U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-C-D-F- LLC

DATE: JULY 28, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a health food services catering and distributorship business, seeks to temporarily employ the Beneficiary as its CEO & president under the L-1A nonimmigrant classification for intracompany transferees.[1] *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 will be employed in the United States in a managerial or executive capacity.[2] On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary will perform as an executive for the U.S. entity.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A 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 or executive capacity. Section 101(a)(15)(L) of the Act.

[1] The Petitioner identifies itself on the Form I-129 as However, its articles of organization filed in the state that the name of the company is

[2] The Director initially denied the petition on November 5, 2015, on the sole issue of the existence of a qualifying relationship between the petitioning U.S. entity and the Beneficiary's foreign employer. The denial was appealed and we withdrew the Director's decision and remanded the matter finding that the Petitioner had not established that the Beneficiary will be employed in a managerial or executive capacity for the U.S. entity. The remand of the decision resulted in this denial and subsequent appeal.

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 AN EXECUTIVE CAPACITY

The Director determined that the Petitioner has not established that the Beneficiary will be employed in the United States in an executive capacity.[3]

The Act defines the term "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 thereof; 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.

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.

A. Duties

When examining the executive capacity of a 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).

Based on the definition of 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.

As we found in our earlier decision in this matter, the Petitioner's initial description of duties for the Beneficiary did not establish he would be engaged in a primarily executive position for the U.S.

[3] The Petitioner states that the Beneficiary is an executive and that his "role was never diminished to a supervisory role, nor even to any functional manager role." As the Petitioner does not claim and the record does not demonstrate that the Beneficiary will perform primarily in a managerial capacity, our analysis is limited to whether the Petitioner established the Beneficiary's executive capacity.

entity. We reviewed the table of duties the Petitioner submitted in support of the petition, and noted that the Petitioner expected the Beneficiary to continue to hold his position as CEO and general manager of the foreign entity while being employed by the Petitioner as CEO and president. We determined that the Petitioner had not adequately delineated the Beneficiary's responsibilities for each position and concluded:

> Based on the description of the Beneficiary's duties it is unclear what duties he would be performing as general manager on behalf of the foreign entity while physically located in the United States, what duties he would be performing in his capacity as CEO and president of the Petitioner, or how he would divide his time. As such, the Petitioner has not provided a clear description of what duties the Beneficiary will perform for the Petitioner.

On remand, the Director issued a request for evidence (RFE) for additional information on the Beneficiary's proposed position for the U.S. entity. In response, the Petitioner asserted that the Beneficiary is a "multinational executive who needs to work on US soil as our President regularly but intermittently in order to accomplish several key EXECUTIVE-LEVEL objectives." The Petitioner described the objectives as:

1) Direct the US enterprise (and continue to direct the Venezuelan enterprises) at [*sic*] a multinational executive does, intermingling the goals and objectives – as both places do the similar types of work, run a high-end food services distribution [business]. 24% of the multinational company is his to lead by contract; But he currently only leads the US organization 20% with 80% devoted to Venezuela. **He needs to spend 30% time directing the US enterprise.**

2) Determine the legal boundaries of US enterprise expansion. Notably, he is qualified to lead above other siblings as a legally-trained executive for the family-wide US-Venezuelan enterprise and he has the most multinational experience and most franchise experience. **30% of his time**.

. . . .

3) Collaborate with other managers and executives, and step in to do managerial duties as needed under the "hands on" leadership philosophy we have. **20% of time, as needed – see those task broken out further below.** Why? To free up the other executives who fill hybrid executive/managerial roles, i.e. (a) operations management and training and personnel currently run by Maria Prieto and (b) financial handling currently overseen by Ana Prieto.

4) Provide executive direction for US expansion. Expansion of sales targets (US schools and a food distribution network as we have in Latin America). **20% of the time.** Duties are easier to do in the US – instead of calling prospective clients

> and texting from Venezuela, he should visit clients in person to do his job more efficiently and more effectively. Manage expansion in (1) more US private schools in the area and (2) identifying US stores/distribution chains for unique Venezuelan salad chips.

The Petitioner noted that because the U.S. entity is a small business, the Beneficiary will step in to manage critical functions as needed, and described these "sub[-]activities" as:

a. Supervise and manage employees, but only as needed in absence of running operations and supply chain.
b. Determine whether net revenues justify the ongoing employment of certain employees; collaborate with other executives to hire and fire employees as needed.
c. Perform very little day-to-day operational functions unless the company is short on hands. Operational functions are managed by who oversees another manager.
d. Other subtasks under executive oversight functions:
    i. Act as Operations & Supply Chain Manager during any absences of
    ii. Interface with brand licensor, i.e., the franchisor, in Florida.
    iii. Handle unexpected corporate issues.
    iv. Handle unusual emergencies and interface with private and charter schools.
    v. Monitor financials more closely than the Finance Executive, as an acting General Manager for the franchise.
    vi. Oversee all sales activity, including directing and other company staff in all sales efforts.
    vii. Encourage production to be done (by Operations Exec., Kitchen Managers and Staff) with sales in mind to generate good will.
    viii. For future corporate growth, identify potential distribution channels and manufacturing venues of proprietary veggie chips.

