U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-S-, LLC

DATE: DEC. 7, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a construction and home improvement business, seeks to continue the Beneficiary's temporary employment as its CEO and president 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 would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner submits additional evidence and asserts that the Director erroneously concluded that the Petitioner does not have the organizational complexity to support a managerial or executive position.

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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period June 1, 2016, until May 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 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).

"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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) takes 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.

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

In the denial decision, the Director determined that the record did not support the Petitioner's claim that the Beneficiary's duties are primarily executive in nature, noting that the record did not demonstrate that the Beneficiary has a subordinate level of managerial employees. The Director further found that the Petitioner did not have sufficient business activities at the end of its initial year of operations to warrant having an executive position. The Director concluded that the Beneficiary's job description was inconsistent with the size and scope of the business.

On appeal, the Petitioner contends that the Beneficiary's duties are "solely executive and managerial" and asserts that the Director did not consider the Petitioner's reasonable needs when considering its staffing levels. The Petitioner notes that, due to the nature of its industry, it was still awaiting permits needed to being construction on its first project and did not have a need to hire lower-level subordinates during its first year of operations. In addition, the Petitioner asserts that the Beneficiary manages subordinate managers who work for its foreign affiliate, which the Director failed to consider.

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, USCIS examines 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

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 at 1533.

The Petitioner is self-described as a construction, home improvement and remodeling company, and states that it employs "in-house architectural, engineering and construction professionals." In June 2016, it completed the purchase of a single family home with the intention of razing it and building a new house on the lot. At the time it filed this petition in April 2017, it had not yet obtained a building or demolition permit for the property from local authorities.[2] The Petitioner did not provide evidence of any other projects or activities apart from this property.

The Petitioner stated that the Beneficiary, as CEO and president, has been "directing strategic project management, strategic marketing, strategic sales management and public relations." The Petitioner stated that executive duties would account for 65% of his time[3] and would include:

- Direct and oversee the function of Strategic Marketing (17%)
- Direct and oversee the function of Strategic Sales Management (8%)
- Direct and coordinate the function of Strategic Public Relations (25%)
- Exercise wide latitude in discretionary decision making (13%)
- Establish the goals and policies of the organization (8%)

Although such responsibilities reflect the Beneficiary's senior position in the company as the owner and president, the Petitioner did not provide details needed to provide insight into what he would be

[2] The Petitioner obtained a building permit on June 7, 2017, and was still awaiting approval of its demolition permit when it filed the appeal on June 13, 2017.

[3] The five "executive duties" identified actually account for 71% of the Beneficiary's time.

doing on a day-to-day basis as the president of a company with a single residential construction project. The description focuses on his oversight of the company's marketing, sales, and public relations functions, but it is unclear what the Petitioner was marketing, selling, or promoting at the time of filing. For example, the description notes that the Beneficiary will "deliver speeches and present information at trade shows, conventions and meetings throughout the US to promote company's innovative solutions and products." The Petitioner owns one residential lot with a structure that is awaiting demolition and rebuild. It is unclear what "innovative solutions and products" the Beneficiary would be promoting throughout the U.S. or what types of speeches he would be delivering as part of his executive duties. Although the Director specifically noted that the breakdown of the Beneficiary's position does not seem consistent with the Petitioner's actual operations, but the Petitioner has not offered further clarification on appeal.

The Petitioner stated that the Beneficiary would spend the remaining 35% of his time[4] on "managerial duties" including: supervising and controlling the work of subordinate managers and professionals in the United States and the department heads of the Petitioner's Russian affiliate (14%); exercising authority to hire and fire subordinates (8%); and managing the Petitioner's operations on a daily basis (6%).

These duties, like those identified as "executive duties" focused on the Beneficiary's level of authority, but did not provide meaningful details about the managerial tasks he would perform on a day-to-day basis. For example, the Petitioner stated that the Beneficiary would manage "implementation of marketing, product and sales strategies" through subordinate department heads but, as noted, the record does not contain evidence that the Petitioner had a product to market or sell at the time of filing, or that it was engaged in any marketing and sales activities. Similarly, the Petitioner indicates that the Beneficiary's duties include reviewing statements, reports and performance data prepared by his subordinates, but it is unclear what data and reports are being prepared based on the Petitioner's current stage of development.

