U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-, INC.

DATE: DEC. 28, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner,[1] a franchise, seeks to temporarily employ the Beneficiary as its "Executive and Director of Enterprise"[2] 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 Director of the California Service Center denied the petition, concluding that the record did not establish, as required, that: (1) the Beneficiary has been employed abroad in a managerial or executive capacity; (2) the Beneficiary will be employed in the United States in a managerial or executive capacity; and (3) the Beneficiary's employment in the United States will be temporary.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by giving insufficient consideration to the evidence, and by imposing additional requirements beyond the regulations.

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.*

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[1] We note that, although the Petitioner consistently spells its name as " " the corporation's legal name is " "

[2] The Beneficiary also referred to himself as the Petitioner's "Executive Officer and Developer."

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

A. Employment Abroad in a Managerial or Executive Capacity

The Director found that the Petitioner had not established that the Beneficiary was employed abroad in a managerial or executive capacity.

A managerial capacity is an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization, and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A personnel manager supervises and controls the work of other supervisory, professional, or managerial employees; the duties of a first-line supervisor are not considered managerial unless the employees supervised are professional. A personnel manager must also have the authority to execute or recommend personnel actions such as hiring, firing, and promotions. A function manager need not directly supervise other employees, but must manage an essential function within the organization, or a department or subdivision of the organization, and function at a senior level within the organizational hierarchy or with respect to the function managed. Section 101(a)(44)(A) of the Act.

An executive capacity is 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) 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.

1. Duties

When examining the managerial or executive capacity of the Beneficiary, we will review the Petitioner's description of the Beneficiary's job duties. The definitions of managerial and executive capacity each have two parts. First, the Beneficiary must perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Beneficiary must be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the company's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner's foreign employer is [redacted] a manufacturer of bricks. On the petition form, the Petitioner stated:

> Beneficiary has been the founder, executive, developer and chief executive officer of [redacted] since the inception of the company. All policy formation, marketing functions, and business negotiations have been handled by beneficiary. Commencing August 2015, two added minority partners have provided supportive administrative functions subject to approval by beneficiary.

When the Beneficiary converted his sole proprietorship to a partnership in 2015, the partners agreed that the Beneficiary had sole authority over "all business operation and final management decision in the conduct of the business," "not subject to override by . . . the other partners." The Petitioner asserted that "the beneficiary has functioned at all times in either an executive capacity as sole owner, or as the managerial partner in the subsequent partnership entity." (The Petitioner did not explain how or why the Beneficiary's role changed from executive to managerial when he took on two partners.) On appeal, the Petitioner asserts that the Beneficiary worked in an executive capacity.

The two minority partners stated that the Beneficiary "maintains and continues to exercise control of all business related decisions . . . , even during the time that he is not physically present on [a] day-to-day basis." The record lacks specific details regarding the nature of the Beneficiary's duties abroad.

The Director denied the petition, stating that the Petitioner had not provided enough information to show that the Beneficiary's duties at the foreign company were primarily either managerial or executive. On appeal, counsel the Petitioner states that the record establishes the Beneficiary's "capacity as sole management decision-maker" at the foreign company, and asks "[w]hat does [the Director] imagine [the Beneficiary] did as the pinnacle of the brick-manufacturing corporation?" Counsel then describes various steps of brick manufacture, and asserts that the Beneficiary was not performing those steps because he was running the company as an executive. Counsel states that the Beneficiary "makes decisions that relate to distributing capital to various functions of the corporation, maintaining assets at optimum productivity levels, and minimizing liabilities."

Counsel submits no evidence from any source at the foreign company to corroborate these assertions, and does not claim first-hand knowledge of the operation of a brick manufacturer in India. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.

Also, counsel has presented what appears to be a highly simplified picture of the foreign company, indicating that all employees below the supervisory level are involved in mining, shaping, and baking clay. The Petitioner states that the Beneficiary performed higher functions such as "business negotiations," but has not indicated what sort of negotiations are involved in the business activity described. There is more to the business than the actual process of making bricks, and the record is deficient in this respect.

