having to primarily perform non-qualifying operational or administrative tasks.

On appeal, the Petitioner submits copies of recent (post-filing) service agreements with two of the subcontractors identified on the organizational chart, and a third company (which installs gutters) not named there. The agreements show that the Petitioner hires the subcontractors for individual jobs, using their services intermittently rather than continuously. The service agreements do not establish that any employee of the petitioning entity has managerial or executive authority over the subcontractors' employees.

The Petitioner secured approval of a new office petition based on the premise that it would import and export vehicle parts, and operate a construction company, within a year after approval. The Petitioner's only fully documented business activity appears to have been as an occasional referral

service, dispatching outside contractors to job sites; the Petitioner has not shown that is a licensed construction contractor or that it directly employs any construction workers. Likewise, the Petitioner has not documented any import/export activity or identified any employees directly engaged in that activity. The Petitioner has not shown that its minimal structure at the time of filing warranted an executive position.

III. DOING BUSINESS

A new office extension petition must include evidence that the petitioner has been doing business for the previous year. 8 C.F.R. § 214.2(l)(14)(ii)(B). "Doing business" means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad. 8 C.F.R. § 214.2(l)(1)(ii)(H).

The Petitioner reported gross receipts of $676,331 on its 2015 income tax return, and a profit and loss statement reported $475,209 in income from January 1 through September 16, 2016. The Petitioner has not fully documented receiving this claimed income or shown what services it provided in exchange for it. The Petitioner claims to have "established itself as a profitable U.S. company facilitating trade between [the] South American and the American market," but the Petitioner did not document this claimed activity. Although the Petitioner claims to do business in part as a construction company, the Petitioner did not submit a copy of a contractor's license to show that it is authorized to perform construction work in Florida.

While the 2016 balance sheet shows $475,209 in income, the accuracy of the balance sheet is in question. The same document indicates that the Petitioner paid $20,700 in salaries from January to September 2016, but tax and payroll documents in the record show $7576 in salaries paid every month since April 2016. This very significant discrepancy casts doubt on the reliability of the profit and loss statement. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of the Petitioner's evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Also, other key claims by the Petitioner lack documentary support.

The Petitioner documented only a fraction of the $475,209 it claims to have earned in 2016. Copies of four invoices dated between February and June 2016 described various construction or renovation jobs, billed for an aggregate total of $48,041.11, and photocopies of seven checks payable to the Petitioner and dated between December 2015 and June 2016, totaling $59,266.05. Four invoices issued over the course of four months do not appear to show regular, systematic, and continuous provision of services. The invoices are numbered between 354 and 419, but we will not infer the existence of additional invoices, because the invoices are not numbered chronologically:

Number	Date
354[3]	2/14/2016
401	6/1/2016
409	4/22/2016
419	6/13/2016

Also, the most recent invoice dates from eight months before the petition's filing date. We acknowledge that the Petitioner's profit and loss statement shows additional income beyond these invoices, but the Petitioner did not directly document any business activity between June 2016 and February 2017.

Given the Petitioner's inconsistent and uncorroborated assertions regarding the nature and extent of its business activity, we find that the Petitioner has not met its burden of proof to show regular, systematic, and continuous provision of services at the time of filing. The Petitioner has not established that it was doing business, as the regulations define that term, at the time of filing and during the previous year.

IV. CONCLUSION

The Petitioner has not established that it will employ the Beneficiary in an executive capacity, or that it was doing business during the months leading up to, and including, the filing date.

ORDER: The appeal is dismissed.

Cite as *Matter of O-M-&S-, Inc.*, ID# 826880 (AAO Apr. 26, 2018)

[3] Among the items billed on invoice #354 are $298.82 for "meat for party," $269.97 for "food for party," and $45.98 for "ice." It is not clear why a construction contractor would bill these expenses to a customer.