On appeal, the Petitioner repeats these duties and those submitted at the time of filing.

The record does not include a sufficiently detailed position description to establish that the Beneficiary will perform primarily executive duties. Although the Petitioner claims that the Beneficiary will direct the U.S. enterprise, an individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the company as the owner or sole managerial employee. For example, on appeal, the Petitioner relies on the Beneficiary's involvement in founding the company to demonstrate that he is an executive. However, not only is this a one-time duty, founding a company does not describe the tasks the Beneficiary will perform for the U.S. entity on a daily basis. Additionally, operating a food services

distributorship, collaborating with other managers and executives, and stepping in to do managerial duties as needed may entail non-qualifying operational, supervisory, or administrative duties. The Petitioner has not established with this general information that the Beneficiary's duties satisfy the statutory definition of "executive capacity."

The Petitioner also references the Beneficiary's involvement in choosing the franchise to invest in as evidence that the Beneficiary is an executive. However, this also appears to be a one-time decision to launch the business, rather than a task that the Beneficiary would perform on a day-to-day basis. The Petitioner must describe the tangible duties that will engage the Beneficiary in carrying out tasks so that we may ascertain whether the duties as described are executive in nature. For example, although the Petitioner also claims that the Beneficiary will "[p]rovide executive direction for U.S. expansion," it does not describe the specific duties that will engage the Beneficiary in this effort. Instead the Petitioner refers to the Beneficiary's multinational and franchise experience. However, it is not a Beneficiary's experience that establishes his employment in an executive position, but the day-to-day tasks that the individual is required to perform in that position.

The Petitioner also claims that the Beneficiary will "[d]etermine the legal boundaries of the Petitioner's expansion," and then explains that this will involve visiting clients, U.S. stores, and distribution chains to increase sales. This appears to involve performing sales and marketing tasks. The Petitioner has not identified subordinate employees who will carry out these duties or will perform the regulatory interface with governments, and contractual interface with vendors and clients, if not for the Beneficiary.

We have also considered the Beneficiary's other duties, such as planning long-term financial strategy, reviewing initial contracts, and working with business planning groups and franchise plans. However, referencing these duties without detail of the tasks involved is insufficient. Overall, the record does not include sufficient evidence establishing the Beneficiary's day-to-day duties so that we can determine if he will be performing primarily executive duties as defined by the statute, rather than performing the duties involved in operating the company.

B. Staffing

Beyond the required description of the job duties, we review the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The 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 he must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. 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.*

The record includes two organizational charts. Both the initial and revised organizational charts show the Beneficiary and his sister at the top of the chart in lateral positions. The initial chart shows the Beneficiary's sister in the position of Supply Chain/Quality Assurance and indicates that she interfaces with the franchisor. The chart also lists several employees near her position although it is not clear who these employees report to. The Beneficiary is depicted as overseeing a marketing and sales department and a finance department. The revised organizational chart depicts the Beneficiary and his sister as each owning 24 percent of the Petitioner and again on the same organizational tier. As the Beneficiary's sister is depicted on the same organizational tier as the Beneficiary's proposed position, the chart conflicts with the Petitioner's claim that the Beneficiary dictates the operations decisions "used by his less-experienced sister who manages day-to-day oversight [of] the US entity alone." The record does not include consistent evidence that the Beneficiary will direct the individual in the operations, supply chain, and quality assurance position.

Moreover, the record does not include probative evidence of the employment of other managerial employees in support of the Petitioner's claim that the Beneficiary will "direct the management" of the organization as an executive. The Petitioner identifies a chief financial officer on one of the organizational charts and on the same chart shows the operations/supply chain/quality assurance manager overseeing the kitchen manager. However, the record does not include evidence of the employment of the financial officer or the duties the individual in this position performs. On appeal, the Petitioner submits an employment contract with a kitchen manager; however, the description of duties for this individual does not include sufficient information to determine that she performs primarily managerial or supervisory duties. Additionally, this individual does not report to the Beneficiary on either of the organizational charts submitted. Thus, the record does not establish the Beneficiary would have a subordinate level of managerial employees to direct.