Finally, the Beneficiary's ongoing oversight for Russia-based department heads does not establish his employment in a managerial capacity with the Petitioning entity absent evidence that those employees perform work that supports the U.S. company's day-to-day operations. The Petitioner suggests that the companies are interrelated but has not provided evidence to support a claim that employees of the Russian company are performing work for the U.S. company. As such, the Beneficiary's continued oversight of the Russian affiliate will not be considered in our analysis of his duties.

The Petitioner was given an opportunity to clarify the Beneficiary's duties in a request for evidence (RFE). The Petitioner submitted essentially the same position in response to the RFE but changed the percentages of time allocated to certain functions. For example, the Petitioner stated that the Beneficiary would spend 21% of his time, as opposed to 8%, to establishing goals and policies. The Petitioner again indicated that the Beneficiary would be allocating nearly half of his time to directing the sales, marketing, and public relations functions, and added a responsibility for directing the

[4] The managerial duties identified in the Petitioner's supporting letter account for 29% of the Beneficiary's time.

"product and service management function" noting that he would be required to identify opportunities and risks for delivering new products and service, "manage home improvement product lines," and "analyze product requirements and scopes." However, the record does not include evidence of the Petitioner's "home improvement product line," suggesting that this and other duties were more likely than not prospective at the time the description was submitted.

This slightly revised position description did not add additional clarity to the original job description, nor did it establish that the Beneficiary's duties, as of the date of filing, would be primarily executive or managerial in nature when considered as part of the totality of the evidence in the record. 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's description of the Beneficiary's duties appears to include duties that he may perform in the future once the company has expanded beyond a single project that was still in its preliminary stages at the end of the initial year of operations.

Even though the Beneficiary holds the senior position within the company, the fact that the Beneficiary will manage 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)(A) or (B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial or executive in nature. Section 101(A)(44) of the Act.

B. Staffing

The Petitioner established that it employs three employees in addition to the Beneficiary: a part-time project manager, a technical and engineering office manager, and a real estate and financial director. In addition, the Petitioner has a contract for accounting services and access to administrative and clerical services through its office lease agreement. The Petitioner's organizational chart included vacancies for an architect (who would report to the project manager); an "engineer counsel" and site engineer (who would report to the technical and engineering manager); and a contract manager (who would report to the Beneficiary). The Petitioner indicated that all four vacant positions would be filled later in 2017 or by January 2018.

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 they 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 he "directs" 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.*

As the Petitioner indicates that the Beneficiary's role is primarily executive, the Director looked at the roles subordinate to him to determine if he would be directing managerial employees, consistent with the definition of "executive capacity." The Petitioner provided a table with details regarding each subordinate position. However, these position descriptions, like that provided for the Beneficiary, do not appear to be consistent with the current nature and scope of the petitioning company.

The Petitioner stated that the real estate and financial director "leads and oversees" the annual budgeting and planning process, administers and reviews financial plans, coordinates the annual audit process, collates financial reporting materials "for all donor segments," oversees financial and "project/program and grants" accounting, manages cash flow, and keeps the "senior leadership team" abreast of the company's financial status. The Petitioner did not explain the relevance of "donor segments" and "grants accounting" within the context of its business and it appears that this is a generic description for a financial director rather than a description of this employee's actual duties as the financial director of a company with one residential real estate project in the pre-construction phase. We cannot conclude that the Petitioner provided a complete or accurate description of this employee's duties.

The Petitioner also stated that the real estate and financial director has three subordinates – a financial advisor, an accountant, and a project manager. The organizational chart shows no current or vacant positions subordinate to the real estate and financial director, does not include a financial advisor position, and indicates that both the contracted accountant and the project manager report directly to the Beneficiary. Therefore, we agree with the Director's determination that this position has no subordinates. This casts further doubt on the job duties attributed to this employee, as the description suggests that she would be leading and overseeing various financial activities rather than performing them herself.

