U.S. Citizenship and Immigration Services

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

MATTER OF A-F-C- CORP.

DATE: AUG. 9, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a grocery store, seeks to continue the Beneficiary's temporary employment as general 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 California Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. On appeal, the Petitioner states that the Director did not give the Petitioner a fair opportunity to prevent the denial of the petition, because a prior request for evidence (RFE) did not raise the principal issue cited in the denial notice.

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. 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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period from November 16, 2016 until October 31, 2017. 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.

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

## 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.

"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 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.

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

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity.

As a threshold issue, we note that the Petitioner indicated, on the petition form, that the Beneficiary would open a new office. As a result, the Director adjudicated the petition under the terms established for new office petitions. By definition, a new office has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The requirements for a new office petition, set forth at 8 C.F.R. § 214.2(l)(3)(v), are different than those for petitions from more established businesses.

The petition before us, however, is not truly a new office petition. Rather, the petition seeks to *extend* status that the Beneficiary initially obtained through a *prior* new office petition. Because a new office must have been doing business for less than one year, a subsequent petition can extend the Beneficiary's L-1A status, but cannot extend the Petitioner's designation as a new office.

Because the Petitioner is no longer a new office, the Director should not have adjudicated the petition under the special standards of a new office petition. Nevertheless, the impact of this error did not affect the Petitioner's ability to prepare its appeal as the specific points raised by the Director (concerning the Beneficiary's duties and the company's staffing) are also relevant to new office extension petitions. Therefore, we consider the erroneous "new office" reference harmless and will consider the petition *de novo* under the appropriate provisions.

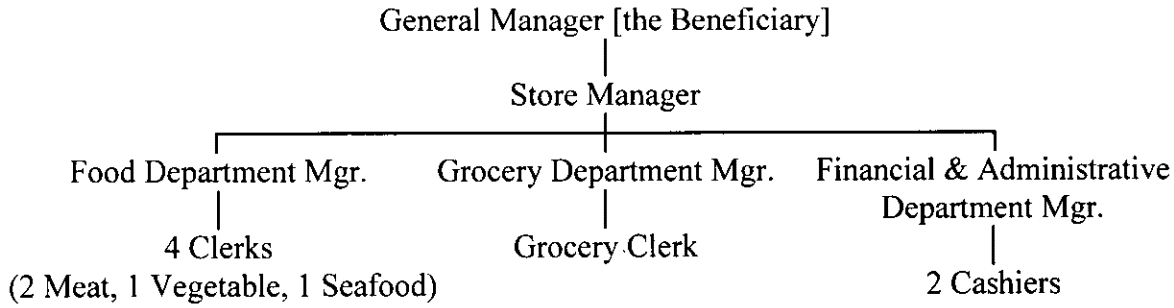
We note that the Petitioner organized its initial submission in accordance with the requirements of a new office extension (found at 8 C.F.R. § 214.2(l)(14)(ii)), rather than the requirements of a new office petition. Also, the RFE listed the "Requirements for New Office Extensions." Therefore, the Petitioner is aware of the proper standards for such cases.

A. Staffing

The Director's decision focused on the Petitioner's staffing, and therefore we begin our discussion on that issue. We review the totality of the record when examining 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. If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, we 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.

A petitioner seeking an extension after a new office petition for a manager or executive must describe the staffing of the new operation, including the number of employees and types of positions held, and submit evidence of wages paid to employees. 8 C.F.R. § 214.2(l)(14)(ii)(D).

The Petitioner's organizational chart showed the following structure at the time of filing:



The chart also showed a Marketing Department with a manager, marketing specialist, and customer service specialist, but all those positions were vacant at the time of filing.

The Petitioner stated that the store manager would direct, oversee, and supervise the day-to-day operation of the store.

