U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-E- INC.

DATE: JULY 20, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a hospitality management and investment company, seeks to extend the Beneficiary's temporary employment as its chief executive officer (CEO)[1] under the L-1A nonimmigrant classification for intracompany transferees.[2] *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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner submits additional evidence and asserts that the record establishes that the Beneficiary will be employed in an executive capacity.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-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.

[1] The Petitioner also refers to the Beneficiary's position as "Real Estate Manager" and "Real Estate (Investment) Manager."

[2] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period October 19, 2015, to October 18, 2016. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation one year within the date of approval of the petition to support an executive or managerial position.

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

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

The Director found that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity under the extended petition. Specifically, the Director found that there were unresolved discrepancies in the record with respect to the Beneficiary's job title and proposed duties. The Director further concluded that the Petitioner's three-person subordinate staff did not include managers, professionals or supervisors, and was not adequate to relieve the Beneficiary from significant involvement in the day-to-day, non-managerial and non-executive activities required to operate the company.

On appeal, the Petitioner submits additional evidence of the Beneficiary's efforts to seek out additional investment opportunities and asserts that the evidence is sufficient to establish that the Beneficiary's duties will be primarily executive in nature.

The statute defines an "executive capacity" 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.

Although the Petitioner claims on appeal that the Beneficiary will be employed in an executive capacity, we will also consider whether he would be employed in a managerial capacity. The term "managerial capacity" is defined 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.

Section 101(a)(44)(A) of the Act. 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.*

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) takes 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.

When examining the managerial or executive capacity of the Beneficiary, we will look first to the Petitioner's description of the job duties. The Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, USCIS examines 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. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the business and its staffing levels.

A. Duties

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 1533.

The Petitioner is self-described as a "hotel management and investment company." At the time of filing in October 2016, it was leasing and operating the [redacted] a small motel, and stated that it was actively looking to invest in other restaurant or hotel properties. The Petitioner stated that the Beneficiary is its CEO and "personally manages the organization of the hospitality wing of the restaurant/hotel management and operations business," "supervises and control all employees of the business," "has authority to hire and fire individuals at all levels," and "will have authority to make day-to-day decisions" regarding the business' operation.

In response to the Director's request for additional evidence (RFE), the Petitioner submitted a "Letter of Intent to Lease [redacted][3] signed in November 2016, and stated that the Beneficiary would oversee both properties as "Real Estate (Investment) Manager." The Petitioner stated that the Beneficiary would allocate his time as follows: 50% to "responsibilities regarding management, purchase and development of real estate investments and holdings"; 25% to "interacting with management team members and facilities operations"; 15% to "miscellaneous review of business operations, approving hiring and firing of personnel"; and 10% to "coordinating business relations with the parent company in India." The Petitioner also provided a list of 22 "detailed duties" which we will discuss below.

We agree with the Director's determination that the submitted position descriptions lack sufficient detail, are inconsistent with each other and with the nature of the business, and do not demonstrate that the Beneficiary will primarily perform managerial or executive duties under the extended petition.

The Beneficiary's duties as CEO were initially so broadly described that they could refer to any senior position in almost any company. The regulations require a detailed description of what this particular employee does on a day-to-day basis within the scope of this petitioner's operations. It is not sufficient for the Petitioner to state that the Beneficiary "manages the organization," "supervises and control all employees" and has authority to make "day-to-day decisions. These responsibilities provide very little insight into the nature of the Beneficiary's daily tasks as the senior employee in an operation that operates a motel with a staff of four people. 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).

While the position description provided in response to the RFE was lengthier, it too was lacking in specific details regarding the nature of the Beneficiary's day-to-day tasks. Although the Director requested a breakdown of the amount of time the Beneficiary would spend on specific duties, the Petitioner provided a very broad breakdown and a list of duties that did not appear to reflect the Beneficiary's actual duties at the time of filing. The Petitioner, as of the date of filing, did not own any properties or have a real estate investment portfolio. It leased one motel and is responsible for the day-to-day operations of the motel under the terms of the lease. However, many of the Beneficiary's stated duties involve oversight of a "real estate investment portfolio." The listed duties were repetitive and were not consistent with the nature of the business. For example, the Petitioner stated that the Beneficiary "manages overall real estate investment portfolio," is

[3] The Petitioner and seller signed the letter of intent agreement on November 5, 2016. The agreement states that the Petitioner and the seller had 72 hours to enter a binding Lease Purchase Agreement and that the seller could carry on negotiations for the sale of the property with other parties if they failed to enter a binding agreement with the Petitioner within three days. The Petitioner submitted its response to the RFE on January 12, 2017, with no further evidence related to its acquisition of the [redacted] On appeal, the Petitioner refers only to the letter of intent. We cannot determine whether the [redacted] is still available for purchase; however, it does not appear that the Petitioner ever had a binding agreement to purchase it or that it had a formal intent to purchase it at the time the petition was filed in October 2016.

