U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-C-E-, LLC

DATE: FEB. 13, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a raw lumber exporter, seeks to temporarily employ the Beneficiary as general manager and president of its new office[1] 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 Beneficiary had been employed in a qualifying managerial or executive for the foreign entity or would be employed in a managerial or executive capacity for the Petitioner within one year.

On appeal, the Petitioner asserts that the Director did not accord the Petitioner the benefit of a full evidentiary review and analysis as required by the statute and a precedent decision. The Petitioner avers that it has established that the Beneficiary's employment for the foreign entity is in a managerial capacity and that the proposed employment satisfies the criteria for the L-1A visa classification.

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

[1] The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

Also, if the Form I-129, Petition for a Nonimmigrant Worker, indicates that the beneficiary is coming to the United States in L-1A status to open or to be employed in a new office, 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 includes information regarding the new office's physical premises, 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).

The term "managerial capacity" is defined 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.

II. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

The Director determined that the Petitioner had not established that the Beneficiary's four subordinates with managerial titles at the foreign entity actually performed managerial responsibilities or supervised others. The Director noted that the foreign entity employed the Beneficiary and his four subordinates leaving no one but the four subordinates to perform the operational duties of the sales, administration, accounting, and logistics of their departments. The Director concluded that the record showed that the Beneficiary's position abroad was primarily that of a first-line supervisor, rather than a managerial or executive position.[2]

We will address both the Petitioner's description of the Beneficiary's foreign duties as well as the foreign entity's staffing to determine whether the Petitioner has established this eligibility requirement. When reviewing staffing levels as a factor in determining whether an individual is acting in a managerial capacity, we 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.

[2] The Petitioner does not claim that the Beneficiary was employed abroad in an executive capacity. We, therefore, restrict our analysis to the Beneficiary's claimed managerial capacity for the foreign entity.

A. Duties

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 managerial and executive capacity have two parts. First, the petitioner must show that the beneficiary performed 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 was *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 foreign entity initially provided a general description of the Beneficiary's duties and slightly expanded upon those duties for the foreign entity in response to the Director's request for evidence (RFE). These duties included the following (bullet points added and paraphrased):

- Develop and execute the company's business strategies such as finding target markets and decision [*sic*] regional types of products available for export and sale – 20%
- Prepare and implement comprehensive business plans to facilitate achievement by planning cost-effective operations and market development activities such as expanding into other countries like China, India and Pakistan – 15%
- Ensure company policies and legal guidelines are communicated all the way from the top down in the company and they are followed at all times such as administration of employment agreements – 5%
- Communicate and maintain trust relationships with business partners and authorities such as authorizing approval of employees to certify payments of VAT invoices – 10%
- Oversee the company's financial performance, investments and other business ventures by proper administration of the bank facility agreement – 20%
- Delegate responsibilities and supervise the work of employees providing guidance and motivation to drive maximum performance such as Letter of Authorization – 5%
- Read all submitted reports by employees to reward performance, prevent issues and resolve problems – 5%
- Analyze problematic situations and occurrences and provide solutions to ensure company survival and growth such as establishing trusted vendor purchase relationships – 20%

The description of the Beneficiary's foreign duties does not detail the Beneficiary's actual day-to-day tasks. Rather, the Petitioner lists broad responsibilities that are applicable to and performed by any company owner. For example, the foreign entity noted that the Beneficiary spent 20 percent of his time developing and executing business strategies such as finding target markets and types of products for export and sale. Similarly, the foreign entity indicated that the Beneficiary

spent 15 percent of his time preparing and implementing business plans for cost effective operations and to expand into other countries. However, the foreign entity did not further explain the tasks the Beneficiary performed in carrying out these responsibilities. These general descriptions add no practical understanding of the specific actions the Beneficiary undertook in his daily routine. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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). An individual will not be deemed a manager or an executive under the statute simply because they have a managerial or executive title or because they "direct" or "manage" the enterprise as the owner of the entity.

The foreign entity also stated that the Beneficiary is the individual responsible for maintaining relationships with business partners and analyzing problems and providing solutions to ensure the company's survival and growth. These responsibilities are conceptually more operational in nature than managerial. The Beneficiary is the individual performing the necessary tasks to continue and expand the foreign entity's operations, rather than managing or directing these activities. As neither the foreign entity nor the Petitioner further expounded upon these responsibilities, the record is insufficient to establish that these responsibilities and any associated duties fall within the parameters of the statutory definition of managerial capacity.

