U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-B-, LLC

DATE: JAN. 9, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a restaurant service, seeks to temporarily employ the Beneficiary as general manager 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 California 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 based her decision on erroneous conclusions of fact and misapplication of the statute and regulations pertaining to managerial employees. The Petitioner contends that it has established that the Beneficiary's employment for the foreign entity and proposed employment satisfy the criteria for 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 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. 8 C.F.R. § 214.2(l)(3)(v)(B). 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. Section 101(a)(15)(L) of the

[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.

Act. The petitioner must also establish that the beneficiary's prior education, training, and employment qualifies him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

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 must establish that the petitioner secured sufficient physical premises to house its operation and disclose 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).

"Managerial capacity" means 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.

"Executive capacity" means 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.

These are two distinct definitions and the Petitioner must establish that the Beneficiary's duties were either primarily managerial duties or primarily executive duties.[2]

II. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director determined that the Petitioner had not established that the Beneficiary's three subordinates with managerial titles actually managed or supervised the foreign entity's other employees. The Director determined further that the Beneficiary's position abroad primarily assisted in the performance of the day-to-day non-supervisory duties of the business.

[2] The Petitioner initially described the Beneficiary's foreign duties as managerial duties. In response to the Director's request for evidence (RFE) the Petitioner described the Beneficiary's duties as including primarily executive duties. On appeal, the Petitioner claims that the Beneficiary's supervision of managers satisfied the criteria for L-1A visa classification. As the Petitioner does not clearly articulate whether it is claiming that the Beneficiary primarily performed managerial duties or primarily performed executive duties for the foreign entity, we will address both the claimed executive capacity and managerial capacity.

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.

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 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.

In its letter of support, the Petitioner stated that the foreign entity operates a Thai and French fusion restaurant, employed 12 persons, and earned gross revenue of $120,000 in the fiscal year ending December 2015. Initially, the Petitioner stated that the Beneficiary "is responsible for managing the day-to-day operations of the [foreign entity's] restaurant" and "presid[ing] over a total of eleven (11) employees." The Petitioner listed a number of duties but did not allocate the Beneficiary's time to each duty. Several of the tasks, such as planning menus, managing the restaurant's financial activities, and leading the sales and marketing activities are duties that do not fall within the parameters of the definitions of executive or managerial capacity. These duties, as described, are non-qualifying in that the Beneficiary is the individual performing the tasks associated with the duties. Several other duties were so broadly-described that it could not be determined whether the duties were managerial, executive, or non-qualifying.

In response to the Director's RFE, the foreign entity noted that the Beneficiary spent 25 percent of her time directing the management of the organization and 45 percent of her time exercising wide latitude in discretionary decision-making. The foreign entity indicated that the Beneficiary spent 20 percent of her time establishing the organization's goals and policies and 10 percent of her time managing the day-to-day operations of the organization. These duties essentially re-state the first three elements of the definition of executive capacity and the fourth element of managerial capacity. Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *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); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Although the foreign entity also provided some narrative to describe the tasks involved in these broadly stated duties, the narrative did not provide sufficient detail to ascertain the Beneficiary's

actual tasks. For example, the foreign entity stated that the Beneficiary directed the management of overall operations (15%) and assigned and delegated tasks as required to meet corporate objectives (10%). The foreign entity also claimed that the Beneficiary had: discretionary authority over the operations of the restaurant and all duties performed by her subordinate staff (20%); ultimate authority over personnel matters (20%); and that she led executive meetings and made suggestions regarding service, goals, operational procedures, and expansion of the food lineup (5%). Again, this description adds no practical understanding of the specific actions the Beneficiary undertook in her 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. *Id.*

The foreign entity also did not explain why some duties initially listed as part of the Beneficiary's routine did not appear in the second iteration of the Beneficiary's duties. Neither description of the Beneficiary's duties for the foreign entity provided sufficient consistent evidence of the Beneficiary's actual daily duties to demonstrate that the Beneficiary's primary duties were in a managerial or executive capacity.

On appeal, the Petitioner quotes the definition of managerial capacity but does not clarify the Beneficiary's foreign duties. Rather the Petitioner asserts that the Beneficiary's "managerial level subordinates are first line supervisors, managing the day-to-day operational activities of [the foreign entity]."

The fact that the Beneficiary managed or directed the organization or the operations of the business does not establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may have exercised some discretion over the foreign entity's day-to-day operations and may have possessed the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that her actual duties were primarily managerial or executive in nature.

B. Staffing

Beyond the required description of the job duties, we review 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.

