U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-E- LLC

DATE: AUG. 25, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an export company, seeks to continue the Beneficiary's temporary employment as its manager under the L-1A nonimmigrant classification for intracompany transferees.[1] *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 will continue to perform executive duties for the company and that it has sufficient staff to support the Beneficiary in an executive capacity.

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.

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period November 1, 2015, until October 31, 2016. 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.

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.

Additionally, a petitioner seeking to extend an L-1A new office petition 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.

Accordingly, in analyzing the Beneficiary's employment capacity, we will consider the Beneficiary's job duties, along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Duties

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.

The Petitioner stated on the Form I-129, Petition for Nonimmigrant Worker, that it currently employs four people. The Petitioner also provided a copy of its business plan which states that its mission is to provide a trading bridge between U.S. manufacturers/suppliers and the Chinese consumer market. The Petitioner initially indicated that the Beneficiary is responsible for launching, developing, and implementing the company's business plans, is in charge of daily operations, manages the office and directors of each department, recruits staff, and designs and executes the company's international strategy.

In response to the Director's request for evidence (RFE), the Petitioner provided the Beneficiary's statement regarding her past and proposed duties. The Petitioner submits the same statement on appeal. In the Beneficiary's statement under the heading "Establish goals and policies of the Company," the Beneficiary stated that she set a goal for the purchase and sales departments to establish cooperative relationships with about 50 boutiques, and a goal to develop a functional products information system. The Beneficiary noted that the administrative department director is responsible for achieving the products information system goal and would report to her periodically. The Beneficiary added that she is responsible for planning, developing, and determining the Petitioner's financial direction and goals, administrative and employment policies and procedures, and for designing and executing the company's international strategy. The Beneficiary stated that she spends about 25 percent of her time performing these responsibilities. However, these general responsibilities do not convey an understanding of the Beneficiary's actual day-to-day duties. Reciting 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 the necessary detail and explanation of the Beneficiary's activities in the course of her 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).

The Beneficiary stated under the heading "Recruitment and Team Building" that these responsibilities will require 20 percent of her time and will include: "interviewing, hiring, training and supervising employees (particularly managerial employees); assigning and directing work, appraising performance, rewarding and disciplining employees, addressing complaints and resolving problems, and ensuring the human resources of the Company are in compliance with Company policy and applicable employment law." As will be discussed in the next section, the Petitioner does not include probative evidence that it employs subordinate managerial or supervisory employees. Although the Beneficiary may hire, assign and direct work, and evaluate her subordinates'

performance, the record does not include sufficient detail to establish that these duties are executive or managerial duties as set out in the statutory definitions.

Under the heading "Oversee and direct the Company's management and performance," the Beneficiary stated generally that she develops solutions to business challenges, provides leadership and management, and develops plans for the operational infrastructure, and represents the company with clients, investors, and business partners. The Beneficiary added that she oversees the company's core business functions and operation of each department, sets targets for the directors of each department to explore and select new brands and boutiques, to cooperate, negotiate with suppliers and retailers for pricing and shipping, to maintain and improve current cooperative relationships, and to keep the normal daily business operation of the company. The Beneficiary noted that the department directors report to her on the implementation of these objectives so that she may evaluate the functioning of each department and make adjustments. The Beneficiary indicated that she will spend approximately 25 percent of her time on these duties. 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. Here, the Petitioner has not submitted sufficient detailed evidence of the Beneficiary actual role within the organization. For example, overseeing core business functions and setting targets for subordinates does not include sufficient detail to establish what the Beneficiary actually does on a day-to-day basis and whether such duties are managerial, executive, or non-qualifying duties.

The Beneficiary asserted that she will spend 15 percent of her time "Exercis[ing] wide latitude in discretionary decision-making," approving and making final decisions on all major actions such as, selecting business partners, terms and conditions of contracts, capital expenditures, purchase and sales plans, product development plans, financial reports, and other operation and business plans required by the parent company's board. Finally, the Beneficiary stated that she will spend approximately 15 percent of her time reporting to the parent company and working with and advising the parent company regarding the Petitioner's strategies. 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 general position descriptions submitted are insufficient to establish that her actual duties would be primarily managerial or executive in nature.

