U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-I- LLC

DATE: JAN. 2, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a gas station and convenience store operator which intends to invest in additional businesses, seeks to continue the Beneficiary's temporary employment as its president under the L-1A nonimmigrant classification for intracompany transferees.[1] 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 the Beneficiary would be employed in a managerial or executive capacity under an extended petition.

On appeal, the Petitioner asserts that the Director erred by finding that it made material changes to the initial petition and contends that it established by a preponderance of the evidence that the Beneficiary will be employed 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, 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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period January 18, 2017, until January 17, 2018. 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). This evidence must demonstrate that the beneficiary will be employed in a managerial or executive capacity, as defined at sections 101(a)(44)(A) and (B) of the Act, under the extended petition.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner established that the Beneficiary will be employed in an executive capacity. Although the Petitioner previously stated that the offered position is managerial or executive in nature, on appeal, it solely claims that the position is executive in nature. Therefore, we will restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

The term "executive capacity" is defined as 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.

When examining the executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine 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.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business, its staffing levels, and its organizational structure.

A. Duties

Based on the definition of executive capacity, the Petitioner must first 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 at 1533.

At the time of filing, the Petitioner provided a lengthy statement intended to describe the duties the

Beneficiary performed and the decisions he made during the previous year, and noted that he would continue to perform similar duties under the extended petition. These duties were organized under the following areas of responsibility:

1. Mergers and Acquisitions and Expansion (25%)
2. Executive, Business Management, Marketing and Market Research Functions (25%)
3. Public and Client Relations and Liaison between U.S. and India offices (10%)
4. Financial and Budget Functions (20%)
5. Administration/Management/Human Resources Functions (20%)

In a separate "Job Duties Chart" included with its initial submission, the Petitioner described the Beneficiary's job duties down as follows:

1. Take Reports/Supervise Operations Managers: 20 to 25%
2. Develop Financial Policies/Decisions: 15%
3. Review Accounts, Tax, Performance: 20%
4. Approve hiring and firing: 15%
5. Future Business Plan, Mergers & Acquisitions: 10%
6. Communicate Goals/Future Plans with Managers: 10%
7. Correspond with parent Company for carrying out the operations of the U.S. Company: 8 to 10%

As a preliminary matter, we note that the Petitioner provided two different descriptions of how the Beneficiary allocates his time without providing an explanation for the differences. Further, although the first breakdown was accompanied by a lengthy narrative and examples of actions the Beneficiary had taken during the initial year of operations, it did not provide sufficient insight into what specific duties he would perform on a day-to-day basis under an extended petition.

For example, in describing the Beneficiary's responsibility for mergers and acquisitions, the Petitioner noted that he had "held discussions and negotiations with close to 20 businesses," had expanded from one stores to two stores within one year, and that he "has been gathering information and resources to start his own [auto mechanic] workshop." While the Petitioner established the Beneficiary's authority to make decisions regarding investments in additional businesses, it did not describe in sufficient detail the specific tasks that would require 25% of his time on a daily basis. Without additional information, we cannot determine that this area of responsibility would involve primarily executive-level tasks, or whether the Beneficiary himself is required to perform his own market research, due diligence, and gathering of information and resources.

As noted, the Petitioner indicated that the Beneficiary would devote an additional 25% of his time to "executive, business management, marketing, and market research functions." Once again, while the Petitioner provided a list of actions he had taken with respect to the operation of the company's gas station and convenience store, it did not describe his specific day-to-day duties. For example, the Petitioner noted that the Beneficiary had installed ATM machines, decided to accept all credit

cards and food stamps, implemented a store policy to provide free soda to local police officers, and ensured that the Petitioner's liquor, grocery, and gas prices are lower than local competitors. However, these examples do not provide insight into the nature of the Beneficiary's typical day-to-day duties, nor has it shown how these operational decisions would continuously require one quarter of his time. Further, the Petitioner noted that the Beneficiary decided to purchase all grocery items from a Sam's Club store 40 miles away and that "he buys these items tax free from Sam's Club." The Petitioner did not explain how making purchases at Sam's Club is an executive-level duty or indicate that he delegates this function to subordinates who work in the Petitioner's gas station/convenience store. The Petitioner also noted that he performs non-executive tasks such as "takes custom orders from clients" and "orders special Dairy Queen cakes on behalf of the local customers."