The initial record includes the foreign entity's October 2016 organizational chart depicting the Beneficiary as the "Director"[3] over a general manager. A chef/kitchen manager and a floor manager are shown reporting to the general manager. Three cooks, a sanitation employee, and four wait staff are shown reporting to the chef/kitchen manager and the floor manager.

The foreign entity described the general manager as spending 25 percent of his time supervising communication between the floor staff and 20 percent of his time supervising the floor staff and managing their work schedules. Similarly, the floor manager is described as spending 25 percent of his time supervising communication between the floor staff and kitchen staff and 20 percent of his time supervising the floor staff and managing their schedules. Each of these individuals also spends 15 percent of their time conducting internal training and 15 percent of their time conferring with or mediating complaints of customers. The similarity in the descriptions of these two positions raises questions regarding their actual role in the foreign restaurant.

The chef/kitchen manager who oversees kitchen operations, staff, and supervises shifts but who does not appear to primarily perform the duties of a chef, raises further questions regarding the foreign entity's actual organizational structure. We note that the chef/kitchen manager meets with the "executive chef" to brainstorm new concepts and menu changes but the organizational chart does not identify an "executive chef." Although one of the organizational charts identifies the Beneficiary as the "Director/Head Chef" the foreign entity has not detailed her duties in a "chef" role. The similarity of duties for different claimed "upper-level" positions and the lack of information regarding who actually performs chef-related duties cast doubt on the foreign entity's actual structural hierarchy.

On appeal, the Petitioner acknowledges that the floor manager and the general manager's duties "seemingly overlap," but does not offer an explanation of the differences between the two positions. The Petitioner asserts that the kitchen manager spends the majority of his time on hiring, promotions, overseeing the culinary operation, and training subordinates, which leaves him little time to perform the duties of the chef. The Petitioner when trying to establish that at least three of the Beneficiary's subordinates are managers or supervisors does not offer a credible and reasonable description of the positions and their duties at the foreign entity's restaurant.

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. If a beneficiary directly supervises other

[3] The foreign entity's organizational chart for 2016 submitted in response to the Director's RFE, identifies the Beneficiary as the "Director/Head Chef."

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*).

The evidence here does not substantiate that the duties of the Beneficiary and her subordinates correspond to their placement in the foreign entity's structural hierarchy. Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. The descriptions of duties do not support the placement of the Beneficiary and the foreign entity's "management" on the organizational charts submitted. The record does not include probative, consistent evidence establishing that the Beneficiary was primarily a personnel manager.

The Petitioner also has not articulated a specific function that the Beneficiary managed for the foreign entity. 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). In this matter, the Petitioner has not described or provided evidence satisfying the above requirements. The Petitioner has not established that the Beneficiary managed an essential function.

The Petitioner also has not established that the Beneficiary was primarily an executive. 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.* As discussed above, the foreign entity's position descriptions for the Beneficiary's subordinates do not include credible, probative evidence establishing that the duties of the subordinates are primarily managerial.

In this matter, the record does not include sufficient consistent evidence so that we may consider the reasonable needs of the foreign entity in light of its overall purpose and stage of development of the

organization. Although the foreign entity was established more than eight years ago, it has not provided consistent, credible evidence of the Beneficiary and her claimed subordinates' actual duties. The record does not establish that the Beneficiary performed primarily executive or managerial duties for the foreign entity.

III. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Petitioner was organized in March 2016 and this petition was filed October 2016. Thus, the Petitioner had not been doing business for a full-year prior to filing the petition and falls under the new office criteria.

If a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within a one-year timeframe. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally* 8 C.F.R. § 214.2(l)(3)(v).

The Director determined that the record did not support the Petitioner's claim that the Beneficiary would manage a subordinate staff of managerial or supervisory personnel. The Director concluded that the record did not establish that the Petitioner would have an organizational structure sufficient to elevate the Beneficiary's position to a primarily managerial position within one year.

The Petitioner's business plan indicated that from June to September 2016, the three months prior to filing the petition, the Petitioner would perform market research, research suppliers and vendors, and plan advertising. In the second phase, October to December 2016, the Petitioner would launch ' ' its bar/restaurant. During the second phase, the Petitioner planned to hire a manager, a chef, two kitchen staff, and two restaurant servers and to have the grand opening of the restaurant. The Petitioner projected $100,000 in revenue for fiscal year 2016. The next phase of the business plan, from January to June 2017, shows the restaurant at full operation and the addition of a manager, a chef, and three restaurant servers. The remaining six months of 2017 is devoted to increased advertising, marketing, and looking for additional opportunities to expand and does not include any additional hires for the second six months of 2017. The business plan estimates the Petitioner's revenue will increase to $690,000 for fiscal year 2017.

