U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF KRS-, LLC

DATE: FEB. 28, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a supplier of equipment and materials for the oil and gas industry, seeks to extend the Beneficiary's temporary employment as its company controller 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, Vermont Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that Director erred in finding that the Petitioner did not submit sufficient evidence of the scope of its operations in support of its claim that the Beneficiary would be employed in an executive capacity.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a managerial or executive capacity, or in a specialized knowledge capacity, for 1 continuous year within 3 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, executive, or specialized knowledge capacity. *Id.*

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as "an assignment within an organization in which the employee primarily":

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) 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;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

Further, "[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." *Id.*

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as "an assignment within an organization in which the employee primarily":

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

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.

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we agree with the Director's determination.

A. Duties

When examining the managerial or executive capacity of the Beneficiary, we will look first to the Petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

In a letter in support of the petition, the Petitioner, a material and equipment supplier for the oil and gas industry with five claimed employees, described the Beneficiary's position of company controller as "a high level executive position responsible for managing the financial and accounting activities of our company with a focus on the oil and gas industry, and further developing the business activities of our office in Texas." The Petitioner provided a list of approximately 30 duties and later, in response to a request for evidence, resubmitted the same list of duties, indicating that the Beneficiary would spend between 2 and 4 percent of his time on each of the listed tasks. It further stated that the Beneficiary "will be responsible for the essential function of directing and managing the financial and accounting activities of our U.S. Corporation."

While the position description was lengthy, the individual listed job duties were repetitive and general in nature and did not clearly illustrate the Beneficiary's claimed role as controller for an international group of companies. The job description conveyed the Beneficiary's authority over the Petitioner's financial matters, noting that he will "direct, control and oversee activities in the accounting, financial and taxation areas," maintain a system of accounting policies and procedures, "oversee the operations of the accounting department, including the design of accounting systems," oversee compliance with government reporting requirements, direct the preparation of financial statements, "ensure the issuance of complete financial statements," and "maintain a system of controls over accounting transactions," amongst other duties.

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 managerial or executive 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, Inc. v. INS*, 940 F.2d 1533. Here, while the evidence showed the Beneficiary would be its senior employee with respect to financial activities, the breakdown of the Beneficiary's duties was disjointed and did not present a clear picture of what he primarily does on a day-to-day basis or to what extent he is relieved from performing non-qualifying duties associated with the company's or group of companies' financial, payroll, accounting and taxation matters.

B. 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 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.

In denying the petition, the Director did not specifically address the Beneficiary's stated job duties, but rather determined that the stated duties were "not consistent with the current scope and development of your company in the United States." The Director acknowledged the Petitioner's assertion that the Beneficiary's role as company controller would require him to direct and manage finance and accounting functions for a group of companies in the United States as well as continued oversight of its Venezuelan affiliate's finance and administration department and its three employees. However, the Director found inconsistencies in the record and insufficient evidence overall to support the interrelated nature of the companies' operations.

On appeal, the Petitioner emphasizes that it provided organizational charts and evidence of ownership for the group companies sufficient to show the overall scope of operations, the relationship between the companies in the United States and Venezuela, and "the Beneficiary's role as a Controller for the entire organization as a whole."

The record contains several charts intended to show the structure of the which depict several Venezuelan and U.S. companies, including the Beneficiary's former employer, The charts listed a total of five U.S. companies, including four "procurement" companies: the Petitioner, and and one "real estate" company, The Petitioner provided addresses and a map showing that the companies are located adjacent to one another in Texas, but later provided evidence that was dissolved subsequent to the filing of the petition.

The Petitioner submitted a copy of its organizational chart which showed as Director of operations, supervising the Beneficiary, a supply chain manager and a vacant commercial and sales manager position. The chart depicted a finance administrator a vacant tax coordinator position, and an administrative assistant subordinate to the Beneficiary. Under the supply chain manager, the chart shows four vacant procurement positions, an inventory and logistic coordinator, and a warehouse assistant. Finally, the chart shows a vacant bid process position under the commercial and sales manager position.

The Petitioner also provided organizational charts for ' and Both charts list and – accounting coordinator, as the Beneficiary's subordinates, with a note that the Beneficiary, and are "assigned from" the petitioning company to provide services for these entities. The chart lists a total of seven individuals reporting to while the commercial and sales department is unstaffed on all three company charts.

The supporting evidence confirmed that and work for the Petitioner (along with the Beneficiary and while is an employee of The

Petitioner provided identical position descriptions for [redacted] and [redacted] stating that both employees are responsible for employee payroll, accounts payable, accounts receivable, and assisting the Beneficiary with the following duties:

- Prepares special reports by collecting, analyzing and summarizing information and trends.
- Complies with federal, state, and local legal requirements by studying existing and new legislation; anticipating future legislation; enforcing adherence to requirements; filing financial reports; advising management on needed actions.
- Ensures operation of equipment by establishing preventative maintenance requirements and service contracts; maintaining equipment inventories; evaluating new equipment and techniques.
- Protects operations by keeping financial information and plans confidential.

