MATTER OF N- LLC

DATE: JAN. 26, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software development company, seeks to temporarily employ the Beneficiary as the chief executive officer 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, California Service Center, denied the petition. The Director concluded that the Petitioner did not submit sufficient evidence to establish that the Beneficiary would be employed in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In support of the appeal, the Petitioner submits a brief disputing the basis for denial.

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.

II. U.S. 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. The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

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.

The Petitioner filed the Form I-129 on April 18, 2016 claiming that it was established in 2013 and that it currently has no employees. In a supplemental statement the Petitioner explained that it was originally established for the purpose of providing consulting services in software development and IT project management. The Petitioner further stated that it "was used mainly as a transaction

company to handle client support, consulting contracts, and documents while active operations and activities were performed by the parent company in Mexico." The Petitioner claimed that it now plans to expand its operation to include installation, hardware integration, and cloud services and that such service will involve the use of engineers, software architects, developers, and integrators, some of whom are located in Mexico. The Petitioner stated that it plans to hire three employees within the first year of the Beneficiary's arrival "with a gradual expansion of employees in the following years." The Petitioner did not state which positions it plans to fill or the services to be provided by the new hires. The Petitioner stated that the Beneficiary's responsibilities would include "establishing and maintaining the company's clientele," overseeing the business's growth and development, determining goals and objectives, and making discretionary decisions regarding the Petitioner's funding and operations, the latter of which would include consideration of the Petitioner's technical capabilities, purchase of equipment, and use of company resources.

After reviewing the record, the Director issued a request for evidence (RFE) informing the Petitioner that it did not provide sufficient evidence to establish that the Petitioner's organizational structure at the time of filing was sufficient to employ the Beneficiary in an executive capacity. The Director offered the Petitioner an opportunity to resolve this evidentiary deficiency by submitting, in part, an organizational chart depicting its employees and the company's staffing levels as well as a statement describing the Beneficiary's proposed executive job duties, the percentage of time he would allocate to each job duty, and an explanation of how the Beneficiary would meet each prong of the four-prong definition of executive capacity. The Director also asked the Petitioner to provide a summary of job duties to be performed by subordinate employees.

In response, the Petitioner provided a statement claiming that it does not currently have "conventional employees" and instead operates through "a virtual platform" whereby its daily administrative and operational job duties are carried out by outsourced professionals to ensure the Petitioner's growth and cost-effective operation. The Petitioner stated that it outsources the following: (1) an accounting firm that carries out bookkeeping, invoicing, and tax services; (2) a corporate law firm, which bills the Petitioner hourly for legal services, such as contract underwriting, copyrights, and patents; (3) the parent company's engineers and sales people, who provide software development and cloud infrastructure services; and (4) independently contracted software developers. The Petitioner claimed that by virtue of overseeing "a group of managers that are employed either by the parent company or outsourced specialty firms" the Beneficiary is employed in an executive capacity.

In a separate statement, the Petitioner restated portions of the original job description, focusing on the Beneficiary's authority to make decisions on the following issues: improving the Petitioner's technical capabilities, purchasing equipment, using company resources, and guiding the company's direction, profitability, marketing, and personnel. The Petitioner further stated that the Beneficiary will allocate 40% of his time to "development of the company," implementing policies and procedures, establishing long- and short-term goals, and ensuring the most efficient and effective means for meeting those goals; 35% of his time to managing the Petitioner's finances by overseeing purchases, contract negotiations, and maintaining vendor and customer relationships; and 25% of his

time to overseeing the review and research of data pertaining to the Petitioner's growth plan and outsourced contracted labor who carry out operational tasks. The Petitioner did not specify which tasks would be involved in "development of the company" or discuss what specific policies, procedures, and goals the Beneficiary would set. The Petitioner also did not explain who would actually engage in purchasing equipment, negotiating contracts, and conducting data research, despite claiming that the Beneficiary's role would be limited to overseeing these activities; nor did the Petitioner establish that maintaining vendor and customer relationships are executive-level tasks.

