U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF FCSO-, LLC

DATE: FEB. 27, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner operates a car wash in which it holds a 50% ownership interest. The Petitioner seeks to extend the Beneficiary's temporary employment[1] as its president and chief executive officer (CEO) 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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that it will employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. On appeal, the Petitioner asserts that the Director erred because the Petitioner has met its burden of proof to establish that it will employ the Beneficiary in an executive capacity.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification 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. 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, approved for the period from 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).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner does not claim that it will employ the Beneficiary in a managerial capacity. Therefore, we restrict our analysis to whether the Petitioner will employ the Beneficiary in an executive capacity.

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 an 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.

A. Duties

When examining the claimed executive capacity of the Beneficiary, we will review the Petitioner's description of the Beneficiary's 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).

The definition of executive capacity has 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 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner owns a 50% ownership interest in [redacted] which in turn owns the car wash that the Petitioner operates. [redacted] operating agreement, as amended on

October 31, 2016, specified that the Beneficiary would be the company's sole manager, with "full and complete power, authority, and discretion" over the car wash business.

The Petitioner listed the Beneficiary's responsibilities, with the approximate time devoted to each. The Petitioner specified that the list applied to the Beneficiary's duties during the previous year and his intended duties under the extended petition. After the Director requested additional information, the Petitioner revised the list somewhat, as shown below:

- Direct the management of the company and direct operational activities of general manager and line supervisors (35%);
- Direct the growth of the company, mainly through careful analysis of sales and marketing policies (15%);
- Development and implementation of strategies designed to boost the company's market position (10%);
- Establish goals and policies of the business with focus on growth and improvement of services (10%);
- Meet with vendors and determine best products to acquire (5%);
- Evaluate and determining pricing policies for services to increase profit margins (10%);
- Oversee company's long-term business vision, which includes overall purpose of the company and its long-term business plan (10%); and
- Identify and hire subordinate staff to manage day-to-day functions and management positions should they become necessary (5%).

In the denial notice, the Director found that several elements of the job description "simply paraphrase statute," asserting that the Beneficiary has broad authority over the company but providing little information as to how he exercises that authority. The Director concluded that the job description was too general to establish that the Petitioner will employ the Beneficiary primarily in an executive capacity.

On appeal, the Petitioner restates the job description submitted previously, first by paraphrasing it and then by repeating it word for word. The Petitioner states that the job description is "not overly general or vague," but that it "clearly describes duties that are executive in nature."

The record does not support the Petitioner's assertion that the job description has sufficient detail. The Director advised the Petitioner that more specifics were necessary, and the Petitioner responded by revising the wording without significantly expanding it.

The Petitioner asserts that the Director did not explain how the job description is deficient. We will address that point here. The Petitioner listed the Beneficiary's major duty as directing the management of the company, which, as the Director noted, derives almost verbatim from the statutory definition of executive capacity. *See* section 101(a)(44)(B)(i) of the Act. The Petitioner listed, as separate items, developing strategies, establishing goals and policies, and overseeing the

business vision and plan, but the Petitioner did not explain the distinction between these three areas. Furthermore, these are general responsibilities rather than specific tasks the Beneficiary would perform to carry out those responsibilities.

In addition, some of the assigned percentage figures appear to be inflated. The Petitioner states that the Beneficiary would devote 10% of his time – several hours per week – to pricing policies. The record does not show how a car wash that sells a limited range of related products would regularly demand that much of the Beneficiary's time. The Petitioner claimed that the Beneficiary spends even more time, 15%, analyzing sales and marketing policies. The record does not show what those policies are or establish that they are sufficiently complex to warrant that level of sustained analysis.

Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive 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). The actual duties themselves reveal the true nature of the employment. *Id.* Therefore, reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties.

The Petitioner asserts that the Beneficiary "is not responsible for washing cars or handling any of the operations associated with washing cars," but there are other non-executive aspects of the business that the Petitioner has not allocated to other employees, such as administrative or clerical functions. The Petitioner refers to marketing but has not shown who is responsible for actual marketing tasks, which are not executive in nature.

