U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-T- CORP.

DATE: JULY 9, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner,[1] which intends to offer travel, vacation rental, and property management and investment services, seeks to temporarily employ the Beneficiary as chief executive officer (CEO) of its new office[2] under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the California Service Center denied the petition, concluding that the Petitioner did not establish, as required, that the new office would be able to support a managerial or executive position within one year of approval of the petition.

On appeal, the Petitioner asserts that it submitted sufficient evidence to establish that the Beneficiary will primarily perform high-level responsibilities consistent with the definition of "executive capacity" within one year of approval of the petition.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving 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. *Id.*

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[1] The Petitioner stated its name as [redacted]' on the Form I-129, Petition for a Nonimmigrant Worker, and as [redacted] on the Form I-290B, Notice of Appeal or Motion. The record shows that the latter is the correct name as registered in the State of Florida.

[2] 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.

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).

II. DEFINITIONS

"Managerial capacity" means 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.

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.

Based on the definitions of managerial and 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 managerial or 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.

III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The sole issue addressed by the Director is whether the Petitioner established that its new office would be able to support a managerial or executive position within one year of approval of the petition.

When examining the executive or managerial capacity of a beneficiary, we will review a petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In the case of a new office petition, we review a beneficiary's proposed job duties as well as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial or executive capacity. A petitioner has the burden to establish that it would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the evidence must be considered in

analyzing whether the proposed managerial or executive position is plausible considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

A. Duties

At the time of filing, the Petitioner stated that the Beneficiary will perform the following duties as CEO:

- Establishing and implementing goals and objectives in marketing, sales, and operations planning and strategic development. Developing organizational vision and programmatic and financial strategies to guide the Company's future while ensuring the successful operations, profitability and sustained growth (50%);
- Utilizing financial, sales, and market reports prepared by the Sales/Administrative Manager to make decisions regarding the acquisition of new properties for management. Relying on personal knowledge of the market, on reports, and on advice of outside professional advisors, to make decisions regarding strategic expansion into new markets (10%);
- Liaising with Sales/Administrative Manager to direct the implementation of business policies, objectives, and goals. Receiving progress reports . . . on the implementation of long-and medium-term business policies, objectives and goals. (15%);
- Reviewing rental reports and financial statements to determine progress and status in attaining objectives and revising objectives and plans in accordance with . . . relevant factors. Liaising with legal counsel . . . to identify and select suitable markets for the Company's business (10%);
- Directing and coordinating formulation of financial programs to provide funding for new or continuing operations . . . . Reviewing and approving annual budgets and major expenditures . . . Determining areas of potential cost reduction, program improvement, or policy change. Making decisions regarding profit distribution, reinvestment into the operations of the business, financing, and debt management (10%).
- Evaluating performance of subordinate employees based on reports for compliance with established objectives of the Company. Employing discretion to hire/fire staff, including Sales/Administrative Manager and Sales/Marketing Assistant (5%).

The Petitioner submitted the same job description in response to the Director's request for evidence (RFE). At the time of filing, the Petitioner characterized the Beneficiary's proposed role as managerial in nature, and, on appeal, it states that he will be employed in an executive capacity. While in some instances there may be duties that could qualify as both managerial and executive in nature, it is the Petitioner's burden to establish that the Beneficiary's duties meet each criteria set forth in the statutory definition for either managerial or executive capacity. A petition may not be approved if the evidence of record does not establish that the Beneficiary will be primarily employed in either a managerial or executive capacity.

Upon review, we find the submitted description insufficient to establish that the Beneficiary's duties would be primarily executive or primarily managerial in nature within one year. The duties are not described in sufficient detail to establish what the Beneficiary would be doing on a day-to-day basis. For example, the Petitioner indicates that he will spend a total of 65% of his time on "establishing and implementing goals and objectives," developing "organizational vision" and strategies, and directing the implementation of "business policies, goals and objectives." These broad statements closely resemble the statutory definition of "executive capacity" at section 101(a)(44)(B) of the Act, but are insufficient to establish what specific tasks the Beneficiary would perform. 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.).

Further, the Petitioner did not outline the types of policies, strategies, goals, and objectives it expects the Beneficiary to develop or implement in support of its claims that such duties would require well over half of his time by the end of the company's initial year in operations. The fact that the Beneficiary will manage or direct the business as its CEO does not necessarily establish his eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. While the Beneficiary will likely exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the general position description is insufficient to establish that his duties would be primarily in a managerial or executive capacity.

