U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-D- LLC

DATE: AUG. 23, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which acquires, renovates, and leases or sells luxury homes, seeks to temporarily employ the Beneficiary as its chief executive officer (CEO)[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 California Service Center denied the petition, concluding that the record did not establish, as required, that it will employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by focusing exclusively on the company's staffing, and disregarding the Petitioner's other evidence.

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 capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application 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.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

[1] The Petitioner also refers to the Beneficiary as the "global CEO" of the organization comprising the Petitioner and its various foreign affiliates.

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.

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 in the United States.

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). Beyond the required description of the job duties, we examine 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 stated:

> In her role in the United States, [the Beneficiary] will be responsible for the administration of the business, managing accounts, managing employees, managing suppliers, and overseeing contracts. She will be responsible for identifying new markets for expansion and sourcing opportunities for business growth. She will also

> work directly with the President and Founder . . . to oversee overall strategic direction of the company as well as develop and maintain business relationships.

In a separate statement, the Petitioner described the Beneficiary's group-wide duties as "Global Chief Executive Officer," noting that she spends "3 to 5 hours per day" on the following duties for the U.S. petitioner:

- Oversee overall performance of the company
- Delegate responsibilities and supervise[] the work of entire team at the company, providing guidance and motivation to drive maximum performance
- Develop and execute the company's business strategies to meet the goals of the Owner
- Work with Owner, attorneys and consultants to achieve successful projects: both operationally and financially
- Analyze[] problematic solutions and occurrences and provide solutions to ensure company survival and growth
- Ensure company policies and legal guidelines are communicated all the way from the top down in the company and that they are followed at all times
- Manage employees such that the entire team is contributing towards the achievement of company's strategic and operational objectives

The Petitioner also listed the Beneficiary's ongoing duties with three overseas affiliates, occupying between five and seven hours per day. The Petitioner did not claim or establish that the Beneficiary's foreign responsibilities (such as "working on a new yacht design" and overseeing the management of properties in England and South Africa) relate to the petitioning U.S. employer.

The Director requested more details about the Beneficiary's intended duties. In response, the Petitioner stated:

> [The Beneficiary] will manage multiple essential functions of the organization. Management of [the Petitioner's] staff, [the Petitioner's] contractors, financial duties, client development, and project execution are all key elements to [the Petitioner's] success. . . .
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> . . . .
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> . . . [The Beneficiary] has the authority to hire and fire, to recommend similar personnel actions . . . , and has the authority to contract [the Petitioner] in obligation to sub-contractors and outside vendors.

In a separate letter, the Petitioner stated that the Beneficiary's "responsibilities include but are not limited to:"

- Identifying new opportunities to add to the [Petitioner's] brand around the globe;
- Overseeing operations and ensuring the Company's standards are continuously met at the various properties and assets owned or managed in the collection;
- Hiring and overseeing the training of personnel managing each property within the collection;
- Identifying and supervising the acquisition and/or sale of properties and development;
- Directing the set-up of all operations and logistics consistent with brand message for [the company];
- Management of [the Petitioner's] staff, contractors, clients, and vendors, internationally.

Printouts of email messages showed various activities by the Beneficiary, including these examples:

- Asking for copies of promotional materials "for review and final approval"
- Discussing issues (such as repairs) regarding various leased properties
- Reviewing proposals from contractors
- Contacting a lessee regarding the need to vacate a property, and listing lease violations
- Sending design team comments to a yacht builder
- Receiving updates on rental negotiations

The Director concluded that the Petitioner had "neither articulated nor corroborated with supporting evidence as to how the position's duties qualify the beneficiary for L-1 purposes." On appeal, the Petitioner submits a revised list of duties. The list matches the version submitted initially, except it indicates that the Beneficiary spends "1 hour per day" on tasks relating to the petitioning U.S. employer. According to the Petitioner's own submission on appeal, the Beneficiary spends the vast majority of her time working on behalf of foreign affiliates that are not doing business in the United States, either through the petitioning entity or separately, rather than on behalf of the petitioning U.S. employer. The record does not show any unified business activity by the affiliated companies; rather, each appears to operate in parallel, independently of the others.

