U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-F-U- LLC

DATE: AUG 5, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an online educational course provider, seeks to temporarily employ the Beneficiary as the "Managing Director/Chief Operating Officer" of its new office[1] 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 Texas Service Center denied the petition on multiple grounds concluding that the record did not establish that: (1) the Petitioner had secured sufficient physical premises for its new office in the United States; (2) the Beneficiary is employed abroad in a managerial or executive capacity; and (3) the Beneficiary would be employed in a managerial or executive capacity in the United States within one year.

On appeal, the Petitioner asserts that it has rented a shared office space that is sufficient for its first year office needs. Further, the Petitioner asserts that the Beneficiary acts as the foreign employer's chief executive officer and that he qualifies as an executive and function manager. Lastly, the Petitioner contends that the Beneficiary will primarily perform executive level duties in the United States within one year and states that it has submitted sufficient evidence to demonstrate its investment in the new venture.

Upon *de novo* review, we will dismiss the appeal. We will, however, withdraw the Director's finding with respect to whether the Petitioner had secured sufficient physical premises to launch its business.[2]

[1] The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

[2] We conclude that the Petitioner has submitted adequate evidence to demonstrate that it more likely than not acquired sufficient physical premises to begin its initial operations in the United States.

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 their 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 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. MANAGERIAL OR EXECUTIVE CAPACITY WITH THE FOREIGN EMPLOYER

We will first analyze whether the Petitioner established that the Beneficiary is employed abroad in a managerial or executive capacity.

"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 statute defines an "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 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.

When examining the foreign managerial or executive capacity of a given beneficiary, we will review the petitioner's description of the foreign job duties. The petitioner's description of the foreign 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 examine the foreign employer's organizational structure, the duties of a beneficiary's foreign subordinates, the presence of foreign employees to relieve a beneficiary from performing operational duties, the nature of the foreign business, and any other factors that will contribute to understanding a beneficiary's actual duties and role abroad. Accordingly, we will discuss evidence regarding the Beneficiary's foreign job duties along with evidence of the nature of the foreign employer's business, its staffing levels, and its organizational structure.

A. Duties

Based on the definition of managerial or executive capacity, the Petitioner must first show that the Beneficiary performs 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 is *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the foreign employer's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner indicated that the Beneficiary has acted as the foreign employer's managing director and chief executive officer since 2012 and stated that "under his management the company developed online courses which to date had over 15,000 subscribers worldwide." In a business plan submitted with the petition, the Petitioner further explained that the founding members of the foreign employer, including the Beneficiary, had also established "[redacted] University" which "acts as a partner institution and marketing agent for online programs of [the foreign employer and Petitioner] and the US partner institutions." In another business plan provided in response to the Director's request for evidence (RFE) the Petitioner indicated that the foreign employer is "a real estate company established in [redacted]."

Furthermore, the Petitioner provided a resume for the Beneficiary indicating that from 2012 to the present he had been the managing partner and cofounder of [redacted], a "research and development company." It also submitted evidence reflecting that the Beneficiary had been enrolled in a postgraduate executive management program at the [redacted] from Fall 2014 through Spring 2018.[3] Lastly, a foreign employer support letter explained that the Beneficiary had also for the "last two years…worked pro bono for [redacted] University as a course developer" and the Petitioner provided supporting emails substantiating this assertion.

The Petitioner provided the following duties for the Beneficiary in his asserted capacity with the foreign employer:

- setting of objective and administration of the company (19%),
- allocation of responsibilities to the heads of departments (15%),
- establishing synergy "pet talk" (3%),
- building interpersonal relationships with upper level management of vendors, content providers, and management of [the foreign employer] (22%),
- analysis of results as reported by the heads of departments (11%),
- performance audits (22%),
- analysis of financial information as reported by CFO (8%).

The Petitioner has not submitted a sufficiently detailed duty description that describes the Beneficiary's day-to-day managerial or executive level duties abroad or which credibly establishes that he devotes his time primarily to qualifying tasks. Specifics are clearly an important indication of whether a beneficiary's duties are primarily managerial or executive in nature, otherwise meeting the

[3] The petition was filed on July 16, 2018.

