U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-S- LLC

DATE: JULY 18, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a gas station and convenience store, seeks to temporarily employ the Beneficiary as its president/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 Vermont Service Center Director denied the petition, concluding that the Petitioner had not established that the Beneficiary: (1) would be employed in a managerial or executive capacity for the U.S. entity; and (2) had been employed as a manager or executive with a qualifying organization for one year in the three years preceding the filing of the petition.

On appeal, the Petitioner asserts that the evidence establishes that the Beneficiary's duties for the U.S. entity "are clearly 'Executive or Managerial' in nature" and that he worked in an executive position for the foreign company at least one year in the last three years prior to coming to the United States.

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 one continuous year within three years preceding the beneficiary's application for admission into the United States. 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. Section 101(a)(15)(L) of the Act.

An individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, must include evidence that the petitioner will employ the beneficiary in an executive or managerial capacity, or in

a position requiring specialized knowledge, including a detailed description of the services to be performed. 8 C.F.R. § 214.2(l)(3)(ii).

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

The Petitioner was established in 2013 and claims it was created to establish a chain of retail stores which would engage in fuel distribution and other retail operations. When the petition was filed in April 2016, the Petitioner notes that it had already invested in a property. The record includes a partial copy of the Petitioner's lease of a property for the operation of a gas station and convenience store. On the Form I-129, the Petitioner states that it has eight employees. In response to the Director's request for evidence (RFE), the Petitioner claims to employ 13 individuals.

The Petitioner asserts that the Beneficiary will perform executive or managerial duties, but does not identify whether the Beneficiary's duties are primarily managerial or primarily executive in nature. We note that the Petitioner must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are either in an executive or managerial capacity. The Petitioner must demonstrate that the Beneficiary's responsibilities will meet the requirements of one or the other capacity. The Petitioner has not done so here.

A. Definitions of Executive and Managerial Capacity

Section 101(a)(44)(B) of the Act 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.

Section 101(a)(44)(A) of the Act defines the term "managerial capacity" as "an assignment within an organization in which the employee primarily":

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

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

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

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

Further, "[a] first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." *Id.*

B. Duties

When examining the executive or managerial capacity of a beneficiary, we will look first to a petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See, e.g., Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

In a letter submitted in support of the petition, the Petitioner asserted that the Beneficiary as its president and chief executive officer would "supervise[] other professional and managerial employees, establish goals and policies for the U.S. investment, and exercise wide latitude in discretionary decision-making under the direction of . . . the Parent Company." The Petitioner listed the Beneficiary's responsibilities as:

- Serving as the key U.S. contact for the shareholders and directors of the parent company;
- Planning and developing the U.S. investment;
- Developing, organizing and establishing operations pertaining to the purchase, sale and marketing of merchandise for sale in the U.S. market;
- Identifying, recruiting and building a management team and staff with background and experience in the U.S. retail market;
- Overseeing managers who in turn supervise subordinate employees in running day-to-day operations;
- Executing or recommending personnel actions and establishing a management team to run daily operations;
- Negotiating and supervising the drafting of purchase agreements;
- Ensuring the marketing of products to consumers according to the parent company's guidelines;

- Overseeing legal and financial due diligence processes and resolving any related issues;
- Supervising all financial aspects of the company;
- Developing organizational policies and objectives;
- Developing trade and consumer market strategies based on guidelines formulated by the parent company;
- Negotiating prices and sales terms and formulating pricing policies and advertising techniques; and
- Developing and implementing plans to ensure the company's profitable operation.

The Petitioner added that the Beneficiary would spend: 25 percent of his time on management/operational decisions and conducting due diligence for acquisitions of retail locations; 30 percent of his time on contract negotiations and developing trade and marketing strategies; 30 percent of his time on expansion decisions, incurring expenses, and resolving financial related issues; and 15 percent of his time on organizational development and putting the management team into place. In response to the Director's RFE, the Petitioner indicated that the Beneficiary would: hire, fire, and lead the senior management team; hire and train other managers and employees; and be responsible for planning, expansion, banking, budgeting, and marketing, as well as increasing sales of the company.

