U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-G-H-, LLC

DATE: DEC. 22, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a real estate maintenance and renovations business, seeks to temporarily employ the Beneficiary as president and general manager of its new office under the L-1A nonimmigrant classification for intracompany transferees. *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 Vermont Service Center Director denied the petition, concluding that the record did not establish, as required, that the Petitioner will employ the Beneficiary in a managerial or executive capacity within one year of approval of the petition.

On appeal, the Petitioner asserts that the record includes sufficient evidence to establish that the Beneficiary's duties will be executive or managerial and that it does not need a large staff as the Beneficiary will manage a function within the corporation.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification for 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 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. The petitioner must also establish that the beneficiary's prior education, training, and employment qualifies him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

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).

"Managerial capacity" means as 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.

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

The Petitioner was organized in November 2013. The Petitioner stated that its main objective is building maintenance, apartment renovations, and renting furnished premises on a monthly basis. The Petitioner opened its bank account in February 2015 and began operations in April 2015. The Petitioner filed the new office petition on January 27, 2016, and thus had not been doing business for a full-year prior to filing the petition.

The Director found that the Petitioner's business plan was vague and did not include sufficient detail to support the Petitioner's financial projections. The Director determined that the record did not support the Petitioner's claim that the Beneficiary would manage a subordinate staff of managerial or supervisory personnel who would relieve him from performing non-qualifying duties. The Director concluded that the record did not establish that the Petitioner would grow to a point in its first year where the Beneficiary will be involved in activities that are primarily managerial or executive in nature.

We will address both the Petitioner's description of the Beneficiary's intended duties as well as the Petitioner's business plan and proposed staffing to determine whether the Petitioner has established this eligibility requirement.

A. Duties

When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of

low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial or executive responsibility cannot be performed in that first year. The "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of a beneficiary in a primarily managerial or executive position.

When examining the managerial or executive capacity of a beneficiary, we review a petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Second, the petitioner must prove that the beneficiary will be *primarily* engaged in executive or managerial duties, as opposed to ordinary operational activities alongside the petitioner's other employees. *See, e.g., Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

The Petitioner's initial description of the Beneficiary's proposed duties re-stated portions of the definitions of executive and managerial capacity. Conclusory assertions regarding the Beneficiary's employment capacity, however, are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *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); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The Petitioner also noted that the Beneficiary would represent the company in its activities, identify new business opportunities, and determine the demand for its services. The Petitioner does not further detail the tasks the Beneficiary will perform in carrying out these duties and does not indicate when and for how long the Beneficiary will be required to perform these duties.

In response to the Director's request for evidence (RFE), the Petitioner provided a lengthy description of the Beneficiary's proposed duties and allocated the Beneficiary's time to those duties. Although the description shows the Beneficiary possesses a senior level of authority within the company, it offers little insight into what he will actually do on a day-to-day basis during the first year of operations and beyond. The Petitioner does not connect any of the vague job responsibilities to its actual apartment maintenance, renovation, or rental management business. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Moreover, the Petitioner does not describe how the Beneficiary will move beyond daily involvement in non-qualifying tasks related to financial review, promoting the business, and developing the Petitioner's business to primarily performing managerial or executive duties within the one-year time frame. The Petitioner's broad allocation of the Beneficiary's time to various functions which includes managerial, executive, and non-qualifying duties does not provide a sufficient framework to analyze and evaluate what the Beneficiary will be doing within and beyond the one-year if the petition were approved. The record does not establish that the Beneficiary will perform duties in a primarily managerial or executive capacity within the required one-year time period.

The Petitioner does not provide any additional information regarding the Beneficiary's actual proposed duties on appeal, but asserts that the Beneficiary "will use her [*sic*] independent discretion and authority in identifying and cultivating new business sources, develop strong and mutually beneficial relationships with providers, staff, sub-contractors and other high level sources." However, 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. 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 position descriptions alone are insufficient to establish that his actual duties would be primarily managerial or executive in nature.

B. Business Plan and Staffing

The Petitioner provides two versions of its organizational chart. The first iteration shows the Beneficiary as the general manager with a marketing manager reporting to him. The chart shows a technician/repairman and an administrative assistant reporting to the marketing manager. The chart also included "workers" reporting to the technician/repairman. The second iteration of the organizational chart, submitted in response to the Director's RFE, shows the Beneficiary as the president and the administrative assistant, marketing manager, and technician/repairman reporting directly to the Beneficiary. The Petitioner does not identify any additional proposed employees or contractors on the second chart.

The Petitioner indicates that the marketing manager will determine the demand for its services, develop pricing and marketing strategies, and oversee product development. The administrative assistant will receive orders, resolve complaints, and perform recording keeping, mail distribution, invoicing and collection, oversee facilities planning, maintenance, and custodial operations, as well as coordinate activities of clerical and administrative personnel. The technician is charged with installing tile, painting, and calculating cost of materials. These descriptions do not appear to correspond to the Petitioner's business. For example, the Petitioner does not identify any clerical or administrative personnel, current or planned, for its administrative assistant to coordinate. Similarly, the Petitioner indicates that its business services include cleaning and maintaining the buildings it services. However, the technician is not described as performing cleaning and maintenance duties but rather with the renovation portion of the Petitioner's business.