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 Beneficiary's duty description includes several generic duties, such as "allocation of responsibilities," "setting objectives," and "building interpersonal relationships," that could apply to any manager or executive acting in any business or industry and they do not provide insight into the actual nature of his role abroad. The Petitioner provided insufficient examples and little supporting documentation to demonstrate the Beneficiary's performance of qualifying duties abroad, such as objectives he set, administration of the company he handled, or responsibilities he allocated to department heads. Likewise, the Petitioner did not adequately detail or document relationships he built with vendor upper management or content providers, performance audits he conducted, or financial information he assessed and took action on. Further, the Petitioner stated that the Beneficiary spends a portion of his time "establishing synergy pet talks," but it did not sufficiently explain this task. The lack of detail and documentation regarding the Beneficiary's asserted foreign capacity is particularly questionable given that the Petitioner asserts that he has acted in this role since 2012.

We acknowledge that the Petitioner did submit three translated foreign employer memorandums meant to demonstrate the Beneficiary making personnel decisions abroad; but, we do not find these asserted letters credible. The letters purport to show the Beneficiary interviewing and hiring candidates for the positions of public relations director, head of security, and chief accounting officer. However, each letter is undated they include suggestions on salaries and instructions to conduct background checks, but the letters are not specifically addressed to anyone. The letters also appear questionable given that the Petitioner claims that the Beneficiary is the managing director and majority owner of the foreign employer, yet they only reflect him making suggestions as to the salaries of his asserted subordinates. In total, we did not find that these letters credibly demonstrate that the Beneficiary primarily performs qualifying managerial or executive level tasks abroad.

In contrast, the Petitioner provided supporting documentation reflecting the Beneficiary performing non-qualifying operational tasks abroad. For example, the Petitioner submitted copies of a chat session the Beneficiary conducted with a client and him coordinating a group of students from [redacted] to attend a proposed business analytics program. Further, provided emails reflect the Beneficiary discussing enrolling foreign students in a business master's program at a university in [redacted] In an email from the Beneficiary to a professor at a [redacted] university the Beneficiary states "we are not only generating leads and applicants, but also filling cohorts with students who are qualified and persist to graduation." As such, the provided chat session and emails indicate that the Beneficiary is performing non-qualifying operational duties, such as arranging courses and programs for clients and generating leads. By comparison, the record includes little credible evidence reflecting the Beneficiary delegating these type of non-qualifying operational tasks to his claimed subordinates abroad.

Even though the Beneficiary holds a senior position within the foreign employer, the fact that he manages or directs the 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 foreign position be "primarily" managerial or executive in nature. *Id.* The Beneficiary may exercise discretion

over the foreign employer's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making; however, the position descriptions alone are insufficient to establish that his actual duties abroad are primarily managerial or 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, the reasonable needs of the organization are taken into account in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

The Petitioner submitted a foreign organizational chart indicating that the Beneficiary oversees several subordinate managers and operational employees, including a "real estate operations manager for [redacted]" supervising a security employee and a sales and marketing and advertising employee overseeing two salesmen and an ad copy employee. In addition, the chart reflected that the Beneficiary supervises a finance employee overseeing "accountants/bookkeepers," a public relations employee supervising two customer support positions, an employee titled "co-director of [redacted]," and a chief legal officer overseeing a legal department employee. Meanwhile, the chart appears to indicate that the company has an educational content department including two curriculum editors.

Meanwhile, the Petitioner also provided a listing of the foreign members of its organizational chart, including their duties, educations, and salaries. However, this list of employees reflected different titles for the foreign employees than those provided in the organizational chart. For example, in the listing of the foreign employees, the real estate operations manager for [redacted] was referred to as the co-director, the finance employee as the chief accounting officer, and the co-director of [redacted] as the development director. In addition, in the listing of foreign employees the chief legal officer was described as the "head, human resources division & legal office," the security employee as the head of security, and the public relations employee as the "Public Relations Director (Educational Division)."

The listing of employees also included several employees who were not identified by name in the foreign organizational chart, including: a legal office specialist, a head of design (educational division), a designer/web-designer, a head of contextual advertising, a contextual advertising specialist, a semantics specialist, a website developer (educational division), a prototypes of webpages specialist, and another designer. Lastly, the employee list included three "hourly workers," a programmer, an educational content editor, and an educational/legal documents editor.