The Petitioner asserts that "the regulatory definition of 'executive' . . . does not require describing the minutiae of what [the Beneficiary] does on a day-to-day basis." It cannot suffice, however, for the Petitioner simply to point to the definition of "executive capacity" and assert that his duties conformed to that definition. Case law addresses this exact point:

> Plaintiffs' documents merely repeat the language of the INS[3] regulations in an effort to meet their burden of proof. Specifics are clearly an important indication of whether an applicant's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. In the Federal Register, the INS specifically mentioned that it wished to avoid situations such as these by emphasizing that the title of a position is not enough to indicate the true nature of employment. 52 Fed. Reg. 5739 (1987). The actual duties themselves 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). Furthermore, while there is no doubt that the Beneficiary had discretionary authority over the foreign company, the Petitioner must also establish that the Beneficiary's duties were *primarily* those of a manager or executive.

The Petitioner asserts that it "has done far more than reiterate the regulation. Petitioner has provided descriptions and background material sufficient for a conclusion about what the position is." The Petitioner's only elaboration on this point is to quote the partnership agreement, which states: "The capital of the firm shall be contributed and *managed* by the parties as per mutual agreement" (the Petitioner's emphasis). The Petitioner states that the Director neglected to consider information already in the record. The record does not support this contention. The initial job description referred to "policy formation, marketing functions, and business negotiations," which are broad areas of responsibility rather than identifiable tasks.

Furthermore, "marketing functions" are not self-evidently the tasks of a manager or executive. Without more information about what these "marketing functions" entailed, the Petitioner cannot meet its burden of proof. There is no presumption of eligibility that USCIS must rebut or overcome, and a general assertion of executive authority does not shift the burden of proof from the Petitioner to USCIS.

The Petitioner has not established that the Beneficiary's duties abroad were primarily those of a manager or an executive.

2. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's

[3] The Immigration and Naturalization Service, USCIS's predecessor agency.

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.

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. 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. The Petitioner has not claimed that the Beneficiary served as a function manager, or identified an essential function that the Beneficiary oversaw.

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*). Earlier in the proceeding, the Petitioner asserted that the Beneficiary served as a manager with oversight over supervisors, but has not reasserted this claim on appeal. Instead, the Petitioner has focused its appeal on a claim that the Beneficiary held an executive position with

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.*

An organizational chart for showed that each of the three partners oversaw an assistant supervisor. Each assistant supervisor, in turn, supervised five employees performing "skill[ed] labour" and five performing "labour."

The Director found that the Petitioner did not provide enough details about the duties of the Beneficiary's subordinate staff, or show that those subordinates adequately relieved the Beneficiary from having to perform primarily non-qualifying tasks.

On appeal, counsel asserts that "such issues as the number of employees, for example, . . . are not determinative of whether [the Beneficiary] was an executive of We agree. A company's small size does not automatically disqualify a given beneficiary, and its large size does not automatically quality a beneficiary. The Petitioner bears the additional burden of establishing the roles of the foreign company's employees.

Counsel for the Petitioner asserts that the foreign company's skilled and unskilled workers would mine and mold clay to be kiln-fired into bricks. Neither counsel nor the Petitioner has specified who handled ancillary responsibilities such as sales, payroll, accounting, and maintenance of equipment. It cannot suffice simply to state that the Beneficiary did not perform those functions because he was an executive, or that the company was sufficiently staffed to relieve the Beneficiary of those tasks.

B. U.S. Employment in a Managerial or Executive Capacity

1. New Office

The Petitioner stated that the Beneficiary would open a new office, but the record does not support that designation. The petitioning company has operated the same restaurant in the same location since 2000, but underwent a change in ownership in 2016, when the Beneficiary acquired a majority interest in the company from its previous owner, who remains at the company as the "store managing partner."

On the petition form, the Petitioner stated that the company is "a new enterprise in USA for beneficiary." A "new office" is one that has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). From this definition, it is clear that the office must be an objectively new business operation; it cannot just be "new . . . for [the] beneficiary." The Petitioner has been doing business in the United States since 2000 and did not become a new office by virtue of its change in ownership. Because the Petitioner's only existing location is not a new office, it cannot avail itself of the new office provisions in the regulations.

Because the regulations pertaining to new offices do not apply in this case, we will look instead to whether the Beneficiary's intended position already qualified as managerial or executive at the time the Petitioner filed the petition.

2. Duties

On the petition form, the Petitioner stated that the "beneficiary will provide the direction for growth of the affiliate and vision for expansion, delegating day to day management responsibilities to the designated manager."