The foreign entity added that Beneficiary also performed duties regarding financial reporting, including selecting the appropriate accounting policy, making accounting judgements, ensuring accurate accounting records, and preparing the financial statements. Further, that the Beneficiary designed and maintained the internal control system, ensured compliance with the registered accounting system, and safeguarded the assets of the company. The foreign entity did not indicate whether these duties fell within the 20 percent of the Beneficiary's time allocated to overseeing the company's financial performance, investments, and other business ventures, or within one of the other generally described responsibilities. Nevertheless, these responsibilities are insufficiently described to establish that the duties require the Beneficiary to manage the financial component rather than perform many of the non-qualifying budgetary and supervisory duties associated with maintaining the foreign entity's finances.

On appeal, the Petitioner emphasized that the Beneficiary exercised managerial authority by administering the foreign entity's contracts and signing corporate documents. The Petitioner also emphasized that the Beneficiary is the foreign entity's controlling shareholder. However, the Beneficiary's senior level of authority within the company is but one factor to consider when evaluating a beneficiary's managerial capacity. The Petitioner in this matter has provided a general description of the Beneficiary's responsibilities which offers little insight into the duties he actually performed on a day-to-day basis for the foreign entity. Without detailed duties, we cannot analyze and evaluate the Beneficiary's actual daily role within the foreign entity.

While the Beneficiary may exercise discretion over the foreign entity's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position

descriptions lack detail and thus are insufficient to establish that his actual duties for the foreign entity were primarily managerial or executive in nature.

B. Staffing

Beyond the required description of the job duties, we review the totality of the evidence when examining 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.

The foreign entity's organizational chart depicted four positions subordinate to the Beneficiary. The sales manager negotiates and manages sales, and maintains good relations with customers. The accountant prepares internal and external financial statements, inputs data, prepares and converts data to general ledger entries, develops spreadsheet reports, and prepares payments. The logistics manager manages the warehouse, transportation and customer services, liaises with suppliers, manufacturers, and retailers, and tracks quality, quantity of stock levels, delivery times, transport costs, and efficiency. The executive assistant provides logistical and administrative oversight, travel support, and tactical organization of meetings, and works with the president and the company's vendors and freight forwarder.

The Director noted that each of the Beneficiary's foreign subordinates was the only employee within the department and found that although the subordinates held managerial or executive titles, each of these individuals was performing the day-to-day tasks of providing the foreign entity's products and services. The Director found that the Beneficiary's position was that of a first-line supervisor.

On appeal, the Petitioner asserts that in addition to supervising professionals, the Beneficiary's performance as a manager in the year prior to his transfer was spent in several functional areas for the foreign entity. The Petitioner claims that the Beneficiary spent 20 percent of his time spent on financial planning and budgeting, 35 percent of his time on "market targeting development and evaluation," 15 percent of his time on business compliance, and 20 percent on human resources administration. The Petitioner contends that the staff accountant/auditor, the sales manager, and the executive assistant performed these functions.

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.

We first note that the record does not include sufficient evidence regarding the subordinates' positions to identify any of the positions as professional positions. 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"). 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." It is the level of education required by the position, rather than the degree held by subordinate employee that establishes a position as a professional position. 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. Here the subordinates' position descriptions focus on the clerical, administrative, logistical, and sales duties necessary to carry out the foreign entity's operations. Neither the Petitioner nor the foreign entity describes specific duties that would require a bachelor's degree to perform the duties of their respective departments. Rather, the position descriptions as described show a sales position, a bookkeeper/junior accountant, a logistic coordinator, and an assistant.

In addition to the lack of evidence establishing that the subordinate positions are professional, we also find that the subordinate positions described are not managerial or supervisory in nature. As the Director found, the Beneficiary's subordinates at the foreign entity are performing the routine operational and administrative duties of their departments. The Petitioner has not established that the Beneficiary's duties at the foreign entity were primarily those of a personnel manager as set out in the statute.

We also find the Petitioner's claim on appeal that the Beneficiary's time at the foreign entity was spent primarily managing four different essential functions unpersuasive. We note that the Petitioner re-arranges the allocation of the Beneficiary's time spent on various responsibilities/functions on appeal, without explanation, and the time allocated does not total 100 percent. The Petitioner's reference to an adopted decision is noted. However, whether a beneficiary is an "activity" or "function" manager turns in part on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See Matter of Z-A-*, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016). Here, the Petitioner does not document who performed the first-line supervisory duties of non-professional employees, if not the Beneficiary.