Throughout the record and now on appeal, the Petitioner asserts that the Beneficiary qualifies as an executive abroad. 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 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. 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.*

However, the supporting foreign employer documentation provided by the Petitioner leaves question as to whether the Beneficiary acts in an elevated position within a complex organizational hierarchy as reflected in the submitted foreign organizational chart. First, there appear to be several material inconsistencies between the foreign employer's asserted organizational chart and its listing of foreign employees. For instance, the position titles for several of the employees differ significantly from the organizational chart to the employee list including their duties, educational levels, and salaries. Likewise, the organizational chart includes several positions that do not appear on the list of employees, including the two sales positions, the ad copy position, "accountants/bookkeepers," and two "customer support" positions. Meanwhile, the listing of foreign employees includes several positions that bear little apparent relation to the foreign organizational chart, including the designers/web-designers, the contextual advertising specialist, the semantics specialist, website developer, prototypes of webpages specialist, and the programmer. In fact, the employee list appears to include several information technology positions while the organizational chart appears to include none.

Furthermore, the record includes other discrepancies that leave uncertainty as to the foreign employer's claimed organizational chart. The Petitioner provided a [redacted]ation document listing the foreign employer's contributions to a social insurance fund for workers dating from the third quarter of 2018. This document reflected that the foreign employer only had three employees. Further, a foreign employer tax income statement for 2018 indicated that the "number of physical parties that received an income" was only four. The Petitioner also provided foreign employer bank account records from June through September 2018; however, this documentation reflects payments to only four employees during these months, the Beneficiary and the asserted chief financial officer, the director of development, and head of security.

The Petitioner also provided a confusing array of business activities for the foreign employer and the Beneficiary. The Petitioner asserted that the foreign employer had "developed online courses which to date had over 15,000 subscribers worldwide," while elsewhere in indicated that it had established [redacted]University" which "acts as a partner institution and marketing agent for online programs of [the foreign employer and [Petitioner] and the US partner institutions." However, it submitted little supporting documentation to substantiate it had established this level of online courses, a university, subscribers, or that it had ongoing U.S. partner institutions as claimed. In addition, the Petitioner also indicated elsewhere on the record that the foreign employer was a "real estate company," and provided claimed documentation reflecting properties it owned in [redacted]along with lease agreements. It also submitted photographs showing an apparent medical facility and a ballerina studio; however, these business operations are left vague and insufficiently explained.

Moreover, the Petitioner provided a complicated group of activities for the Beneficiary during his claimed foreign employment, including him acting as the chief executive officer of the foreign employer, as the partner and cofounder of [redacted]" a "research and development company," as well as him being enrolled in a postgraduate executive management program at [redacted]as an F-1

student from the Fall of 2014 through Spring 2018. Lastly, the Petitioner further explained in a foreign employer support letter that the Beneficiary had also for the "last two years...worked pro bono for [redacted] University as a course developer" and provided supporting emails supporting this assertion. In light of the other discrepancies we have noted above and the lack of substantiating evidence of the foreign employer's organizational chart and operations, the various activities of the Beneficiary only leave further question as to whether he acted in his claimed executive role with the foreign employer. The Petitioner must resolve this inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Beyond this, the Petitioner submits little supporting evidence to substantiate the Beneficiary's asserted subordinates acting in their claimed positions, including foreign payroll documentation or other similar evidence. The Petitioner also provided vague duty descriptions for the asserted members of its foreign organizational chart. For instance, the Petitioner stated that one of the foreign co-directors was tasked with "operations and resources management," that the chief financial officer was responsible for "accounting and finance, reporting functions," and that the development director focused on "maintaining operations by planning, implementing, and evaluating work processes." The Petitioner submitted similarly vague duty descriptions for all of the claimed members of the foreign employer's organizational chart. These vague foreign employee duty descriptions provide little insight to their actual roles and they do not sufficiently substantiate these positions.

Therefore, in sum, the Petitioner has provided inconsistent and insufficient evidence to establish that the Beneficiary acts in an executive capacity with the foreign employer; or that he acts in an elevated position within a complex organizational hierarchy and that he is primarily focused on the broad goals and policies of the organization rather than its day-to-day operations. Section 101(a)(44)(B) of the Act.

On appeal, the Petitioner points to *Matter of Z-A-*, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016) as persuasive in demonstrating the Beneficiary's eligibility as a function manager abroad. 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 manages 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 primarily *manages*, as opposed to *performs*, the function; (4) the beneficiary acts at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary exercises discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

In this matter, the Petitioner has not adequately described, or provided sufficient evidence to demonstrate, that the Beneficiary manages an essential function. First, the Petitioner only generally refers to the concept of a function manager and does not explain describe the Beneficiary's function or why it is essential. In fact, the Petitioner asserts that the Beneficiary acts as the majority owner, managing director, and chief executive officer of the foreign entity; given this, it is not clear without further explanation how he qualifies as a function manager. Further, as noted, the Petitioner has

submitted a vague duty description for the Beneficiary and it has not sufficiently substantiated with supporting documentation that he is primarily tasked with qualifying managerial duties. In addition, as we have discussed at length in this decision, there are several discrepancies on the record that leave question as to the foreign employer's asserted organizational chart and business operations and these have not been resolved with independent, objective evidence.

