U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-E- INC.

DATE: AUG. 4, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a three-employee construction company, seeks to extend its new office petition and 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 of the Vermont Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary will be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner asserts that the Beneficiary qualifies as an executive as he does not directly perform the routine functions of the company.

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 managerial or executive capacity for one continuous year within three 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 or executive capacity. Section 101(a)(15)(L) of the Act.

The Act defines the term "executive capacity" as an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function thereof; 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.

The Act defines the term "managerial capacity" as an assignment within an organization in which the employee primarily manages the organization or a department, subdivision, function, or component; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function; if the employee directly supervises other employees, has the authority to take personnel actions, or if no other employee is directly supervised, functions at a senior-level within the organization 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.

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 1533.

Additionally, 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. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

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). Beyond the required description of the job duties, we also examine 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. Additionally, 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.

A. Duties

The Petitioner, on the Form I-129, Petition for a Nonimmigrant Worker, provided a general description of the Beneficiary's proposed duties under the extended petition. The Petitioner did not describe any duties in relation to its construction business. For example, the Petitioner asserted that

the Beneficiary would "[d]evelop a strategic plan to advance the company's mission and objectives," "[o]versee company operations to insure efficiency, quality, service, and cost effective management," "[p]lan, develop, and implement strategies for generating resources and/or revenues," and [a]pprove company operational procedures, policies, and standards." These general assertions do not convey an understanding of the Beneficiary's actual day-to-day duties. Additionally, although the Petitioner refers to evaluating executives and directing policy-planning committees, the record does not include evidence that the Petitioner employs executives or has established policy-planning committees.

In response to the Director's request for evidence, the Petitioner provided an overview of the Beneficiary's duties and listed the amount of time he devoted to those duties. The Petitioner stated that the Beneficiary spent 5 percent of his time ensuring the filing of legal and regulatory documents and monitoring compliance with relevant laws and regulations; 10 percent of his time helping top management determine values, mission, vision, and goals, as well as evaluating the Petitioner's relevance to the community; 20 percent of his time focusing on long range strategic issues, managing the company's due diligence, and working with staff to ensure their involvement and to motivate them to give their best; and 20 percent of his time on community relations including marketing and communications, acting as the Petitioner's advocate on issues relevant to it, its services and constituencies. This description also lacks detail regarding the Beneficiary's specific tasks for the Petitioner's construction business. The duties as generally described do not provide sufficient information to ascertain whether the Beneficiary will perform the marketing and communication tasks, the due diligence including filing legal and regulatory documents, and the first-line supervisory duties of the staff. It is not possible to ascertain whether these duties include executive, managerial, or non-qualifying duties.

The Petitioner also indicated that the Beneficiary will spend 35 percent of his time providing general oversight, managing the day-to-day operations, assuring program quality and organizational stability, assuring a work environment that recruits, retains, and supports quality staff and volunteers, and specifying accountabilities for management personnel (whether paid or volunteer) and evaluating their performance. This additional information does not detail the tangible tasks necessary to manage the Petitioner's day-to-day operations, and does not explain the Petitioner's use of volunteers in its construction business. The Petitioner also stated, generally, that the Beneficiary would spend 10 percent of his time on financing and overseeing the fiscal activities of the organization. However, the record does not include evidence that the Petitioner employs anyone to actually perform the routine tasks associated with its financial matters, other than the Beneficiary.

The lack of detail regarding specific duties related to the Petitioner's construction business, as well as references to volunteers, when the Petitioner does not explain or claim it uses volunteers, raises questions regarding the accuracy, reliability, and origin of the job descriptions and the allocation of the Beneficiary's duties and responsibilities specified therein.

On appeal, the Petitioner asserts that the Beneficiary duties "clearly include directing and managing the [P]etitioner's financial, legal, management, administrative [], and establishing financial and

budgetary plans and goals." However, reciting the 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 Petitioner has not provided sufficient detail or explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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).

Moreover, the fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial or executive in nature.

B. Staffing

The record includes a copy of the Petitioner's organizational chart which shows the Beneficiary as the president and identifies a purchasing manager and a client relationship manager reporting directly to him. The chart also includes a project manager to be hired and shows that an external team of project-based contractors report to the project manager. As the Petitioner did not employ the project manager when the petition was filed, this position will not be considered. The Petitioner must establish that all eligibility 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 Petitioner does not include position descriptions for the employees identified as the purchasing manager and the client relationship manager. Accordingly, we cannot find that the duties performed in either of these positions will relieve the Beneficiary from performing the necessary sales, operational, financial, and administrative tasks necessary to run the Petitioner's construction business. We have also reviewed the Petitioner's agreements with several different individuals to perform general construction tasks that the Petitioner submits on appeal. The contracts are for limited services, such as installing granite counters or fixing stone around a sign at service stations, dismantling a freezer at a restaurant, and other remodeling tasks for various businesses. Although the Petitioner has submitted evidence that it uses subcontractors to perform some of the actual construction tasks, the record does not include evidence that the subcontractors, or the Petitioner's other employees, negotiate, market, and promote, the Petitioner's business and perform the Petitioner's other routine financial, operational, and administrative tasks.

To establish executive capacity under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to this definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather

than the day-to-day operations of the enterprise. One does not qualify as an executive under the statute simply because one "directs" the enterprise as the sole managerial employee. Here, the Petitioner has not established how any of the positions held by the Beneficiary's subordinates are managerial positions. Thus, the record is deficient in establishing that the Beneficiary directs a subordinate level of managerial employees and will perform primarily executive duties.

Although the Petitioner does not explicitly assert that the Beneficiary's duties are primarily managerial duties, we briefly note that to establish managerial capacity, the Petitioner may demonstrate that the Beneficiary will perform duties primarily as a personnel manager or a function manager. 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." Section 101(a)(44)(A)(iv) 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.[1]

The Petitioner's descriptions of the Beneficiary's duties do not indicate that the Beneficiary will supervise other employees. Although the Beneficiary may very well be the only individual responsible for the supervision of the Petitioner's two employees and the independent contractors, the Petitioner's organizational structure lacks the complexity to elevate the Beneficiary to a position higher than a first-line supervisor of non-professional employees.[2] Therefore, the Beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions. *See* section 101(a)(44)(A)(iv) of the Act.

On appeal, the Petitioner asserts that a small company with a limited number of employees may still support a managerial or executive position and again refers to its retention of independent contractors for its construction projects. We recognize that 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 if staffing levels are used as a factor in

[1] The Petitioner does not claim and the record does not establish that the Beneficiary will perform primarily function manager duties. We note, for information purposes, that the term "essential function" is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a petitioner must clearly describe the duties to be performed in managing the essential function, or more specifically, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). The record does not include this information.

[2] When evaluating whether a beneficiary manages professional employees, we 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"). Therefore, we focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity. The record here does not include any evidence that the Beneficiary's subordinates are employed in professional positions.

determining whether an individual is acting in a managerial or executive capacity. *See* section 101(a)(44)(C) of the Act. However, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the Petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. Here, the Petitioner has not established that its business has the necessary staffing to sufficiently relieve the Beneficiary from performing its routine day-to-day operational, financial, and administrative tasks. Accordingly, the Petitioner is ineligible for an extension.

The record documents that the Petitioner is doing business, but it does not contain sufficient probative evidence of the Beneficiary's claimed work in a managerial or executive capacity for the petitioning entity. A review of the totality of the record does not establish that the Beneficiary's work will be primarily managerial or executive in nature. The Petitioner has not overcome the Director's determination on this issue.

III. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary will be employed in a primarily managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of A-E- Inc.*, ID# 545290 (AAO Aug. 4, 2017)