In addition, the Petitioner stated the following:

> . . . . Additionally, [the Beneficiary] will be responsible for reviewing company compliance including tax and other legal requirements to ensure the company's contract terms, standards, and obligations are fulfilled and completed. To carry out and implement his duties, he will have regular meetings and review sessions during which he will set mid-range plans for the company, define performance indicators with measurable objectives, review both operational and financial progress, define capacity in the event demand grows, and assess the annual sales forecast budget. To review performance, [the Beneficiary] will frequently compare his Revenue and Profit forecasts and budget plan to the actual sales, expenses and capital investment to make sure the company is on track to meet its goals. . . . Accounting software is used to compare previous financial performance against current results and future expectations for both profit and budget.
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> A typical day for [the Beneficiary] as Chief Executive might include several meetings with potential clients, vendors, and partners. Risk management and performance evaluation will also be an active daily process for [the Beneficiary].

Although the Petitioner claimed that the Beneficiary would oversee the Petitioner's tax compliance and adherence to contractual agreements, it did not provide evidence to establish that it has staff to comply with tax requirements and contractual obligations. The Petitioner also did not specify who would participate in the "regular meetings and review sessions" with the Beneficiary; nor did the Petitioner clarify what data would be used as the basis for the Beneficiary's risk management and performance evaluation or who would generate such data.

The Petitioner also provided an organizational chart showing that its hierarchy would be comprised of an outsourced accounting firm, the foreign entity's engineering and sales staff, professional freelance developers, and a corporate legal firm. In support of information provided in the chart, the Petitioner provided résumés of the foreign entity's general manager of software development and its cloud infrastructure manager, respectively. We note that neither résumé indicated that either employee was performing work for the Petitioner, nor did the Petitioner provided other evidence to show that it allocated funds to pay the foreign entity's employees for services it claims they have been providing for the benefit of the Petitioner's clientele. The Petitioner also did not provide any

documentation to support the claims made with regard to outsourcing services for software development, accounting, and legal work.

The Director determined that neither the Beneficiary's job description nor its organizational chart established that the Beneficiary would be employed in an executive capacity. Rather, the Director found that a number of the duties that were attributed to the Beneficiary's proposed position were not those typical of an executive, and further noted that the lack of employees available to staff the Petitioner indicates that the Petitioner's organizational structure is not sufficient to elevate the Beneficiary's position to that of an executive.

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary would be employed in an executive capacity.

When examining the executive capacity of the Beneficiary, we will look first to the description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(iv). The duties themselves will reveal the true nature of a beneficiary's employment. *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). Therefore, we look for a job description that clearly describes the Beneficiary's proposed job duties.

The definition of executive capacity has two parts. First, the Petitioner must show that the Beneficiary performed 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 would *primarily* be engaged in executive duties, as opposed to ordinary operational activities alongside the company's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

In the present matter, the Petitioner did not provide a specific list of the Beneficiary's proposed executive job duties as requested in the RFE. As discussed above, the Petitioner provided vague statements about the Beneficiary's proposed position without specifying actual daily tasks or assigning time allocations to individual activities such that would lead to a meaningful understanding as to the portion of the Beneficiary's time that would be allocated to executive-level tasks. As previously stated, a detailed job description that delineates specific tasks is critical, as the duties themselves reveal the true nature of the employment. *Fedin Bros.*, 724 F. Supp. at 1108.

Further, while the Petitioner states that the Beneficiary will assume the top-most position with the organizational hierarchy and make discretionary decisions on the Petitioner's behalf, neither his placement within the organization, nor his decision-making authority would be sufficient to establish that the nature of the Beneficiary's underlying job duties would be primarily that of an executive. The Petitioner's emphasis on the Beneficiary's use of discretionary authority is meaningless unless placed in a context of executive job duties that the Beneficiary would typically carry out on a daily basis. Further, we note that the organizational chart the Petitioner provided in response to the RFE does not specifically depict the Beneficiary nor any other employees; rather, the chart seemingly

divides the organization into four departments – accounting firm, [redacted], professional developers, and corporate legal firm – without naming any individuals who would be assigned to carry out the operational and administrative tasks of the organization. Also, despite claiming that it would outsource its daily operational and administrative tasks to employees of the foreign entity, freelance developers, an accounting firm, and a law firm, the only evidence the Petitioner provided to support its assertion included the résumés of the foreign entity's general manager of software development and its cloud infrastructure manager. However, the résumés alone do not establish that either employee provided and would provide IT services for the benefit of the Petitioner's clients. The Petitioner also provided no evidence to show that it has retained the services of any freelance developers or that it paid an outside law firm and accounting firm to carry out other daily operational and administrative tasks. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof, particularly when supporting documentary evidence would reasonably be available. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