In contrast, in *Matter of Z-A-, Inc.*, Adopted Decision 2016-02, the petitioner provided sufficient evidence to demonstrate that the Beneficiary was supported by at least eight staff members and that he acted in a high level corporate position reviewing and monitoring the company's substantial sales activities. Here, the same cannot be said, as the Petitioner submits a conflicting foreign organizational chart and employee listing, vague duty descriptions for the Beneficiary's foreign subordinates, foreign tax and financial documentation that does not support its number of employees, and other inconsistent evidence that does not sufficiently corroborate that he acts as a function manager. As such, the Petitioner has not demonstrated that the Beneficiary qualifies as a function manager abroad.

For the foregoing reasons, the Petitioner has not established that the Beneficiary is employed in a managerial or executive capacity abroad.

III. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The next issue we will address is whether the Petitioner established that the Beneficiary would be employed in a managerial or executive capacity in the United States within one year of an approval of the petition. Because of the dispositive effect of the above finding of ineligibility; namely, our affirmation of the Director's conclusion with respect to the Beneficiary's asserted foreign managerial or executive capacity, we will only briefly address the issue pertaining to his proposed employment in the United States.

Upon review, we find that the Beneficiary's U.S. duty description is also overly vague as it does not effectively convey his day-to-day managerial or executive duties within one year. The Beneficiary's U.S. duty description also includes several general tasks that could apply to any manager or executive acting in any business or industry; such duties do not provide insight into the actual nature of his role. The Petitioner provided insufficient specifics related to how the Beneficiary's day-to-day duties fit specifically within the company's first year business plans. For instance, the Petitioner provided few examples of the actions the Beneficiary would take during its first year of operation to assure that the business develops as necessary to support him in a managerial or executive capacity within one year. In fact, the Petitioner did not submit a comprehensive duty description for the Beneficiary in the United States, including the percentages of time he would devote to each of his tasks. Again, specifics are clearly an important indication of whether a beneficiary's duties are primarily managerial or executive 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).

In the case of a new office petition, we also review the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial 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 of the petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed manager position is plausible based on 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).

In a support letter submitted with the petition, the Petitioner provided an organizational chart reflecting that the Beneficiary would continue the oversee members of the foreign organizational chart in his capacity in the United States, including the part owner of the Petitioner and the co-director/director of development (his wife). The chart also reflected the Beneficiary overseeing a legal department headed by counsel in this matter, a director of educational content, a "CPA finance," and a public relations department head. Similar to the foreign employer organizational chart, it included a sales/marketing department with subordinate salesmen, accountants/bookkeepers underneath the "CPA finance," a "customer support/PR" subordinate to the public relations employee, and editorial and curriculum staff within the educational content department.

However, beyond vaguely stating it would hire the aforementioned employees during the first year, it did not clarify when during the first year it would hire them or how it would support their salaries within one year. The Petitioner also did not submit duty descriptions or expected educations levels for these projected employees. The Petitioner also provided a vague business plan that does not sufficiently demonstrate it would support the Beneficiary in a managerial or executive capacity within one year. For instance, the Petitioner indicated in its financial projections that it would devote only $102,400 to salaries and wages during the 2020 fiscal year, its projected second year of operation, a seemingly insufficient amount to support its robust projected organizational chart, particularly given the Beneficiary asserted salary of $60,000. In sum, the Petitioner has provided vague and insufficient hiring plans that do not establish that it would be adequately staffed to support the Beneficiary in a managerial or executive capacity within one year.

For the above stated reasons, the Petitioner did not establish that the Beneficiary would act in a managerial or executive capacity within the first year.

IV. CONCLUSION

The appeal must be dismissed because the Petitioner has not established that Beneficiary is employed in a managerial or executive capacity abroad or that he would be employed in a managerial or executive capacity in the United States within one year.

ORDER: The appeal is dismissed.

Cite as *Matter of F-F-U- LLC*, ID# 4452668 (AAO Aug. 5, 2019)