responsible for "managing the overall investment strategy for the investment portfolio," will manage "the overall risk and performance of the real estate investment portfolio" and develop "the overall investment strategy for the investment portfolio," will implement "performance benchmarks" for the portfolio, will maintain a "real estate strategy that supports core business goals," and will oversee "real estate transactions, asset management and financial analysis techniques within company's real estate portfolio." Other stated duties assume that the Petitioner is already engaged in real estate development work, an assumption that is not supported by the record. These duties include "overseeing site selection, design, planning and construction," and ensuring the timely and on-budget completion of construction work.

Although the evidence supports the Petitioner's claim that the Beneficiary has researched the possibility of leasing or investing in other hotel or restaurant properties, the record does not show that he would be spending most of his time developing strategies and managing a portfolio of real estate investments or development work as of the date the petition was filed. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). The Petitioner may intend to grow to a point where it anticipates the need for an investment manager who primarily oversees a portfolio of properties and the development of such properties, but it had clearly not reached that point at the time of filing.

Other "detailed duties" listed in response to the RFE were either vague or not clearly managerial or executive in nature. For example, the Petitioner stated that the Beneficiary "accomplishes organization goals by accepting ownership for accomplishing new and different requests" and "develop[s] the fundamental and relative value view of the real estate sector." We cannot discern what specific tasks these responsibilities would entail. Some of the Beneficiary's other duties include preparing reports by collecting, analyzing and summarizing data, updating job knowledge by participating in educational opportunities, and researching and analyzing property values of potential investments. While the Beneficiary has worked with a broker to identify potential future investments, the Petitioner has not established that the related research work involves managerial or executive tasks.

Overall, the Petitioner has not established that the more detailed position description provided in response to the RFE accurately or completely reflected the Beneficiary's actual duties as of the date of filing. Even though the Beneficiary holds a senior position within the organization, the fact that the Beneficiary will manage or direct 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. 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; however, the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial or executive in nature.

B. Staffing

The record establishes that the Petitioner employed four employees at the time of filing: the Beneficiary, a facilities manager, a sales manager, and a facilities supervisor.[4] The Petitioner's organizational chart showed openings for a chief financial offer, a finance manager, a guest service representative, and two "helpers."

The Petitioner has referred to the Beneficiary's position as both executive and managerial, and emphasized that he would supervise subordinate managers. 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. 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."[5] Section 101(a)(44)(A) of the Act. If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act.

The Petitioner did not state the educational requirements for the subordinate positions, nor has it provided evidence of the educational credentials for the individuals who fill those positions. Therefore, the record does not establish that the Beneficiary would supervise subordinate professionals. We note that all three of the Beneficiary's subordinates have managerial or supervisory job titles; however, we must examine their actual duties to determine whether they should be considered managers or supervisors.

The Petitioner indicates that the facility manager arranges janitorial, landscaping, trash removal and other services, monitors the performance of contractors, purchases supplies and equipment, and supervises maintenance staff, which the Petitioner does not claim to employ. While these duties are necessary for the operation of a motel, they do not establish that this employee is a manager or supervisor, despite the Petitioner's placement of the facility supervisor below the facility manager on the organizational chart. Further, the job description for the facility manager includes some duties that are inconsistent with the Petitioner's operation of a motel, such as collection of rent, and duties which appear to overlap with the Beneficiary's proposed duties, such as directing the purchase, sale,

[4] The Petitioner provided evidence that it made a job offer to an individual who agreed to join the company as an accountant in March 2017. As noted, the Petitioner must establish eligibility as of the date of filing. The accountant position will not be considered in our discussion of the Petitioner's staffing levels.

[5] To determine whether the 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 United States 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."

and development of real estate properties, negotiating contracts for the purchase or lease of property and negotiating the sale of properties.

The facilities supervisor, despite his job title, does not perform supervisory duties. While this employee appears to perform tasks such as welcoming visitors, providing information and ensuring the cleanliness of the premises, he is not a full-time employee and it is unclear how a single part-time employee would handle all room maintenance and front desk operations. His duties do not overlap with those of the guest/front desk representative, a proposed position, and it is unclear who currently performs the necessary duties of that vacant position.[6]

Finally, while the Petitioner has provided a lengthy position description for the sales manager position, the description appears to be inconsistent with the nature of the Petitioner's business and contains no references to its operation of a motel. Several of the duties overlap with the Beneficiary's and others appear inflated when considering the size and nature of the petitioning company. For example, the Petitioner states that the sales manager "accomplishes market and sales human resources objectives by recruiting, selecting, orienting, training, assigning, scheduling . . . , and disciplining employees," but this position has no current or proposed subordinates. The description contains references to "merchandising and trade promotion programs," "field sales action plans," "improving product packaging," "coordinating new product development," and making periodic visits to key accounts. Again, at the time of filing, the Petitioner was operating a small motel that appears to have 10 to 15 guest rooms and it has not shown a need for a sales manager to perform the described duties.