The duties as described are insufficiently detailed to determine whether the Beneficiary is primarily a managerial or executive employee. *See* sections 101(a)(44)(A) and (B) of the Act. The descriptions provided are broadly-stated so that it is not possible to ascertain what proportion of the Beneficiary's duties would be managerial or executive functions and what proportion would be non-qualifying. For example, planning and developing the U.S. investment, developing, organizing, and establishing operations pertaining to the purchase, sale, and marketing of merchandise, supervising the company's financials, developing organizational policies and objectives, and recruiting and building a management team and staff and recommending personnel actions, include elements that may be managerial, executive, or may involve non-qualifying duties. 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).

Without additional detailed information on the Beneficiary's proposed position, we cannot ascertain the Beneficiary's actual role within the U.S. company. For example, the Petitioner indicated that the Beneficiary would negotiate and supervise the drafting of purchase agreements, negotiate prices and sales terms, formulate pricing policies and advertising techniques, and ensure the marketing of products and develop trade and consumer market strategies based on the parent company's guidelines. However, the Petitioner does not detail the tasks involved in these duties as it relates to the Petitioner's gas station and convenience store business. 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. *Id.* at 1108.

Additionally, the fact that the Beneficiary manages or directs a business does not necessarily 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 exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial or executive in nature.

C. 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.

In response to the Director's RFE, the Petitioner described its "current executive and professional staff" as including the Beneficiary in the position of President and Chief Executive Officer, the Petitioner's minority interest owner and manager as its vice president and general manager, and an individual in the position of sales/operations manager. The Petitioner provided brief, generic descriptions for the positions of general manager and sales/operations manager. The Petitioner's organizational chart, also submitted in response to the Director's RFE, depicts the Petitioner's minority interest owner and manager as in the same position, but shows the individual described as the sales/operations manager in the position of finance/accounting. The organizational chart also depicts two assistant managers reporting to the vice president/general manager and a retail supervisor reporting to one of the assistant managers and an inventory manager reporting to the other assistant manager. The organizational chart further depicts two cashiers/clerks, two cleaners, two deli managers/cooks, and one inventory assistant reporting to the retail supervisor or inventory manager. The Petitioner also provided brief, general position descriptions for the positions listed on the organizational chart.

The Petitioner does not explain the inconsistency in the position for the individual in the sales/operations manager or finance/accounting position. The Petitioner also does not describe any of the positions in relation to the operation of its gas station/convenience store except in the most general way. The Petitioner does not include probative evidence establishing that it employed any of these individuals when the petition was filed. The record included copies of the Petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Return, for the 2015 year showing the Petitioner employed two to six employees in 2015. In response to the Director's RFE, the Petitioner submitted

an unsigned copy of IRS Form 941 for the second quarter of 2016, the quarter in which the petition was filed, which indicates that the Petitioner employed seven individuals in the quarter. The Petitioner does not identify the seven employees by name or position.[1] The lack of evidence identifying the Petitioner's seven employees and the positions they occupied in the petitioning organization in the quarter in which the petition was filed precludes a determination that the Petitioner has sufficient staff to relieve the Beneficiary from performing the operational tasks of the organization.

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. At the time of filing, the Petitioner was a gas station/convenience store that had been operating for over a year. The Petitioner claimed that it employed eight individuals on the Form I-129, but provided an IRS Form 941 showing it employed seven individuals.

The Petitioner's organizational chart identifies five employees, excluding the Beneficiary, holding the following titles: vice president/operations manager; assistant manager (2); inventory manager; and retail supervisor. The Petitioner does not include information on the hours its gas station/convenience store operates and how it is staffed throughout its hours of operation. Accordingly, the record does not include sufficient probative evidence establishing that the Petitioner employs subordinate staff to perform the actual day-to-day, non-managerial, non-executive operations of the company. It does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the Beneficiary as president/chief executive officer, five upper tier employees, and only two individuals to perform the operational and administrative duties of the Petitioner's gas station/convenience store. The Petitioner has not established that the Beneficiary will be primarily employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act.