In the case of a new office petition, much is dependent on factors such as the Petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the Beneficiary in the proposed position. Accordingly, we will weigh the totality of the evidence in analyzing whether the proposed duties are plausible considering the Petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

B. Business Plan and Projected Staffing

The Petitioner indicates that it will primarily focus on offering its customers short-term rentals of vacation villas and resorts. In addition, the Petitioner states that it will provide consulting services to home buyers and investors interested in purchasing rental properties in Florida, provide property management services, and operate an online travel agency that will offer hotel bookings, car rentals, travel insurance, and full travel packages.

According to the Petitioner's business plan, it intends to commence operations with two employees – a CEO (the Beneficiary) and a sales/marketing assistant, and it expects to hire a sales/administrative manager later during its initial year, for a total of three employees. The Petitioner's organizational chart indicates that the Beneficiary will directly oversee the sales/administrative manager, and indirectly oversee an unidentified corporate attorney, SEO specialist, "banks and financial institutions," and a CPA. The chart shows that the sales/administrative manager will oversee the sales/marketing assistant and indirectly oversee various vacation home real estate agencies, vacation

home properties, [redacted] a "home development" company, an architectural design group, a real estate agent, and "property management companies." The Petitioner did not provide evidence that it has agreements with the various companies listed on the organizational chart or specifically identify or document the specific rental properties from which it anticipates deriving most of its income during the initial year of operations.

Further, in response to the RFE, the Petitioner submitted a letter from the foreign entity outlining the company's proposed staffing which contained information that was inconsistent with the proposed organizational chart. Specifically, the letter stated that the employees to be hired in the first year are an "operational manager/vacation homes reservations," and a "financial assistant" who will be responsible for "accounts receivable, payable and billing." The Petitioner did not provide position descriptions for the newly-identified operations manager or financial assistant positions or explain why the job titles and functions of the Beneficiary's proposed employees were different from what the Petitioner had indicated in its business plan. Accordingly, it is unclear which positions the company intends to staff during the first year.

The Petitioner did provide position descriptions for the sales/administrative manager and the sales/marketing assistant. The manager's duties primarily relate to the vacation property rental line of business, and include such tasks as conducting property inspections, scheduling repair and maintenance work, communicating with property owners, monitoring property reviews and listings, and facilitating acquisition of management agreements. The sales/marketing assistant's duties include direct contact with travelers, handling vacation property reservations, and some general office duties. However, based on the information provided, neither proposed employee would be responsible for handling duties related to the company's travel agency services or its vacation home investment consulting services. Therefore, even if the Petitioner provided consistent information regarding its proposed staffing, the evidence did not show that these two employees would relieve the Beneficiary from involvement in providing the company's services.

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."[3] Section 101(a)(44)(A) of the Act.

[3] 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."

The job description for the sales/administrative manager includes mainly non-managerial and non-supervisory duties, and the Petitioner has not established that the position is one that requires completion of at least a bachelor's degree. Moreover, as noted, the record contains inconsistent information regarding the two positions to be filled during the first year of operations. Finally, although the Petitioner indicated that the Beneficiary will supervise some contracted professionals such as a lawyer and CPA, as needed, the record does not show that he would primarily supervise managerial, professional, or supervisory employees within one year, nor does it claim that he will manage an essential function of the company.

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.

Here, the Petitioner submitted a position description that paraphrases the definition of "executive capacity," but has not shown that the Beneficiary would be directing subordinate managers and focusing primarily on the goals and policies of the company within one year. It provided inconsistent information regarding the type of staff to be hired and did not indicate that it would hire anyone to assist the Beneficiary with the investment consulting or travel agency lines of business in that timeframe. The Director also reasonably questioned whether the Beneficiary's two proposed subordinates would sufficiently relieve him from performing non-managerial duties associated with over $400,000 in projected sales over three lines of business. The Petitioner has not addressed this issue on appeal. Similarly, the Petitioner claims that it will outsource many day-to-day functions to contractors and partners, but has not provided evidence in support of those claims, such as copies of agreements with property owners, management companies, travel companies, and other types of businesses identified on its proposed organizational chart.