In sum, the Petitioner has not shown that the Beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act when seeking classification as an L-1A manager based on the supervision of personnel. The Petitioner has not claimed, in the alternative, that the Beneficiary would primarily manage an essential function of the organization.

On appeal, the Petitioner emphasizes that the Beneficiary's position will be in an executive capacity. 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

[6] The Petitioner submitted a copy of the offer letter for this employee which refers to an unrelated entity and raises questions regarding the credibility of his job duties as a whole. The offer letter states that the facilities supervisor will "work as a part of a wider team across the [redacted] to delivery organizational objectives." There is no other mention of the "[redacted]" in the record.

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.*

Here, while the Beneficiary appears to have the appropriate level of authority, the Petitioner has not established that, as of the date of filing, he was primarily concerned with the broad policies and goals of the organization, that the day-to-day management rested with a subordinate tier of management, or that he would be relieved from substantial involvement in the day-to-day operations of the business.

As emphasized by the Petitioner on appeal, a company's size alone may not be the determining factor in denying an L-1A visa petition without taking into account the reasonable needs of the organization. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company or a "shell company" that does not conduct business in a regular and continuous manner. *Family*, 469 F.3d 1313; *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner operates a motel with three "managers" and one "supervisor" but does not claim to have employees to provide guest services such as checking them into rooms, responding to their needs during their stay, or daily room cleaning and maintenance. Nor does it claim to have employees to perform the administrative tasks associated with operating this type of business. While we acknowledge that the Petitioner is seeking to operate additional hotel or restaurant properties, we must review the nature of the business at the time of filing. The Petitioner has not established that the Beneficiary's three subordinates, two of whom work from 9:00 to 5:00 five days per week, and one who works fewer hours, are able to relieve him from involvement in the day-to-day operations of operating the motel. As a result, the record does not adequately support the Petitioner's claim that he would be primarily involved in tasks related to the oversight and development of the company's investment portfolio.

On appeal, the Petitioner contends that the Beneficiary's position has all the necessary elements of an executive position, but, again, does not sufficiently elaborate regarding the nature of the Beneficiary's duties within the context of the business as it existed at the time of filing. We agree with the Director's determination that the evidence is insufficient to establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

III. QUALIFYING RELATIONSHIP

Although not addressed in the Director's decision, we find insufficient evidence in the record to establish that the Petitioner maintains a qualifying relationship with the Beneficiary's claimed foreign employer. To establish a "qualifying relationship," the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See* section

101(a)(15)(L) of the Act; *see also* 8 C.F.R. § 214.2(l)(1)(ii) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate").

The Petitioner claims to be a majority-owned subsidiary of an Indian partnership firm. As evidence of this qualifying relationship, the Petitioner submitted copies of its stock certificates nos. 1 and 2, both of which were dated June 21, 2016, eight months after the new office petition was approved. The record shows that the company was incorporated in Connecticut on that date. However, the Petitioner notes that it was originally incorporated in New York in May 2015 and therefore, the original new office approval granted in October 2015 was based on the New York corporation's relationship with the Beneficiary's claimed foreign employer. Based on the Petitioner's 2015 IRS Form 1120, U.S. Corporation Income Tax Return, the New York corporation was owned 100% by the Beneficiary, who holds only a minority ownership interest in the foreign entity.

As a result of the company's reincorporation during the first year of operations, and the apparent differences in ownership between the two entities that have petitioned for the Beneficiary, there are unresolved ambiguities in the record relating to the qualifying relationship. 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). For this additional reason, the petition cannot be approved.

IV. BENEFICIARY'S EMPLOYMENT ABROAD

Finally, the Petitioner stated in the petition that the Beneficiary worked for in India from 2008 until 2015. However, U.S. Department of State records show that when the Beneficiary applied for a B1/B2 visitor visa in 2014, he stated on his nonimmigrant visa application that he was "self employed in and working in the "trading of shares, currencies and He did not list as a former employer. While we are not making an adverse determination here based on this information obtained from the U.S. Department of State, the Petitioner may need to address the Beneficiary's statements regarding his employment abroad in any future petition filed by the Petitioner on his behalf.

V. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity under the extended petition or that it maintains a qualifying relationship with the Beneficiary's foreign employer.

ORDER: The appeal is dismissed.

Cite as *Matter of N-E- Inc.*, ID# 506121 (AAO July 20, 2017)