In the RFE, the Director requested additional information about the subordinate positions, and tax and payroll documentation, to establish that the company "has an organizational structure sufficient to elevate the beneficiary to a position that is primarily managerial or executive in nature." The Director also stated that the Petitioner had not established that the Beneficiary's higher-ranking subordinates "are primarily involved with managerial or supervisory duties." In response, the Petitioner stated that it "currently employs 9 employees" in an "organizational hierarchy [that] clearly relieves the beneficiary from the performance of day-to-day duties and supervising non-professional employees."

The Petitioner's response to the RFE showed that three additional positions (grocery department manager, grocery clerk, and financial and administrative department manager) had become vacant, leaving two departments entirely unstaffed and three out of four department manager positions unfilled. The Petitioner did not explain who performed the duties of the department manager positions in the absence of those managers.

Tax and payroll records from before and after the filing date showed that the Beneficiary earned $5000 per month, and the store manager earned $1491 per month.[2] Each remaining subordinate, including those with managerial titles, earned $1020 or less per month.

In the denial notice, the Director concluded that most of the employees appear to "work part-time or less than part-time," because their salaries are too low for full-time employment at California's 2017 small-business minimum wage of $10 per hour. The Director found that the Petitioner had not established that the company would be sufficiently staffed to relieve the Beneficiary from primarily performing non-qualifying operational tasks.

On appeal, the Petitioner protests that "the bases for the proposed denial were not specified in the RFE," and therefore the "Petitioner was not able to have adequate notice and sufficient information to respond." The Petitioner offers no other argument on appeal.

The regulations do not require the Director to warn the Petitioner in advance of all possible grounds for denial. If the Petitioner's initial evidence does not demonstrate eligibility, then the regulations

[2] The Director concluded, from payroll records, that the store manager earned only $6707 per year, but that employee began working in August 2017; the stated figure represents only four and a half months' pay. The store manager's annual salary is actually $17,886 per year.

give the Director the discretion to request further evidence or simply deny the petition. *See* 8 C.F.R. § 103.2(b)(8)(ii) and (iii).

In this instance, the Director *did* issue an RFE, and then determined the evidence submitted in response did not establish eligibility. In such a case, the Director is under no obligation to issue a second RFE or a notice of intent to deny.

The Petitioner cites 8 C.F.R. § 103.2(b)(8)(iv), which requires that a request for evidence must specify the type of evidence required, sufficient to give the petitioner adequate notice and sufficient information to respond. In this instance, the Director requested "a statement describing the staffing of the new operation," and "[e]vidence of wages . . . paid to employees." These requests conform to the requirements at 8 C.F.R. § 214.2(l)(14)(ii)(D). The Director also stated that, from the available evidence, the Beneficiary appeared to be a supervisor rather than a manager or executive, and that the Petitioner had "not established that the U.S. business has an organizational structure sufficient to elevate the Beneficiary to a position that is primarily managerial or executive in nature."

The Director requested wage documentation for subordinates, but did not state that the submission of this evidence would automatically result in approval of the petition. Rather, the Director needed to examine the evidence in order to determine the extent to which other workers would be available to relieve the Beneficiary from performing non-qualifying tasks.

Furthermore, although the Petitioner protests that it should have had the opportunity to respond to the Director's finding that the company is not sufficiently staffed to permit the Beneficiary to work primarily as a manager or executive, the appeal itself is such an opportunity. The Petitioner offers no substantive response to the Director's finding, and does not say what arguments or evidence it would have provided earlier in response to an RFE that specifically discussed salary figures.

The record shows that the store is staffed by part-time employees, who have dwindled in number from 11 at the time of filing in October 2017 to 8 in January 2018. We note that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa petition for classification as a multinational manager or executive. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for U.S. Citizenship and Immigration Services (USCIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *See, e.g., Family Inc.*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner has not shown that the store is adequately staffed, at any given time, to allow the Beneficiary to focus primarily on managerial or executive responsibilities. The organizational chart shows layers of supervision, but the supervisors do not earn enough to be lawfully employed throughout the operating hours of a typical grocery store. In January 2018, two departments were entirely unstaffed, which devolved more responsibilities onto the smaller number of remaining employees.

For these reasons, we find that the Petitioner has not established that the company is sufficiently staffed to relieve the Beneficiary from primarily performing non-qualifying tasks.