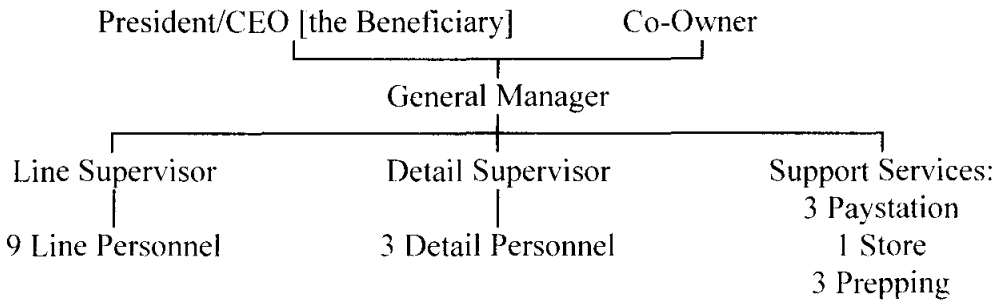
We acknowledge the Beneficiary's stated authority over hiring and other personnel actions, but that authority falls within the definition of managerial, rather than executive, capacity. The Beneficiary's position must meet all elements of one or the other definition, rather than combining aspects of both.

The record establishes that the Beneficiary oversees a functioning car wash, but does not show how he would primarily spend his time on the overly broad responsibilities listed in the job description. The Petitioner did not show that the Beneficiary's actual duties will be primarily executive in nature.

B. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining a beneficiary's claimed executive capacity, 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 Petitioner indicated that it had 19 employees at the time of filing; payroll records show that this number fluctuates somewhat due to a high rate of turnover. A subsequent organizational chart showed the following structure:



The Petitioner initially stated that the general manager was responsible for "Daily and weekly planning and labor management, [and] Personnel Recruitment."

The Director asked the Petitioner to establish that some of the subordinate positions are managerial or executive. In response, the Petitioner asserted that it "has the necessary staffing levels for [the Beneficiary] to only perform qualifying executive [tasks]," and that the "General Manager . . . is responsible for overseeing the work of the Line Supervisor, Detail Supervisor, and Support Services." The Petitioner provided no further details.

In the denial notice, the Director found that the Petitioner had not established that its staffing structure was sufficient to support an executive position. The Director noted that the Petitioner had not provided detailed job descriptions for any of the positions subordinate to the Beneficiary, and therefore the Petitioner had not shown how those positions relieve the Beneficiary from primarily performing non-qualifying operational or administrative tasks.

On appeal, the Petitioner asserts that the "car wash . . . cannot effectively operate without an executive to direct subordinate employees who perform day-to-day functions." This argument presumes that the Petitioner's business requires executive leadership. The Director did not contend that the car wash employees should work without supervision, but supervision can take the form of a supervisor, a manager, or an executive. It is the Petitioner's burden to show how its car wash business is able to support the Beneficiary in a position that requires him to primarily perform duties that fall within the statutory definition of "executive capacity." The fact that the Beneficiary will manage or direct the business as its senior employee does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(44)(B) of the Act.

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.

In this instance, the Petitioner has identified a general manager between the Beneficiary and the first-line supervisors, but the Petitioner has not provided enough information about the general manager's position to show that it is truly managerial rather than supervisory.

The Petitioner states that it previously "provided a list of its 18 employees, their job descriptions and salaries." The record shows that the Petitioner listed its employees by job title with very brief job descriptions. The Petitioner does not quote any subordinate job descriptions on appeal, apart from a brief statement of the hierarchy from general manager to supervisors and the cursory assertion that the subordinates relieve the Beneficiary from having to perform lower-level operational duties. In fact, the referenced employee list summarizes the Beneficiary's own duties as "Strategic Planning, Marketing, Maintenance, and Administration." We note that the Petitioner does not attribute any marketing, maintenance, or administrative duties to other employees. Based on the limited information provided, the record reflects that the Beneficiary likely performs these non-executive duties, but does not indicate how much time he spends on them.

In sum, while it does not appear that the Beneficiary washes cars or runs the cash register, the Petitioner has not affirmatively established that the functions the Beneficiary *does* perform are primarily those of an executive. Rather, there are a number of non-executive functions, such as administrative and marketing functions, that the Beneficiary does not delegate to subordinate staff. The totality of the evidence does not show how the Beneficiary is relieved from significant involvement in the day-to-day operations of the business so that he can primarily devote his time to executive duties.

III. CONCLUSION

The Petitioner has not established that it will employ the Beneficiary in an executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of FCSO-, LLC*, ID# 981542 (AAO Feb. 27, 2018)