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). Here, the foreign entity does not describe the Beneficiary's duties as primarily managing an essential function but rather operating the entire company as its majority owner. Merely performing or supervising all the necessary sales, logistical, and financial operations is not the same as managing an essential function.

At the time of filing, the foreign entity was a six-year old company with five employees. The company employed the Beneficiary as its chief executive officer and four additional employees, three of whom had managerial titles.[3] It does not appear that the reasonable needs of the foreign entity might plausibly be met by the services of all managerial/executive employees. The foreign entity's organizational structure is not sufficient to elevate the Beneficiary to more than that of a first-line supervisor of non-professional employees. The Petitioner has not established that the Beneficiary was primarily employed in a managerial or executive capacity for the foreign entity. *See* sections 101(a)(44)(A) and (B) of the Act.

III. NEW OFFICE

The Director determined that the record did not establish that the Petitioner would have projected growth in one year sufficient to require the Beneficiary to perform primarily in a qualifying capacity. The Director also found that the Petitioner's proposed organizational structure was not sufficient to elevate the Beneficiary's position to a primarily managerial or executive position within one year.

On appeal, the Petitioner reiterates that it is primarily an export company that sources southern yellow pine from log suppliers, who load the logs and deliver the containers directly to the freight forwarder. The Petitioner also notes that it entered into a 50-50 joint venture with another company to establish a subsidiary company in July 2017. The Petitioner indicates that the subsidiary company employs five people.

Preliminarily, we find that the creation of a separate subsidiary entity in July 2017 is not relevant to establishing eligibility for a "new office" petition filed in March 2017. 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). Consideration of the separate subsidiary will not be considered in evaluating the Petitioner's projected growth and support of the Beneficiary in a managerial or executive capacity.

We also question whether the Petitioner was a "new office" when the petition was filed. The Petitioner was organized in August 2015 and this petition was filed in March 2017. To qualify as a "new office" the organization must have been doing business[4] in the United States for less than one

[3] The duties of the executive assistant's position are not sufficiently detailed to establish whether the position is primarily clerical or executive in nature.

[4] The term "doing business," is defined as the regular, systematic, and continuous provision of goods or services. 8 C.F.R. § 214.2(l)(14)(ii)(A) and 8 C.F.R. § 214.2(l)(1)(ii)(H).

year. 8 C.F.R. § 214.2(l)(1)(ii)(F). In this matter if the Petitioner was doing business prior to March 2016, it could not be considered a "new office," subject to the less strict "new office" regulations.

The record in this matter includes copies of the Petitioner's bank statements since November 2015. The Petitioner's pertinent bank statements are:

- The Petitioner's November 2015 bank statement which shows two deposits totaling just over $200,000 from [redacted] of Australia.[5]
- The Petitioner's December 2015 bank statement which shows the foreign entity's transfer of just over $120,000 to the Petitioner and also shows three large withdrawals totaling over $100,000.
- The January 2016 bank statement which lists only four withdrawals, three of the withdrawals total over $90,000.
- The February 2016 bank statement which shows the foreign entity's additional deposit of $58,296 and shows almost $160,000 paid out.

The record does not include evidence detailing the purpose of the initial November 2015 deposit from what appears to be an unrelated company and the purpose of a number of significant withdrawals from the Petitioner's bank account prior to March 2016. These transactions, with no underlying evidence describing their purpose, raise significant concerns regarding the Petitioner's status as a new office.[6]

Additionally, the individual in the Petitioner's export coordinator/operations manager position indicated on his resume that he began his employment with the Petitioner in January 2016. Further, one of the Petitioner's suppliers, in a letter written on the Petitioner's behalf, indicates that it has been doing business with the Beneficiary since 2015. This information and the lack of explanation regarding the Petitioner's receipts and debits prior to March 2016, casts doubt on the Petitioner's claim on the Form I-129, Petition for a Nonimmigrant Worker, that it is a new office. As the Petitioner was not given an opportunity to respond to these concerns, we will discuss the other deficiencies in the record which preclude a determination that the Petitioner established it could support a managerial or executive position within a one-year time frame at the time of filing.