The remainder of the duties described under this area of responsibility were overly broad and included "drive all phases of business development process from identifying key market trends, actively targeting prospective clients in the United States, delivering targeted marketing propositions to clients and converting prospective clients," as well as performing "crucial marketing functions" and supervising "the implementation of marketing strategies and programs." The Petitioner did not, for example, describe the "targeted marketing propositions" the Beneficiary has delivered to the Petitioner's retail customers. 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).

With respect to the Beneficiary's responsibility for "public and client relations and liaison between U.S. and India offices" the Petitioner noted that he "manages relationships with the community, society, clients and other businesses," and "contributes to the society on a regular basis" by maintaining relationships with the local school, fire department and community organizations. The Petitioner further stated that he "corresponds with [the parent company's] offshore departments for carrying out the operations of the Company," but has not otherwise claimed that the foreign entity supports the U.S. company or is involved with its operation of a gas station and convenience store. While the Beneficiary's involvement in the local community is noted, the Petitioner did not explain the specific executive tasks he performs in this regard.

The Petitioner's description of the Beneficiary's responsibility for "administration/management/ human resources functions" was also described in non-specific terms. The Petitioner noted that his responsibility for "operations management" requires him to "manage, coordinate, and oversee our business operations," but did not provide sufficient detail regarding what he primarily does on a day-to-day basis. The Petitioner stated that the Beneficiary visits its gas station regularly and meets the managerial personnel at least once a week, but the Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that the gas station is the Beneficiary's worksite. While we do not doubt his overall authority over the business and his ability to make decisions regarding human resources matters, the Petitioner did not describe his duties in sufficient detail to establish that he would be primarily performing executive functions.

Overall, the Petitioner has not provided sufficient insight into the specific tasks the Beneficiary will perform as part of his day-to-day routine. The descriptions convey the Beneficiary's discretionary decision-making authority and oversight over the operations as a whole, but are too broad to give a sense of the types of duties he primarily performs on a daily basis. Reciting the 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 has not provided any detail or explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros.*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990). While the Petitioner provided examples of specific actions the Beneficiary has taken, both at the time of filing and in response to a request for evidence (RFE), most of those actions were one time decisions that would not continuously occupy his time.

The fact that the Beneficiary will direct a 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)(A) of the Act. Even though the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, a broad overview of his responsibilities is insufficient to establish that his actual duties would be primarily executive in nature as of the date of filing.

B. Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, we 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.

At the time of filing in December 2017, the Petitioner stated that it had 10 employees and expressly indicated in a supporting letter that it "owns two (2) business locations at this time." It identified those locations as [redacted] and [redacted] Later, in response to the Director's RFE, the Petitioner stated that it completed the purchase of [redacted] at the end of February 2018, after the initial new office petition expired. While the Petitioner claims on appeal that it was forthcoming about the status of the second store, the initial statement that it owned both businesses in December 2017 undermines that claim.

The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It did not explain the inclusion of the wine and liquor store and its staff on its initial organizational chart and we find that its initial claims regarding the second store were misleading at best. The Petitioner did submit evidence that it had signed an agreement to purchase the store,[2] but its initial claim that it had

[2] The purchase documents themselves contain an unresolved inconsistency. These documents identify the seller as [redacted] doing business as [redacted] but the attached tax returns for the purchased business identify the business owner as [redacted] doing business as [redacted] a company owned by [redacted] The Petitioner identifies [redacted] as the former business owner and states that he agreed to stay on, but did not explain the involvement of [redacted] a company represented by [redacted] in the sales transaction.

already staffed the wine and liquor store with its own operations manager and employees was clearly premature. The Petitioner's took over the lease for the store on March 1, 2018.