B. Duties

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 and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

A petition to extend L-1A status after a new office petition must include a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition. 8 C.F.R. § 214.2(l)(14)(ii)(C).

The Petitioner stated that, during the year covered by the new office petition, the Petitioner performed the following tasks:

- "He directed the Store Manager . . . to conduct marketing research and competition research," and based on the report, decided that the store should sell live seafood;
- Negotiated with suppliers;
- Added dim sum to the store's existing hot food offerings (with subordinates researching menu options and supply chains); and
- Hired subordinate managers and met with them weekly.

The Petitioner provided a breakdown, paraphrased below, of how the Beneficiary would spend his time under the extended petition:

- **Final Decision Making** (25% of his time): "[S]tudying marketing and financial opportunities, making projections and determining achievable objectives," and making "decisions regarding marketing, sales plans, and strategies designed to generate revenue," and "retainer agreements . . . [for] outside professional services" such as accounting;
- **Establish Company's Goals and Polices** (20%): Review "product trends and consumer preferences" and adjust pricing and promotion in response to competitors' strategies;
- **Managing Operations of Different Departments** (20%): Meet with department managers to discuss "daily departmental activities along with difficulties and challenges";
- **Communicate with Foreign Parent Company** (10%): Report on the Petitioner's "overall progress, external challenges, current affairs and . . . financial status," and discuss the decisions made on behalf of the company;
- **Financial and Budget Management** (10%): Create, review, and optimize budget, and "[a]pprove, deny, or modify funding requests from subordinate employees";
- **Hiring and Firing of All Staff** (10%): Conduct final job interviews and make final hiring, firing, and recruiting decisions based on subordinates' recommendations;

- **Consult with Outside Marketing/Advertising Agencies** (2.5%): Meet with marketing and advertising companies and evaluate results of promotional efforts;
- **Consult Legal Counsel Regarding Company's Internal Affairs** (2.5%): Outside counsel will advise on compliance with laws and internal policies.

In the RFE, the Director stated that the Beneficiary appears to "primarily be involved with the day-to-day, non-qualifying duties of the business," and the direct supervision of non-professional employees. The Petitioner's response to the RFE did not directly address this concern. As we have noted above, one department was wholly unstaffed at the time of filing, and a second became vacant shortly afterward. Therefore, the Beneficiary would not spend any time meeting with management or staff of those departments, and the question arises as to who performs the work of those departments in the absence of dedicated staff.

The Petitioner submitted examples of quarterly departmental reports that subordinates submitted to him for review, and personnel documents such as performance reviews. The information in the one-page quarterly reports is minimal. For example, the financial and administrative manager's report for the first quarter of 2017 contained five substantive sentences, three of which reported monthly business volume (in Chinese yuan rather than U.S. dollars even though the store is in California). The other two sentences read: "The Corporation's business volume is stable" and "The Store Manager shall try to increase the business volume in next quarter by 5% at least as the business volume still has the possibility to rise, although it is relatively good." The principal focus of the grocery department's report for the second quarter of 2017 was poor sales of soda water. The Petitioner did not establish that the compilation and review of these quarterly reports made significant demands on the time of the Beneficiary or his subordinates.

In the denial notice, the Director repeated the passage from the RFE indicating that the Beneficiary appears to be essentially a supervisor rather than a manager or executive. The Petitioner does not address this concern on appeal; the only allegation of adjudicative error concerns subordinates' salary figures, as discussed above. We agree with the Director's unrebutted findings about the apparent nature of the Beneficiary's duties and responsibilities.

Based on the deficiencies described above, the Petitioner has not established that it will employ the Beneficiary in a primarily managerial or executive capacity.

## IV. CONCLUSION

The Petitioner did not establish that it will employ the Beneficiary in a primarily managerial or executive capacity.

**ORDER:** The appeal is dismissed.

Cite as *Matter of A-F-C- Corp.*, ID# 1554504 (AAO Aug. 9, 2018)