The Petitioner's organizational chart showed the Beneficiary in the position of general manager/executive chef, reporting to a director. The chart also depicted a kitchen manager and an unnamed front house manager, reporting to the Beneficiary. The chart also shows two chefs, two kitchen staff, four waiters, and one waiter/delivery person reporting to the kitchen manager and front house manager.

The Petitioner also included a document with the business plan showing the restaurant's monthly overhead including payroll totaling approximately $31,500. The breakout for the approximate

$6,500 in weekly payroll costs covers the positions of bartender, barback/porter, two kitchen cooks, security, a DJ, a delivery person, and two named individuals and This document does not correspond with the positions outlined in the Petitioner's business plan and does not include the Beneficiary's $50,000 yearly salary.[4]

The Director issued an RFE in February 2017 and notified the Petitioner it had until May 2017 to provide its response. In the RFE, the Director requested that the Petitioner provide state quarterly wage reports for the third and fourth quarter of 2016. The Petitioner's May 2017 response did not include these reports or any evidence that the Petitioner had begun operations. An Internet search for ' at the Petitioner's address resulted in information indicating that this bar/restaurant opened in January 2017. *See* http:/ (last visited Dec. 21, 2017). When the Petitioner responded to the Director's RFE, it would have been open for at least five months. However, the record does not include any information regarding its opening, the employees actually hired, or evidence that the Petitioner is implementing its business plan. As the Petitioner actually opened a bar/restaurant and began operations, it is reasonable to expect that the Petitioner would provide corroborating evidence of its actual employees and revenue when attempting to establish that the Beneficiary will be performing in a managerial or executive capacity within one year.

On appeal, the Petitioner relies on the previously submitted descriptions of the proposed kitchen manager and front house manager and asserts that the descriptions provided show that the kitchen manager and front house manager will be handling fundamental functions of the restaurant. The Petitioner claims that "the proposed organizational structure is sufficiently complex to establish that [the B]eneficiary will be relieved from primarily performing non-managerial duties."

As noted above, the Petitioner's weekly payroll for its bar/restaurant employees does not correspond to the positions outlined in the business plan and reiterated on appeal. For example, the estimated weekly payroll does not include the Beneficiary's position of general manager/executive chef. The record also does not corroborate that the Petitioner employs a kitchen manager and a front house manager. The record does not establish that the Petitioner will actually employ the Beneficiary in the proposed general manager/executive chef position. The Petitioner must resolve this ambiguity 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). Unresolved material ambiguities and inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* Here, the record does not include sufficient consistent evidence to demonstrate a realistic expectation that the Petitioner will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

[4] The breakout for the weekly payroll includes $2,040 for two cooks. This amount could cover the Beneficiary's salary if she performed the duties of one of the cooks.

We have also reviewed the evidence showing that the Beneficiary's spouse transferred $50,000 to the Petitioner as the foreign entity's capital contribution.[5] The record also includes a 2015 table showing the foreign entity's total income, the foreign entity's partially translated[6] tax filings dated January 2017 and March 2017, and a monthly payroll document for April 2017. Without additional evidence, the record does not include sufficient information to establish that the foreign entity has the financial ability to remunerate the beneficiary and commence doing business in the United States as set out in the petition and accompanying documents.

The Petitioner has not submitted probative evidence establishing a credible expectation that it will support a manager or executive within the one-year timeframe.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary was employed in a managerial or executive capacity for the foreign entity and will be employed in a managerial or executive position for the Petitioner within one year.

ORDER: The appeal is dismissed.

Cite as *Matter of L-B-, LLC*, ID# 881560 (AAO Jan. 9, 2018)

[5] The Petitioner claims that $29,000 of the capital contribution came from the Beneficiary's spouse's sale of personal property and the additional $21,000 came from his personal funds. Although the Petitioner references the Beneficiary and her spouse's ownership of the foreign entity, the record does not include evidence corroborating that ownership. Accordingly, it is not clear if the foreign entity actually supplied the capital necessary to obtain its membership in the Petitioner, as was required in the Petitioner's operating agreement. Although we do not enter a finding on the qualifying relationship between the Petitioner and the Beneficiary's foreign employer, the Petitioner must address this issue in any future proceedings.

[6] Any document in a foreign language must be accompanied by a full English language translation. 8 C.F.R. § 103.2(b)(3). The translator must certify that the English language translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.* The tax filings include only a translated first paragraph. Because the Petitioner did not submit a properly certified English language translation of the document, we cannot meaningfully determine whether the translated material is accurate and thus supports the Petitioner's claims.