Therefore, we find that the Petitioner's initial organizational chart, which depicted the Beneficiary as president, supervising an operations manager (and four sales clerks) for and an operations manager (as well as an assistant manager and two sales clerks) for was not accurate. Further, we note that the record does not contain evidence of the Petitioner's employment of three of the ten employees listed on the organizational chart provided at the time of filing. Specifically, the Petitioner did not establish that it employed or at the time of filing.

For purposes of determining whether the Petitioner had grown to the point where it could support the Beneficiary in an executive capacity, we will review the Petitioner's staffing at the time of filing. 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).

We acknowledge the Petitioner's claim that its structure and staffing needs changed when it completed its acquisition of the wine and liquor store, subsequent to the date of filing. While such changes may not be "material changes" as determined by the Director, the Petitioner must still establish that it met all eligibility requirements from the date of filing, at which time it operated from a single retail location.

Although the Petitioner claims that it employed 10 workers at the time of filing on December 26, 2017, the record shows that it issued paychecks to only eight employees on December 25, 2017. These employees included: the Beneficiary, two employees identified as operations managers and four employees identified as sales clerks and one employee who did not appear on either organizational chart Two of the employees – and – were no longer with the Petitioner as of January 1, 2018, and we note that one or both of them may have left the company prior to the filing of the petition.[3] Therefore, although the Petitioner claims on appeal that the company supported eight full-time positions and four part-time positions in the fourth quarter of 2018, the record shows that there were at most three full-time and five part-time employees at the end of the year.

While the Petitioner claimed that one operations manager worked at its gas station and convenience store and the other worked for its wine and liquor store, as noted, the Petitioner later conceded that it had not yet acquired the wine and liquor store at the time of filing. It is unclear what role the second operations manager was performing at that time. Although the Petitioner provided a description for the operations manager position, most of the listed duties were not credible for a position that is essentially a retail store manager. For example, the Petitioner indicated that both operations managers "handle logistics" by preparing reports on the current conditions of logistics and ensuring

[3] The Petitioner submitted a payroll record for the period January 1, 2018, through February 28, 2018. This document showed the addition of four employees during this period, but their hire dates were not provided and three of the four staff earned less than $100 in wages.

"that the machinery and equipment used have the ability to produce goods and services for the client at an acceptable standard." The Petitioner also noted that the operations managers make recommendations on mergers and acquisitions, conduct feasibility studies, provide detailed account information to the president, prepare program budgets, and "facilitate programs around the company." The absence of retail store-related duties casts doubt on the credibility of the operations manager job description.

The evidence must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; job titles alone are not probative and will not establish that an organization is sufficiently complex to support an executive position. Here, the job duties for the operations manager positions were incongruous with the nature of the business, while the Petitioner did not claim to have any employee in its store who would be responsible for duties such as opening and closing the store, reconciling the cash register receipts, supervising cashiers, receiving deliveries, ordering inventory, stocking inventory, etc. In fact, the Petitioner stated that such duties would eventually be assigned to an assistant manager position that was not filled at the time of filing. The Petitioner did not describe the actual duties of the operations manager position.

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, 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.*

For the reasons discussed, the Petitioner has not established to what extent the Beneficiary delegates non-executive duties to subordinate staff. Although the Petitioner indicates that it had sufficient lower-level staff at the time of filing to allow the Beneficiary to primarily focus on the broad policies and goals of the organization, and to remove him from significant involvement in the day-to-day operations of the company, the record does not sufficiently support that claim, as the Petitioner indicated, for example, that the Beneficiary himself shops for inventory and takes special orders from clients.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive 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. However, it is appropriate 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. *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 size of a company may be especially relevant when we note discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