Overall, the Petitioner has not established that it would employ sufficient staff to relieve the Beneficiary from significant involvement in non-qualifying duties within one year. The Petitioner has consistently stated that the Beneficiary will occupy the senior position in the new office, but has not submitted supporting evidence sufficient to demonstrate that he would primarily engage in managerial or executive duties, or that the new office would support a managerial or executive position, after the initial year of operations.

IV. ONE YEAR OF EMPLOYMENT ABROAD

Finally, we will enter an additional basis for denial. The Petitioner has not established that the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying

organization within the three years preceding the filing of this petition on July 17, 2017. *See* 8 C.F.R. § 214.2(l)(3)(iii).

U.S. Citizenship and Immigration Services (USCIS) records show that Beneficiary was physically present in the United States for approximately two years and eight months between July 2014 and July 2017. He had one stay in F-1 status that exceeded two years (from October 2014 until December 2016), re-entered the United States in F-1 status in January 2017, and was maintaining that status at the time this petition was filed.

Even though the Petitioner submitted evidence that its foreign parent company continued to pay the Beneficiary's salary in 2016 and 2017, he had been outside of the United States for only four months in the three years preceding the filing of the petition and cannot meet the one year foreign employment requirement simply by remaining on the foreign entity's payroll. Qualifying foreign employment only accrues when the Beneficiary is working for a qualifying entity while outside the United States.

The record shows that the foreign entity employed the Beneficiary for many years prior to his initial entry in F-1 status, but that employment was outside of the relevant three-year time frame and has been interrupted by the subsequent stay in the United States.

The regulations define the term "intracompany transferee" as:

> An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

8 C.F.R. § 214.2(l)(1)(ii)(A).

As noted, the language of the statute indicates that the relevant three-year period to be used as a reference point in determining whether the beneficiary had one year of continuous full-time employment with a qualifying entity abroad is the three years "preceding the time of his application for admission into the United States." Section 101(a)(15)(L) of the Act. The statute, however, is silent with regard to those beneficiaries who have already been admitted to the United States in a different nonimmigrant classification.

When the definition of "intracompany transferee" cited above is construed together with the regulation at 8 C.F.R. § 214.2(1)(3) and section 101(a)(15)(L) of the Act, the phrase "preceding the time of his or her application for admission into the United States" refers to a beneficiary whose admission or admissions were "for a branch of the same employer or a parent, affiliate, or subsidiary thereof" or for "brief trips to the United States for business or pleasure."

The principal focus of section 101(a)(15)(L) of the Act and 8 C.F.R. § 214.2(l) is on the continuity of a beneficiary's employment with the same international qualifying organization in the United States. The three-year window established by the statute ensures that there will be no significant interruptions in employment within the same organization and is consistent with the purpose of this nonimmigrant classification. Allowing the "transfer" of employees who had not worked for the organization for over two years would be contrary to Congress' intent that international businesses will use this nonimmigrant classification solely to temporarily transfer their foreign executive, managerial, and specialized knowledge employees to their United States operations.

Therefore, according to the purpose of the Act and regulations, USCIS will not reach back to the three-year period preceding the Beneficiary's admission as a nonimmigrant in all circumstances. For the reasons discussed above, we find that the statute and regulations support a finding that only time spent in the United States *working* for a branch, subsidiary, affiliate, or parent of the foreign employer will be deemed non-interruptive. It logically follows that any non-qualifying period of stay in the United States that is longer than two years would prevent a beneficiary from meeting the "one-in-three" requirement at 8 C.F.R. § 214.2(l)(3)(iii).

The Beneficiary in this matter had been in the United States for the purpose of attending college for over two years in the three years prior to the date of filing. Therefore, we consider the Beneficiary's period of stay as an F-1 nonimmigrant student to be interruptive. The Petitioner did not establish that the Beneficiary had at least one year of full-time continuous employment with a qualifying entity abroad in the three years preceding the filing of the initial L-1A petition. *See* 8 C.F.R. § 214.2(l)(3)(iii).

V. CONCLUSION

The Petitioner has not established that it would employ the Beneficiary in a managerial or executive capacity within one year. In addition, it has not established that the Beneficiary has at least one continuous year of full-time employment with a qualifying organization abroad within the three years preceding the filing of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of F-T- Corp.* ID# 1479175 (AAO July 9, 2018)