The Petitioner stated that both of these positions require a bachelor's degree "or equivalent" with 2 years of bookkeeping experience. The Petitioner also submitted a job description for the administrative assistant, indicating that she manages her supervisor's calendar, screens incoming calls and correspondence, acts as custodian of corporate documents and records, directs preparation and filing of corporate legal documents, composes and prepares correspondence and reports, creates and maintains database and spreadsheet files, and arranges travel plans and itineraries.

In addition, the Petitioner provided a chart for its Venezuelan affiliate, [redacted] which depicted the Beneficiary as controller supervising a systems and telecommunications employee, a finance and administration manager, and an accounting management employee. The Petitioner also submitted detailed position information for these claimed foreign subordinates. However, according to the information provided, none of these positions report to the Beneficiary's controller position; rather, the submitted information indicated that an administration manager supervises the systems and telecommunications coordinator, while the finance and administration manager and accounting manager both report to the foreign entity's finance director.

The Director later issued a request for evidence (RFE). The Director advised the Petitioner that the initial evidence did not demonstrate how its current scope and structure could support an L-1A employee who performs primarily managerial or executive duties. The Director noted that some of the documentation submitted suggested that the Beneficiary would be acting on behalf of a group of companies, but noted that the evidence did not substantiate or corroborate these claims with documentary evidence. As such, the Director advised that the Beneficiary's role within the larger group of companies had not been established.

In a letter submitted in response to the RFE, the Petitioner stated that the Beneficiary "directs the financial and accounting activities of our company and its affiliates" and "oversees a team of six (6) professional accounting and systems and telecommunications personnel" located in Texas and Venezuela. The Petitioner provided a revised U.S. organizational chart which includes the Petitioner's company name along with [redacted] and [redacted] The chart shows

the Beneficiary supervising and as well as the three previously-identified Venezuelan employees.

The Petitioner re-submitted the same position description for but changed his job title to "Finance Administrator/Coordinator – Accounts Payable." The Petitioner revised job title to "accounting coordinator" and submitted a completely revised position description for him, and at the same time submitted copies of quarterly tax filings for both the Petitioner and which signed in his capacity as "HR Supervisor." Finally, the Petitioner changed title to "Administrative Assistant – Accounts Receivable" and added one duty ("assists with accounts receivables items") to her previous job description.

The Petitioner also submitted revised position information for the foreign employees. Specifically, it revised the title of the supervisor for each of these positions. The new descriptions indicate that the finance and administration manager and accounting manager are supervised by the "controller & financial director," while the systems and telecommunications coordinator is supervised solely by the controller.

The Petitioner provided certificates of formation for and in support of its claim that these entities are the Petitioner's affiliates. It provided its unaudited financial statement for the year ended December 31, 2015, showing $7.79 million in net sales and net income of $52,332. The Petitioner also submitted audited financial statements for 2012 and 2013 for

Upon review of all of the submitted evidence, we agree with the Director's finding that the totality of the evidence submitted is insufficient to support the Petitioner's claims that the Beneficiary performs primarily managerial or executive duties associated with the group's financial activities in the United States and abroad.

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."[1] 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*).

[1] In evaluating whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

Here, the Petitioner has stated that the Beneficiary supervises six professionals, including two employees of the petitioning company, one employee who works for its U.S. affiliate, and three employees who work for its Venezuelan affiliate. With respect to the U.S. employees, while the Petitioner indicated that two of the three positions require a bachelor's degree or its equivalent, it later stated that only one of the employees, the finance administrator actually obtained at least a bachelor's degree. Moreover, the duties attributed to this position, including preparing payroll and handling accounts payable and receivable, did not clearly require completion of a bachelor's degree. The Petitioner provided two completely different position descriptions for position of accounting coordinator without providing an explanation and also submitted evidence indicating that he is acting as an "HR Supervisor." The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Overall, the evidence did not establish that the Beneficiary is primarily supervising professional positions or that his subordinates are managers or supervisors, as none of them have any stated supervisory duties.

With respect to the Beneficiary's claimed supervision of the three foreign staff, we note that the initially submitted position descriptions for those employees stated that the employees report to either the foreign entity's administration manager or its finance director, rather than to the Beneficiary. While the Petitioner later revised this information to indicate that these employees report to the Beneficiary, the Petitioner did not provide an explanation for this material change. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Moreover, there is nothing in the position descriptions for the foreign employees suggesting that they are involved in the day-to-day financial and administration duties of the petitioning company, nor is there indication in the breakdown of the Beneficiary's job duties suggesting that he oversees the Venezuelan staff in carrying out his duties for the Petitioner. Therefore, we find insufficient evidence to establish that the Beneficiary directly supervises the foreign staff.