At the time of filing, the Petitioner operated a gas station and convenience store. Its initial organizational chart showed that this retail business employed an operations manager (whose duties are unrelated to retail sales) and four sales clerks. Two of those clerks left the company right around the time of filing and a third one has not been documented as an employee of the Petitioner. The Petitioner also employed one other worker who appears on neither submitted chart, and two employees who were claimed to already work for a second store that the Petitioner had not yet acquired. When we review this ambiguous staffing information in light of the Beneficiary's extremely broad position description, we cannot determine how the day-to-day, non-executive activities needed to carry out the operations of the store were allocated among the employees. The Beneficiary is purportedly responsible for overseeing financial, administrative, and marketing matters, but does not have subordinate staff to assist him with these functions. Further, the Petitioner's statements suggest that the Beneficiary himself is responsible for purchasing grocery items for the store by visiting Sam's Club.

Based on the nature of the company and its documented staffing levels, the Petitioner has not shown that it requires the Beneficiary to *primarily* perform the higher level planning, policy-making and business development duties attributed to him. Rather, it appears that he would more likely than not be required to perform a variety of non-executive duties necessary for the day-to-day operations of the company.

On appeal, the Petitioner cites to *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), and appears to suggest that the Beneficiary would be responsible for directing an essential function for the larger international organization. In this regard, the Petitioner notes its claimed parent company's desire "to expand its operations internationally and provide the world class service it is known for in India." If a petitioner claims that a beneficiary will manage or direct an essential function, it must clearly describe the duties to be performed in directing 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). In this matter, the Petitioner has not sufficiently articulated or documented a claim that the Beneficiary would direct an essential function in an executive capacity.

Finally, we acknowledge that the Petitioner questioned why the Director digressed from the previous approval of an L-1A petition for "the same position for the same person with the same company," noting that the denial of this extension "is beyond comprehension." The prior petition was a new office petition subject to the requirements at 8 C.F.R. § 214.2(l)(3)(v), while this extension of the new office petition is adjudicated pursuant to the requirements at 8 C.F.R. § 214.2(l)(14)(ii). If the business does not have the necessary staffing after one year to sufficiently relieve the Beneficiary

from performing non-executive tasks, the Petitioner is ineligible for an extension. While the Petitioner emphasizes that it has achieved high gross receipts in its initial year, it did not meet its burden to demonstrate that it has grown to the point where it is able to relieve the Beneficiary from involvement in the day-to-day operations of the company. Accordingly, the Petitioner has not established that he will be employed in an executive capacity.

III. QUALIFYING RELATIONSHIP

Although not addressed in the Director's decision, the Petitioner has not submitted sufficient evidence to establish that it has a qualifying relationship with the Beneficiary's foreign employer. To establish a "qualifying relationship," the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See* section 101(a)(15)(L) of the Act; *see also* 8 C.F.R. § 214.2(l)(1)(ii) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate").

The Petitioner claims that it is wholly owned by a partnership firm located in India. In support of its claim, the Petitioner submitted a membership certificate number "001" (issued in November 2016) indicating that holds 100% of its membership interest, as well as evidence of two wire transfers it received from

However, the record also contains the Petitioner's IRS Form 1065, U.S. Return of Partnership Income, indicating that it was filing three Schedules K-1. The Petitioner was required to file a Schedule K-1 for each person who was a partner (or member) in the company at any time during the year. If the Petitioner continued to be solely owned by as claimed, then the expected number of Schedules K-1 attached would be one, not three. The Petitioner did not submit a complete copy of its 2017 tax return and we cannot determine the company's current ownership and control. Accordingly, the Petitioner has not met its burden to establish that it maintains a qualifying relationship with the Beneficiary's foreign employer. *See* 8 C.F.R. § 214.2(l)(14)(ii)(A). For this additional reason, the petition cannot be approved.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner did not establish that it will employ the Beneficiary in an executive capacity under the extended petition, or that it maintains a qualifying relationship with the Beneficiary foreign employer.

ORDER: The appeal is dismissed.

Cite as *Matter of A-I- LLC*, ID# 1767245 (AAO Jan. 2, 2019)