B. Staffing

The initial version of the Petitioner's organizational chart shows the Beneficiary as the manager and identifies one individual as the administrative and the financial departments' director, one individual as the purchasing department director, and one individual as a "buyer" reporting to the purchasing department director. The original chart shows the sale department director and two subordinate

positions as vacant, as well as an additional buyer, secretary, and supplier relationship position vacant. The Petitioner provided broad position descriptions for each of the filled positions.

In response to the Director's RFE, the Petitioner submitted a revised organizational chart which showed the purchasing department director also handling the sales department and the individual in the "buyer" position also handling sales, supplier relationships, and secretarial duties. The Petitioner also noted that it hired an additional employee in December 2016 who performed as a sales and purchasing account manager. However, as the Petitioner did not employ the sales and purchasing account 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 also revised the position descriptions for the Beneficiary's subordinates to incorporate additional tasks. For example, the purchasing/sales director position is described as dividing his time equally between the two departments and performing market research, formulating purchasing plans and incentive policies, meeting suppliers and negotiating contracts, attending trade fairs, dealing with e-commerce providers, recognizing potential business opportunities, and leading the team members in achieving sales. The position description shows this individual will spend only five percent of his time supervising the supplier relationship and only ten percent of his time training and mentoring junior staff. The description of this individual's duties shows that he will primarily perform the duties of these departments, and will spend a limited amount of time interacting with or supervising junior employees. Additionally, his compensation is based, in part, on commissions suggesting he also will perform some sales duties.

The financial and administrative director is charged with liaising with the accounting firm, managing cash flow, ensuring contract billing and the collection schedule, using accounting software, as well as having responsibility for the administrative aspects of the company. This individual also spends a limited time training and mentoring junior staff. The duties provided for this individual indicate he will perform primarily as the Petitioner's bookkeeper or payable/receivable clerk. The Petitioner does not develop his actual responsibilities for the administrative aspects of the company.

The record shows that the Petitioner hired the individual initially identified as its "buyer" four days prior to filing the instant petition. In response to the Director's RFE, the Petitioner claimed that this individual will perform the buying and sales duties as well as maintain relationships with suppliers and source new suppliers. On appeal, the Petitioner asserts that as this individual performs "all the most basic function and activities of the Company," the Purchasing/Sales director and Financial/Administrative director are "relieved from performing the non-qualifying functions of lower-level positions." The Petitioner's claim on appeal that one recently-hired employee will perform all the necessary work to operate and administer the business is not credible. Moreover, the Petitioner's job descriptions for the purchasing/sales director and the financial/administrative director (the positions it claims are on a tier above the one junior employee and a tier below the Beneficiary), while general in nature, include duties that show they primarily perform operational and administrative tasks.

To establish employment in an executive capacity under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of the 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 the positions held by the Beneficiary's subordinates are managerial positions. Rather, the record shows that these individuals perform the operational and administrative tasks necessary to continue the Petitioner's business. 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.[2]

The Beneficiary's descriptions of her duties and her allocation of her time to those duties do not demonstrate that she will primarily supervise other employees. Although the Beneficiary may very well be the only individual responsible for the supervision of the Petitioner's three employees, the Petitioner's organizational structure lacks the complexity to support the Beneficiary in a position higher than a first-line supervisor of non-professional employees.[3] Therefore, the Beneficiary's

[2] The Petitioner does not claim and the record does not establish that the Beneficiary will primarily manage an essential function. 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). Stating that the Beneficiary will oversee all business functions of the business is insufficient to describe a specific essential function. The record here does not include probative evidence that the Beneficiary manages an essential function within the company.

[3] 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 evidence that the Beneficiary's subordinates are employed in professional positions.

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. 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 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 the necessary first-line supervisory duties of non-managerial, non-supervisory, and non-professional employees and other routine day-to-day operational tasks. Accordingly, the Petitioner is ineligible for an extension of its new office petition.

The record documents that the Petitioner is doing business, but it does not contain sufficient probative evidence of the Beneficiary's proposed work in a managerial or executive capacity for the petitioning entity. A review 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 F-E- LLC*, ID# 550590 (AAO Aug. 25, 2017)