The Petitioner has not established, in the alternative, that the Beneficiary will be employed primarily as a "function manager." 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 term "essential function" is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a petitioner must clearly describe the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties dedicated to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function.

While a function manager is not required to directly supervise subordinate staff, the Petitioner claims that the Beneficiary supervises six staff located in the U.S. and abroad, and that these individuals perform non-qualifying duties associated with accounting, taxation, and payroll, leaving the

Beneficiary free to primarily manage these essential function for the group of companies. However, we note that the Petitioner initially described the function in narrower terms, as it stated at the time of filing that the Beneficiary "will be responsible for the essential function of directing and managing the financial and accounting activities of our *U.S. Corporation*." The record does not establish how the three U.S.-based employees would relieve the Beneficiary from performing the non-qualifying duties associated with this function as the Petitioner initially indicated that two of the Beneficiary's subordinates perform identical, and limited duties, associated with payroll and accounts payable and receivable, while the other employee performs mostly administrative tasks. The Petitioner has submitted three job titles and two very different position descriptions for and we are not in a position to determine what his role is.

Further, as discussed, the record contains inconsistent information regarding the Beneficiary's oversight of the Venezuela-based finance and administration team and does not support a claim that the foreign staff will support the Beneficiary in carrying out his duties for the Petitioner or its U.S. affiliates. We acknowledge that the Petitioner cites to *Matter of Z-A- Inc.*, (Adopted Decision 2016-02) (AAO Apr. 14, 2016) in support of its claim that USCIS must consider evidence of a Beneficiary's role within the wider qualifying organization, and consider the reasonable needs of the organization as a whole, including any related entities within the qualifying organization. However, we agree with the Director's finding that the evidence here does not establish that the foreign entity's finance and administration employees relieve the Beneficiary from performing non-qualifying duties associated with the activities he is claimed to manage in the United States, or that the financial operations of the Petitioner and its Venezuelan affiliate are intertwined and under the Beneficiary's authority. As noted, the initial evidence showed that the Beneficiary's claimed foreign subordinates report to an administration manager and to a finance director, not to the Beneficiary.

Based on these deficiencies, we cannot determine that the Beneficiary would primarily manage an essential function, rather than performing many of the day-to-day operational and administrative tasks associated with that function.

For similar reasons, the Petitioner has not established that the Beneficiary would be employed in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and they must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because 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.* Here, while the Beneficiary likely establishes the goals and policies for the company's financial department, for the reasons already

discussed the record does not establish that he will primarily focus on these higher-level activities rather than on the day-to-day financial, accounting and administration activities of the company.

We acknowledge 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, 8 U.S.C. § 1101(a)(44)(C). 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. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner is an oil and gas industry material and equipment supplier with four documented employees, including a company controller, a finance administrator, an administrative assistant, and a supply chain manager, with several vacancies for procurement positions, a commercial and sales manager, and a bid process manager. The submitted evidence suggests that the Petitioner's affiliate, which appears to be engaged in the same line of business, employs procurement, inventory and logistics, and warehouse staff that the Petitioner lacks, the Petitioner has not provided supporting evidence showing how or to what extent the companies and their staff work together to carry out both companies' operations. While we acknowledge that the Petitioner submitted an unaudited financial statement showing that its revenue increased from $223,000 in 2014 to over $7 million in 2015, it is unclear how the Petitioner achieved those sales with the four employees it has on staff, or how work is distributed within the company and between the group companies.

The Petitioner cites *Nat'l Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) and *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1574 (N.D. Ga. 1988) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, we note that the Petitioner has not furnished evidence to establish that the facts of the instant petition are analogous to those in *Nat'l Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the former Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, we are not bound to follow the published decision of a U.S. district court in matters arising within the same district. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *Nat'l Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of a foreign national's claimed managerial or executive capacity. We have long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *Nat'l Hand Tool Corp.*, the Petitioner is required to establish that the Beneficiary's position consists of primarily managerial or executive

duties and that it will have sufficient personnel to relieve the Beneficiary from performing operational and/or administrative tasks. Like the court in *Nat'l Hand Tool Corp.*, 889 F.2d at 1472, n.5., we emphasize that our holding is based on the conclusion that the Petitioner did not submit sufficient evidence in support of its claim that the Beneficiary will perform primarily managerial or executive duties or document his claimed role within the wider group of companies and does not rest on the size of the Petitioner.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity under the extended petition.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of KRS-, LLC*, ID# 181149 (AAO Feb. 28, 2017)