III. MANAGERIAL OR EXECUTIVE CAPACITY ABROAD

The Petitioner states that [redacted] a Ugandan company established in 2001, owns a majority (51 percent) interest in the U.S. limited liability company. The record includes documentation showing that the sole member of the petitioning limited liability company transferred 510 of the outstanding

[1] The Petitioner also submitted an IRS Form 941 for the third quarter of 2016, which shows the Petitioner employed 13 individuals for the quarter as well as the Louisiana wage report for the same quarter. The Louisiana wage report lists 16 names, identifies 12 of the positions as "cashier," and the other 4 positions as store manager, assistant store manager, retail manager, and sales associate. The individual identified as the vice president/general manager on the organizational chart is identified as the store manager, the individual previously inconsistently described as sale/operations manager or finance/accounting is identified as the assistant store manager, the individual on the organizational chart in the position of assistant manager is identified as retail manager, and the individual on the organizational chart in the position of inventory manager is identified as sales associate. Although the third quarter IRS Form 941 and Louisiana wage report are not relevant to establishing eligibility when the petition was filed on April 11, 2016, these documents raise concern regarding the validity of the Petitioner's organizational chart and position descriptions for its claimed employees.

1000 shares to [redacted] on April 6, 2016.[2] The Petitioner describes the foreign entity as specializing in retail and wholesale distribution of technology solutions and IT equipment. [redacted] confirms that it employed the Beneficiary from September 2013 to September 2015 as its general manager. According to the Form I-129, and U.S. Citizenship and Immigration Services' records, the Beneficiary entered the United States on October 9, 2015, on a B2 nonimmigrant visa. The definitions of executive and managerial capacity cited above also apply to the Beneficiary's foreign position.

A. Duties

The Petitioner asserts that the Beneficiary was employed in an executive capacity[3] for the foreign entity and claims that the Beneficiary as general manager "managed from 10 to 20 employees and supervised different facets of the operation such as production, finance, marketing, and the like." The Petitioner added that the Beneficiary's duties in this role included the following (paraphrased and bullet points added for clarity):

- Developing, implementing, and consistently applying business-related policies to optimize the quality of the organization and employees (30%);
- Negotiating client contracts and promoting sales of products and services (15%);
- Recruiting, hiring, promoting, disciplining, and discharging of sales department personnel (15%);
- Developing and implementing marketing strategies using current market information, competitive and economic conditions, and innovative programs (10%);
- Developing pricing strategies and responding to internal and external customer inquiry (10%); and
- Meeting with appropriate officials to propose transactions, negotiating confidentiality and service agreements, coordinating the due-diligence process with in-house counsel and outside auditors, and directing the preparation and completion of sale contracts and other related documents (20%).

In response to the Director's RFE, the Petitioner submitted a letter from the foreign entity which repeated the above duties. The foreign entity also referenced the Beneficiary's qualifications to hold the position of president/chief executive officer with the Petitioner and his experience and work with managers who supervise the day-to-day production and quality control, distributorship, and sales of the company. The Petitioner then listed additional duties. However, these duties do not appear to

[2] We observe that the Petitioner's unsigned IRS Forms 941 show the previous 100 percent owner as continuing to be the Petitioner's sole member.

[3] On appeal, the Petitioner asserts that the Beneficiary's foreign position was a managerial position and that his duties satisfied the statutory definition of managerial capacity. The Petitioner does not offer any explanation regarding the new identification of the Beneficiary as a managerial employee rather than an individual employed in an executive capacity. However, the record is not supported with probative evidence, nor is the position description sufficiently detailed, to conclude that the Beneficiary's foreign position was managerial or executive.

relate to the foreign entity as the list includes the Beneficiary's "work with various government agencies and officials to ensure that the petroleum products were delivered and manufactured safely." The foreign entity, however, provides IT services and equipment and is not involved in delivering and manufacturing petroleum products.