In a request for evidence that touched on several deficiencies in the record, the Director informed the Petitioner that the submitted information did not provide necessary details about the nature of the Beneficiary's duties or the time he would spend on various tasks. The Petitioner's response did not address this issue.

The Director did not address the Beneficiary's duties in the denial notice. Instead, the Director found that the Petitioner had not submitted "sufficient information to indicate that [its] new office in the United States would be able to support an executive or managerial position in one year." As we have already noted, the petitioning company did not operate a new office at the time of filing.

Because the nature of the Beneficiary's U.S. duties was not a direct ground for denial of the petition, it is understandable that the Petitioner does not address this issue on appeal. Nevertheless, the Petitioner did not provide a substantive response when asked for more information about the Beneficiary's intended duties in the United States.

As with the foreign company, the Petitioner has provided few details of the Beneficiary's responsibilities as a manager or executive of the petitioning U.S. company. The Petitioner listed "unanticipated challenges" with which the Beneficiary had to contend, such as road construction which significantly affected access to the restaurant and the opening of new establishments which introduced additional competition for customers. In describing these problems, the Petitioner said little about exactly what the Beneficiary did to respond to them, apart from increasing the company's participation in franchisor promotions.

3. Staffing

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 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, or a "shell company" that does not conduct business in a regular and continuous manner. *See e.g., Family Inc.*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

An organizational chart identified five people: The Beneficiary, as "Executive Decision Maker"; minority shareholder J.P., as "Store Managing Partner"; one "Senior Employee" and two "Employees," without more specific titles. After the Beneficiary later purchased J.P.'s remaining shares, and J.P. left the company, the Petitioner promoted the "Senior Employee" to "supervise employees, formulate schedules, [and] train workers." Two front-line employees would prepare food, while the third would clean, purchase supplies, and act as cashier.

Quarterly tax returns in the record indicated that, at the time of filing, the Petitioner had five part-time employees. Four of their names appeared on the Petitioner's initial organizational chart. A fifth name, not shown on either version of the organizational chart, appears in tax documents from both before and after the petition's filing date. The record does not reveal the role of this employee.

In the denial notice, the Director found that the Petitioner had not established "a subordinate-level of managers for the beneficiary to direct. As such, it appears that the beneficiary would be employed as a first-line supervisor of non-professional employees."

On appeal, the Petitioner states that the Director's "demands for evidence in a start-up operation in the US for the first year are excessive and unrealistic." As we have already observed, the record does not support the assertion that the Petitioner is "a start-up operation" in its "first year." The sale of an existing company does not reset or obliterate that company's past history of operation and business activity.

We note that the Petitioner's assertions make it clear that the Beneficiary has already taken an active role in running the company, despite the lack of employment authorization that would allow him to accept compensation. In this respect, it is significant that one of the Petitioner's quarterly tax returns shows that the company had no paid employees on December 12, 2016, but nevertheless remained in operation. If the Beneficiary was preparing food and acting as a cashier, then he was primarily neither a manager nor an executive. If the Petitioner did have other paid staff in December 2016, then an erroneous tax return was prepared under his authority.

The Petitioner has identified an intermediate supervisor between the Beneficiary and the food preparers and cashier. Therefore, the Beneficiary does not appear to be the first-line supervisor of non-professional staff. Nevertheless, the record does not show what the Beneficiary has been doing, or will do, at the company. We duly note the Petitioner's plans to expand and open new businesses, but the Petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1). Because the Petitioner does not qualify as a new office as claimed, we cannot allow an additional year for the Beneficiary's position to grow into a managerial or executive capacity. The Petitioner cannot establish eligibility through the expectation of future growth. The Petitioner, upon whom the burden of proof rests, has not established that a franchise sandwich shop with four employees (or fewer) requires dedicated managerial or executive oversight.

III. TEMPORARY EMPLOYMENT

As noted above, the Beneficiary was the Petitioner's majority shareholder at the time of filing and has since become its sole owner. If the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and evidence that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

On the petition form, the Petitioner stated that the "Beneficiary will continue to grow and develop both companies and his home is still in India."