The Petitioner states that the Beneficiary has duties "in South Africa, England, and the United States. Her absence from the US makes fulfilling these obligations particularly challenging." The Petitioner does not identify the challenges, or explain why the Beneficiary would be able to spend most of her time overseeing projects in England and South Africa if she relocates to the United States.

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.

In this instance, the Beneficiary clearly has high-level responsibilities, but the record does not show that she primarily acts as a manager or executive. Email communications show her involvement in company decisions and negotiations, but also in day-to-day activities including communications with tenants. Also, as described above, the Petitioner's most recent accounting of the Beneficiary's activities indicates that her oversight over the U.S. entity occupies little of her time.

The Petitioner has not shown that the Beneficiary's duties are primarily managerial or executive.

B. Staffing

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*4*). If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(*2*)-(*3*).

The Petitioner stated that the Beneficiary "will . . . be responsible for managing [the Petitioner's] US employees and third-party contractors." The record is inconsistent concerning the number of employees the Petitioner employed at the time of filing in September 2017. The Petitioner claimed three employees on the petition form, but a quarterly tax return for the third quarter of 2017 indicated nine unnamed employees. The return for the previous quarter named six employees:

- President and Founder
- CEO (the Beneficiary)
- Design Team (2 members)
- Hospitality Staff
- A sixth employee whose title is not provided, but who received only $637.50 for the quarter

2017 payroll documents in the record identify other employees, but because the records are formatted by calendar year, they do not clarify which of these individuals were actively employed by the Petitioner at the time of filing.

In the denial notice, the Director cited discrepancies in the record, and found that the Petitioner had reliably established only four full-time employees at the time of filing:

- The Beneficiary;
- A "Hospitality Specialist . . . who oversees the maintenance of the completed and operational properties . . . including coordinating housekeepers, gardeners, chefs, and maintenance staff";
- "[A] design and architectural intern . . . [who] handles office administration which includes answering phones, customer service, preparing for presentations, 3D design renderings, and developing client materials." The intern holds a bachelor's degree in interior design; and
- "[A] design assistant . . . [who] regularly contributes to design strategy and executes design ideas based upon direction provided by [the Petitioner's] leadership, including [the Beneficiary]." The design assistant holds a bachelor's degree in art history and a master's degree in interior architecture.

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

The Director acknowledged the Petitioner's submission of educational credentials for two of the subordinates named above, but found that the Petitioner had not established that their positions qualify as professions requiring at least a bachelor's degree. This is a separate question from whether the subordinates *have* such degrees. On appeal, the Petitioner refers to its "staff of hard-working professionals," but offers no substantive response to the Director's finding. The Petitioner has not established that any of the Beneficiary's subordinates qualify as professionals.

Instead, the Petitioner contends that the Director improperly relied on the company's small size as a primary ground for denial. The Petitioner concedes that it "is a small company," but maintains that the Beneficiary "exercises substantial executive and managerial control over a significant budget and extensive scope of projects," involving "outside independent contractors."

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 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).

We do not dispute that a manager or executive may work, in part, through contractors, but in such a case the burden of proof is on the Petitioner to establish that the authority exercised is primarily

managerial or executive. The record lacks sufficient documentation to place exact figures on the extent of contractor involvement, and the level of the Beneficiary's authority and control over the contractors' work. Delegating functions to contractors is not inherently or exclusively a managerial or executive prerogative.

Earlier in the proceeding, the Petitioner asserted that the Beneficiary qualifies as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that:

> (1) the function is a clearly defined activity; (2) the function is "essential," i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations.

Matter of G- Inc., Adopted Decision 2017-05 (AAO Nov. 8, 2017). In this matter, the Petitioner has not described or provided evidence that the Beneficiary manages an essential function.

The Director found that the Petitioner did not adequately describe the essential function that the Beneficiary manages. On appeal, the Petitioner asserts that the Beneficiary manages "multiple essential functions of the organization both in the US and abroad," but does not elaborate.

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.*

As discussed above, the Petitioner has shown that the Beneficiary holds a high-ranking position within the company, but not that her duties and responsibilities rise to the level of a *primarily* executive capacity.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

IV. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of M-D- LLC*, ID# 1434645 (AAO Aug. 23, 2018)