The Petitioner provided a similarly incongruous job description for its technical and engineering office manager. The Petitioner stated that her duties include directing and coordinating "quality assurance, testing and maintenance in industrial plants," assisting "production" regarding "customer complaints with respect to quality, tolerances, specifications, and delivered condition of products or services," and coordinating "technical services between operations, maintenance, research & development and management to ensure continuous improvement." The Petitioner does not have an "industrial plant," and is not engaged in production, quality assurance, testing, maintenance, or research and development activities, so we cannot determine that this is a credible description of this employee's duties. Further, this employee has an accounting background, rather than a technical and engineering background.

Finally, the job description provided for the part-time project manager appears to be prospective in nature. The Petitioner indicates that he will manage the construction team, oversee the design process and technical specifications, attend construction meetings, supervise the installation team, plan and supervise delivery and installation of logistics, and review specifications and installation drawings. Since the Petitioner has not progressed to the point where it is ready to begin a construction project, it is unclear what this employee would be doing as of the date of filing.

Further, according to the submitted resume, this employee has a bachelor's degree in finance and work experience as a contract analyst and accountant; he does not appear to have the experience needed to oversee construction projects.

The Petitioner contends that the Director placed too much emphasis on the fact that the Beneficiary's subordinates did not yet have subordinates of their own at the time of filing. We agree with the Petitioner that it would not be practical for the company to have engineers and architects on staff if it has one project that is not yet in the construction phase. However, given the Petitioner's current stage of development, the job descriptions provided for the existing employees were not credible and we cannot determine what tasks they actually perform. The record does not support a finding that the Beneficiary is directing management employees as an executive, or that the Beneficiary supervises subordinate managers, supervisors or professionals in order to qualify as a personnel manager.[5]

In evaluating whether a 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 U.S. 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."

Therefore, we must focus on the level of education required by the position, rather than the degree held by a 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. While the Petitioner indicates that all three of the Beneficiary's subordinates have degrees in economics, finance, or accounting, the record does not contain clear descriptions of their actual duties and does not support a finding that these employees hold professional positions.

On appeal, the Petitioner objects to the Director's discussion of its staffing levels and asserts that the Director failed to take into account the Petitioner's reasonable needs and stage of development. The Petitioner emphasizes that the Beneficiary is responsible for managing the company's $700,000 investment in this project and that the Director should not have denied the petition on the basis that the Beneficiary does not currently have indirect subordinates.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account

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[5] The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 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. 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."[5] Section 101(a)(44)(A)(iv) of the Act.

the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. As noted, the Director considered the Petitioner's staffing levels and concluded that the company had not yet hired lower-level staff. However, the Director also considered the Petitioner's stage of development and determined that the duties provided for the Beneficiary were not consistent with the Petitioner's current level of business activities. The Petitioner has not addressed this deficiency. Without a meaningful description of the actual duties performed by the Beneficiary and his subordinates within the context of the Petitioner's operations at the time of filing, we cannot determine that the Petitioner had a reasonable need for the Beneficiary to perform primarily managerial or executive duties.

The Petitioner was given one year to grow to the point where it can employ the Beneficiary in a managerial or executive capacity. The Petitioner asserts that the preliminary phase of its residential construction project took longer than expected, which impacted its hiring plans. However, the Petitioner claimed at the time of filing that the company offers services such as upgrading HVAC systems, remodeling, plumbing and electrical work, basement waterproofing, and soundproofing. The Petitioner did not provide evidence of these activities and it appears more likely than not that the Petitioner did not engage in these activities by the end of its first year of operations or otherwise expand the business. Therefore, for all of the reasons discussed, the Petitioner has not established that it is eligible for an extension of its new office petition.

III. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of M-S- LLC*, ID# 858753 (AAO Dec. 7, 2017)