A. Duties

The Petitioner has not submitted sufficient evidence to establish that it will support the Beneficiary in an executive or managerial capacity, as the statute defines those terms, within one year. When a

[5] This deposit raises questions regarding the foreign entity's purchase of the Petitioner's outstanding units. That is, as the record does not include evidence describing the purpose of this deposit, it is unclear if [redacted] purchased an interest in the Petitioner or if this deposit was payment for lumber or other goods and services. The issue of the Petitioner's initial funding and resulting qualifying relationship with the foreign entity in this matter must be addressed in any future proceedings.

[6] The Petitioner has provided invoices, shipping information, and bills of lading for transactions conducted from April 2016 through June 2017.

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.

The Petitioner provided a broad 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. Other than responsibilities to procure lumber and coordinate with the affiliate in Vietnam, the Petitioner does not connect any of the vague job responsibilities to its actual export operation. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The Petitioner also does not describe how the Beneficiary will move beyond daily involvement in non-qualifying duties such as procuring lumber, negotiating terms, reviewing orders, identifying market opportunities, and allocating resources, 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 responsibilities includes qualifying and non-qualifying duties. The Petitioner 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.

B. Business Plan and Staffing

In its business plan the Petitioner states that it sources southern yellow pine logs in the United States and exports them to Asia's markets, mainly to Vietnam. The Petitioner indicates that it planned to hire an operations manager in 2016, a marketing manager in 2017, and a logistics executive in 2018. The initial record also included the Petitioner's proposed organizational chart. The chart showed the Beneficiary in the position of president/general manager with three subordinate employees, identified as an international sales manager, a sourcing/purchasing manager, and a coordination executive. The organizational chart depicts the Beneficiary's position and the coordination position[7] as filled when the petition was filed. The organizational chart indicates the Petitioner's plan to hire an international manager in the second year and a sourcing/purchasing manager in the third year.

On appeal, the Petitioner claims that it has exceeded its projected sales using only two employees and a contract vendor in 2017 and that these results prove the viability of its business plan.

[7] The individual in the coordination executive position identifies his position for the Petitioner as "operations manager" on his resume.

However, when the petition was filed, the Petitioner did not support its projections with a detailed market analysis or other supporting documentation demonstrating a realistic expectation that the company would grow significantly the first year. The Petitioner claims on appeal that the foreign entity will handle import logistics, the foreign entity's sales manager will handle sales, and that it will use the foreign entity's accountant for financial matters. The Petitioner asserts that the foreign entity's employees' involvement in the Petitioner's operations demonstrate that the Beneficiary will perform the duties of a function manager. The Petitioner again references the *Matter of Z-A-* adopted decision.[8]

The Petitioner, however, does not provide probative evidence of employees, contractors, or foreign staff who will source the U.S. lumber, negotiate the terms and purchase of the lumber to be exported, as well as supervise the foreign and local non-professional staff, other than the Beneficiary. For example, the Petitioner indicated that it would not hire a sourcing/purchasing employee until the third year of operations and the record to date does not include evidence that the Petitioner has hired such an employee. The record also does not show that the Petitioner has hired a marketing manager or an international sales manager as set out in its business plan. The record in this matter does not include a sufficiently developed business plan detailing the Petitioner's proposed staffing and describing how and when the Beneficiary would be relieved from performing the necessary operational exporting tasks of the company within a one-year time frame.

The record lacks evidence regarding the Petitioner's financial projections and a staffing plan. The business plan lacks consistent information regarding the number and type of projected employees, their salaries, and duties. 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. The record also does not include any of the Petitioner's federal tax records supporting the unaudited three-page balance sheet and profit and loss statement for 2016.

The record does not include probative evidence that the Petitioner will be sufficiently staffed to allow the Beneficiary to primarily manage a major component or function of the organization and delegate the duties necessary to carry out the component or functions administrative and operational tasks within a one-year time frame.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary's foreign employment was in a managerial or executive capacity and that it will employ the Beneficiary in a managerial or executive capacity within one year of approval of the petition.

[8] The Petitioner incorrectly identifies *Matter of Z-A-* as a "new office case." However, the Petitioner in the *Matter of Z-A-* sought to extend a previously approved new office petition.

ORDER: The appeal is dismissed.

Cite as *Matter of E-C-E-, LLC*, ID# 929296 (AAO Feb. 13, 2018)