In addition, while the Petitioner indicated that it plans to hire three employees within the Beneficiary's first year of employment in the United States, the Petitioner's eligibility must be based on the facts and circumstances that existed at the time of filing. Based on the information provided in the petition itself, the Petitioner did not claim any employees when it filed the petition. A visa petition may not be approved based on speculation of future eligibility or after a petitioner or beneficiary becomes eligible under a new set of facts. *See, e.g.*, *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Moreover, 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, 8 U.S.C. § 1101(a)(44)(B). 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. 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.*

On appeal, the Petitioner submits a brief in which it contends that the Director erroneously focused on lack of professional subordinates, thereby requiring the Petitioner to have in-house employees as a prerequisite to meeting the definition of executive capacity. The Petitioner asserts that independent contractors and outsourced professionals are sufficient to enable the Beneficiary to meet the statutory definition. We do not contest the Petitioner's assertion. We do, however, find that the

Petitioner did not provide evidence to corroborate its claims regarding the retention of independent contractors and outsourced employees. Rather, a review of the record shows that neither the petition, which indicates that the Petitioner had no employees at the time of filing, nor the evidence of record demonstrates that the Beneficiary "presides over a group of managers that are employed either by the parent company or outsourced specialty firms," as claimed in the RFE response. As previously stated, the Petitioner's provision of job descriptions of individuals it claims to have outsourced is not sufficient to establish that, in fact, the Petitioner retained and would continue to retain the claimed individuals, who would ultimately relieve the Beneficiary from having to allocate his time primarily to the provision of operational and administrative tasks. *See Matter of Soffici*, 22 I&N Dec. at 165. Therefore, despite the Petitioner's repeated references to outsourced personnel and its claims on appeal, the Petitioner has not established that at the time of filing the petition it was adequately staffed with a management tier that would elevate the Beneficiary to an executive level in which he would "direct[] the management of the organization." Section 101(a)(44)(B)(i) of the Act.

While the Petitioner is also correct in pointing out that there is no statutory provision that expressly imposes a requirement as to the number of in-house employees a petitioner must have to meet the definition of executive capacity, the Petitioner maintains the burden of demonstrating that its particular organizational hierarchy is sufficient to support the Beneficiary in an executive-level position. It is unreasonable to contend that the Petitioner would be able to elevate the Beneficiary to that high level without a management tier of employees or contractors to carry out the underlying nonexecutive duties of the organization. This is particularly true in the present matter, where the Petitioner merely claimed, but did not provide sufficient evidence to establish, that it retained the services of outside contractors to manage the organization and carry out its operational and administrative functions. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Applying this reasoning to the record in the present matter, we cannot conclude that the Petitioner had the ability to (1) relieve the Beneficiary from having to primarily perform nonexecutive tasks necessary to provide the operational services of the organization and (2) elevate the Beneficiary to an executive level without objective evidence to show that it retained the necessary labor force as claimed. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See also*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l., 19 I&N Dec. 593, 604 (Comm'r 1988).*

In light of the above, we do not agree with the Petitioner's contention that the Director went "above and beyond the scope of the law" and instead find that the Petitioner did not supplement the record with sufficient evidence to demonstrate how, with no employees at the time of filing, the Petitioner would have the ability to support the Beneficiary in an executive capacity. We find that the Petitioner provided a deficient job description for the Beneficiary's proposed position and did not provide sufficient evidence to establish that the Beneficiary's role within the organization would be

that of an executive whose primary concern would be to direct the management of the organization and focus on the organization's broad goals and policies rather than its day-to-day operations.

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 entirely 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 N- LLC*, ID# 146921 (AAO Jan. 26, 2017)