The Beneficiary's job description for the foreign entity is comprised of vague statements that stress the Beneficiary's leadership position within the foreign organization without delineating his specific daily tasks or explaining how the proposed position would meet the four-prong definition of executive capacity or the four-prong definition of managerial capacity. For example, the foreign entity claims that the Beneficiary will develop, implement, and consistently apply business-related policies to optimize the quality of the organization and employees. However, the foreign entity does not describe the actual tasks that will engage the Beneficiary in carrying out this broadly-stated duty. Similarly, duties that involve meeting with officials, coordinating with counsel and auditors, and directing the preparation of sales contracts and other documents, are not sufficiently detailed to ascertain the Beneficiary's position within the foreign entity. Without details of the Beneficiary's duties as they relate specifically to the foreign entity and its operations, we cannot identify the Beneficiary's role within the foreign organization.

Additionally, it is not clear what tasks will engage the Beneficiary in negotiating contracts and promoting sales of products and services and developing and implementing marketing and pricing strategies, and whether those tasks fall within the parameters of executive capacity as defined by the statute or comprise duties that are operational in nature. These duties, as described, are non-qualifying operational duties. 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, e.g*, 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). Similarly, recruiting, hiring, promoting, disciplining and firing sales department personnel appears to the duties of a first-line supervisor over non-professional employees. The record does not include sufficient evidence to conclude otherwise.

B. Staffing

The record includes a copy of the foreign entity's organizational chart depicting the Beneficiary as the general manager overseeing an account manager, a marketing manager, and a technical manager. The chart further shows two employees reporting to the account manager, one employee reporting to the marketing manager, and two employees reporting to the technical manager. The chart does not include a sales department. The chart identifies nine employees including the Beneficiary. The record does not identify "20 to 30 employees" for the Beneficiary to manage. Moreover, it is unclear why the Beneficiary is required to spend 15 percent of his time recruiting, hiring, promoting, disciplining, and discharging sales department personnel, when the organizational chart does not identify this department.

The record also lacks position descriptions for the Beneficiary's claimed subordinates and probative evidence of their employment. The record does not establish that the foreign organization employed a sufficient number of employees to perform the administrative, operational, sales, and technical duties and thereby relieve the Beneficiary from primarily performing the necessary duties of the organization to keep it running. The record does not establish that the Beneficiary's employment for the foreign entity was in an executive or managerial capacity.

C. Beneficiary's One-Year of Employment with a Qualifying Organization

As noted above, the Petitioner must establish that a qualifying organization employed the Beneficiary for one continuous year within three years preceding the Beneficiary's application for admission into the United States. The Director noted that the Beneficiary stated on his B2 visa application, signed April 28, 2015, that he worked for from September 2004 to May 2010, and that his current employer in April 2015 was a company in India.[4] Accordingly, the Director questioned the Petitioner's claim that the Beneficiary was employed at the foreign entity in Uganda from September 2013 to September 2015.

On appeal, the Petitioner asserts that the Beneficiary owns the family business in India, but he is not employed there. The Petitioner adds that the Beneficiary, pursuant to a telework agreement with performed his duties as a general manager indirectly and remotely from his domicile in India. The Petitioner submits a copy of the telework agreement on appeal. The managing director of the Ugandan foreign entity, in response to the Director's RFE when discussing the Beneficiary's qualifications, referenced that the Beneficiary had "developed many executive and supervisory skills here in India as General Manager." The record also includes copies of the Beneficiary's Ugandan tax records listing his employment income in Uganda and stating that he was a resident of Uganda from July 2011 to June 30, 2015.

The record contains inconsistent and confusing information regarding the Beneficiary's domicile and his employment with the Ugandan qualifying organization. The record does not include sufficient consistent and clarifying evidence to overcome the Director's decision that the Petitioner had not established that a qualifying organization employed the Beneficiary for one continuous year within the applicable three-year time period.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary will perform in an executive or managerial capacity for the Petitioner and has not established that the Beneficiary performed duties in an executive or managerial capacity for the foreign entity for one continuous year in the three years preceding his application for admission into the United States

[4] The record shows that the Beneficiary entered the United States on October 9, 2015.

ORDER: The appeal is dismissed.

Cite as *Matter of S-S- LLC*, ID# 494570 (AAO July 18, 2017)