The Petitioner's undated business plan notes that the Petitioner employs three full-time employees and that it provides maintenance and small renovations to 10 buildings. The business plan projects that the Petitioner will grow to service 20 buildings within six months and that by the end of 2016 will service 30 buildings. The Petitioner also refers to furnishing and renting out apartments with a

partner management company.[1] The Petitioner projects that it will earn $225,000 in the upcoming year of business and that its gross profits will be $90,000. The Petitioner did not provide a hiring plan and did not include a marketing study or other evidence to support its business forecast.

In response to the Director's RFE, the Petitioner revised its business forecast and indicated that by the end of 2016 it expected to service 25 buildings and that when it serviced 20 buildings it would hire one additional maintenance employee. The Petitioner projected that by the end of 2017 it expected to service 35 buildings and at that time it would have two full-time maintenance employees. The Petitioner does not include evidence of its projected salary expenses.

The Petitioner also submitted a profit and loss statement for January 2016 through September 2016. The statement listed the cost of labor as $53,162. The Petitioner lists the Beneficiary's annual wage on the Form I-129 as $36,000 annually; thus his salary for the first nine months of the year would equal $27,000. It appears that the remaining $26,162 would have been divided between the Petitioner's three other employees and the cost of subcontractors to perform small renovations.[2] This level of salary expense for three employees and subcontractors does not support the Petitioner's assertion that it will be fully staffed and able to relieve the Beneficiary from performing the non-qualifying duties associated with operating a real estate maintenance and renovation service, as well as a rental business.

It is not clear how the Petitioner plans to staff its business with only one technician providing the work to perform the maintenance and small repair for 20 to 30 buildings. It is also not clear who will perform the operational tasks necessary to procure, furnish, and rent or sublease the premises monthly. The business plan lacks basic information regarding the Petitioner's projected employees and their salaries. The record does not include evidence of the Petitioner's current employees, the actual salaries paid, and their position within the Petitioner's organizational structure. There is insufficient evidence in the record to adequately evaluate and analyze whether the Petitioner will realistically grow and expand to support the Beneficiary in a managerial or executive position within one year.

On appeal, the Petitioner asserts that it will use subcontractors to perform real estate maintenance and renovations. However, the Petitioner does not submit probative evidence that it has used or has entered into contracts for these services. The Petitioner also does not explain how the cost of subcontractors impacts its revenue and expenses, if at all. Further, the record does not include sufficient evidence demonstrating that these subcontractors will relieve the Beneficiary from

[1] The Petitioner does not identify the management company. The Petitioner did include copies of its bank statements for May through December 2015, which reveal a number of payments received from [redacted] an online marketplace and hospitality service for rentals.

[2] The Petitioner states that renovation services are billed separately and that most times it hires a separate crew to perform these renovations. The record does not include evidence of these separate bills or expenses. The Petitioner also does not explain why it described its technician position as performing the renovation tasks.

performing financial and other operational tasks or that the Beneficiary will supervise or direct the management of the subcontractors.

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." Section 101(a)(44)(A)(iv) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*). The record does not include sufficient and consistent evidence to establish that the Beneficiary will primarily supervise professional,[3] managerial, or supervisory employees.

The Petitioner also vaguely refers to the Beneficiary managing a function within the company. It is not clear if the Petitioner is claiming that the Beneficiary will be a function manager, and not a personnel manager. In any event, the Petitioner has not articulated a specific function that the Beneficiary will manage. 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). Merely performing the functions of the company is insufficient. In this matter, the Petitioner has not described or provided evidence that the Beneficiary manages an essential function.

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

[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, not the degree held by the subordinate employee. Thus, 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 Petitioner's descriptions of the Beneficiary's subordinates' duties do not demonstrate that the positions require a bachelor's degree.

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 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.* The Petitioner has not included sufficient probative evidence establishing that the Beneficiary will have subordinate managers, rather than operational employees, to direct.

The evidence in the record does not establish that the company will be able to support a qualifying managerial or executive position within a one year period. The regulations require the Petitioner to present a credible picture of where the company will stand in one year, and to provide sufficient evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within that time. In this case, the record lacks adequate staffing and financial projections, and a credible business plan. There is insufficient evidence in the record to support a finding that the Beneficiary will have a sufficient staff to relieve him from performing the daily tasks of running the petitioning business within one year. It appears more likely that he will perform many of the tasks that the Petitioner purports he will supervise, manage, or direct.

III. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary will be employed in a managerial or executive position for the Petitioner within one year.

ORDER: The appeal is dismissed.

Cite as *Matter of E-G-H-, LLC*, ID# 869308 (AAO Dec. 22, 2017)