The Director asked for additional evidence to show that the Beneficiary would leave the United States after completing his temporary assignment. The Director stated that this evidence might take the form of "[a] contract showing a future assignment at the foreign entity and the beneficiary's expected date of return," a statement from the foreign entity explaining how the company is run in the Beneficiary's absence and when the Beneficiary will return, or the Petitioner's statement "explaining the plan to replace the beneficiary's services upon his or her return to the foreign entity."

In its response, the Petitioner did not specify when the Beneficiary would leave the United States or say who would assume his duties upon his departure. The Petitioner stated: "The longer range plan for [the Beneficiary] is that he will travel back and forth between the India company and the USA company, on an as needed basis."

The Petitioner's two partners in India offered a similar statement, asserting that "it is [the Beneficiary's] full intention to continue to exercise managerial supervision and direction over both companies . . . . [He] will essentially travel back and forth as needed to assure the continued profitable operation of both business enterprises." The arrangement described is not temporary and time-limited as required by the L-1A classification. Rather, the partners indicated that the Beneficiary would travel back and forth indefinitely between India and the United States. They did not indicate how much of his time the Beneficiary would spend in India, but they did assert that he "[d]oes not have to be physically present in India to continue to exercise [his] duties."

The Director stated that, when a beneficiary is a major shareholder of the petitioning entity, "a greater degree of proof is required" than the petitioner's assurance that the beneficiary will depart the United States after completing a temporary assignment in the United States. The Director cited case law, stating:

> While a petitioner for an L classification generally need submit only a simple statement of the facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily, where the beneficiary is the owner/major stockholder of the petitioning company, a greater degree of proof is required.

Matter of Isovic, 18 I&N Dec. 361, 364 (Comm'r 1980).[4]

On appeal, the Petitioner states that it addressed this issue in response to the request for evidence. That response set forth the Petitioner's intention to have the Beneficiary continue running the company and return to the United States to do so. This is not indicative of a temporary assignment.

The Petitioner submits an affidavit in which the Beneficiary states that, because he controls both the petitioning company and [redacted] in India, no one has the authority to give him "assignments" or to instruct him to return to India. This assertion does not resolve the issue. The key regulatory requirement is the temporary nature of the employment in the United States, rather than the existence of a higher authority in a position to make "assignments."

The Beneficiary states that he intends "to return to India to re-engage in the business activities of [redacted] on an in-person basis," but in the meantime the U.S. business requires "remodeling and modernization." The Beneficiary offers no timetable for this work, but states that "upon approval . . . of the one year L1A visa petition application, I will shortly thereafter travel back to India." The Beneficiary also states: "It is safe to say . . . that I would choose to return back to the U.S. within a reasonable period of time [after] my departure, to again engage more fully in the continued development of [the Petitioner's] business enterprise."

The Petitioner has not explained what would happen to its leadership structure after the Beneficiary completed what is supposed to be a temporary assignment in the United States. Rather, the Petitioner has indicated that the company requires his continued involvement. The Petitioner has specified that the Beneficiary's role with the company is not temporary, but will continue indefinitely into the future. The Petitioner's business plan indicated that the Beneficiary would take an active role in expanding the company in the United States. The Petitioner has also emphasized that the foreign company is capable of operating in the Beneficiary's absence. The Petitioner has, in effect, offered the Beneficiary permanent employment in the United States, albeit with the provision that the Beneficiary will return to India at unspecified intervals.

It is also significant that, in India, the Beneficiary brought on partners to share the management of the company, whereas in the United States, the Beneficiary bought out the minority owner who had initially stayed on in a supervisory role. In this way, the Beneficiary decreased his responsibilities abroad and increased them in the United States.

The submitted evidence does not establish that the Beneficiary's direct involvement with the petitioning U.S. company would be temporary, as the regulations require.

[4] While *Isovic* dates from an earlier statutory and regulatory regime, the pre-1991 regulation at 8 C.F.R. § 214.2(l)(3)(C)(vi) was worded identically to the current regulation at 8 C.F.R. § 214.2(l)(3)(C)(vii).

IV. CONCLUSION

The Petitioner has not established that was employed abroad, and will be employed in the United States, in a managerial or executive capacity. The Petitioner has also not established that it intends for the Beneficiary's employment in the United States to be temporary.

ORDER: The appeal is dismissed.

Cite as *Matter of R-, Inc.*, ID# 871415 (AAO Dec. 28, 2017)