The record also includes the third and fourth quarter federal employer's quarterly reports for 2015, and the employer reports for the same quarters which identify the Petitioner's employees by name. The third quarter federal employer's quarterly report, the report covering the time period the petition was filed, lists only one employee as paid in this quarter; however, the report lists two individuals. The first individual on the report, is identified as a chef on the initial organizational chart and is identified as one of the "AM food preparation" employees on the second. This individual's position is described on an addendum to her employment agreement with the Petitioner as "[a]ssist the [c]hef to prepare over 400 meals per hour." The second individual, is not listed on either of the organizational charts, but a payroll report shows that she was dismissed in August, thus was not employed when the petition was filed on September 25, 2015. The Petitioner's payroll journal

including September 25, 2015, to September 30, 2015, identifies only two paid employees, [redacted] AM prep cook, and [redacted] kitchen manager.[4]

The record also includes IRS Forms 1099, for miscellaneous income paid by the Petitioner in 2015. A Form 1099 was issued to [redacted] who is identified as a food preparation worker on the initial organizational chart, but is not listed on the revised organizational chart. A second Form 1099 was issued to [redacted] who is identified as a driver on the initial organizational chart but is not listed on the revised organizational chart. A third Form 1099 was issued to [redacted] The record does not include evidence identifying the nature of this business. Although we recognize that there may be high employee turnover in the food preparation and distribution business, as well as part-time and intermittent workers, the Petitioner must still establish that it has a sufficient number of employees to relieve the Beneficiary from performing primarily non-qualifying duties, when 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).

In this matter, the record does not identify any individual or department that will assist the Beneficiary in developing the U.S. entity's expansion and growth in the United States, tasks referenced in the description of the Beneficiary's proposed duties. Similarly, the record does not include information or evidence demonstrating that the marketing duties will be performed by anyone other than the Beneficiary. Although both organizational charts submitted identify a bookkeeper and refer to a third party CPA, the record does not include evidence that these individuals were employed or contracted by the Petitioner when the petition was filed. Further, although the Petitioner on appeal asserts that it used offsite vendors to generate sales materials and to perform market outreach, the record does not include evidence of payment or contracts with these vendors.

A petitioner must establish that it meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *Matter of Chawathe*, 25 I& N Dec. 25 I&N Dec. 369, 376 (AAO 2010). In other words, a petitioner must show that what it claims is "more likely than not" or "probably" true. To determine whether a petitioner] has met its burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). Here, the Petitioner has not submitted sufficient probative evidence to determine that the Beneficiary will be relieved from performing many of the company's operational tasks, such as marketing and expanding the business, budgetary duties, and regulatory and contractual compliance.

[4] Even if we considered the individuals the Petitioner employed in the fourth quarter, a time subsequent to filing the petition, the Petitioner has not established that these individuals would relieve the Beneficiary from performing non-qualifying duties. The fourth quarter federal report lists four employees paid during this quarter, while the [redacted] report lists five individuals, although the fifth person is not identified in any position on the organizational charts. The remaining four individuals included employees involved in food preparation and distribution. They do not perform sales, marketing, bookkeeping, or other operational and administrative duties necessary to operate a business.

Although the Beneficiary may not directly participate in preparing food for distribution, the Petitioner has not established that the Beneficiary will be relieved from performing other routine non-executive tasks necessary to continue business operations.

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. We interpret the statute to prohibit discrimination against small or medium-size businesses. However, we also interpret the Act to require petitioners to establish that the beneficiary's position "primarily" consists of managerial or executive duties, and that it has sufficient personnel to relieve a beneficiary from performing operational and administrative tasks. The lack of clarity regarding the Beneficiary's role at the U.S. entity and the lack of personnel to relieve the Beneficiary from performing non-qualifying duties preclude a determination that the Petitioner has a reasonable need for the Beneficiary to perform primarily executive duties. The Petitioner has not established that its organization is sufficiently complex to support the Beneficiary in an executive capacity, as defined by the statute.

The Petitioner refers to several unpublished AAO decisions in which we addressed managerial or executive capacity and asserts that the position offered to the Beneficiary is either distinguishable or analogous to the various decisions. However, while 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on USCIS, unpublished decisions are not similarly binding. Moreover, this record does not include sufficient probative evidence that the Beneficiary will focus primarily on the broad policies or goals of the organization or that the Petitioner employs sufficient staff to relieve the Beneficiary from performing primarily non-qualifying duties.

III. CORPORATE STATUS OF PETITIONER

During our preliminary review of the record we were unable to determine that the Petitioner is a limited liability company in good standing in the [redacted] We issued an RFE advising the Petitioner that although its business license appeared active, [redacted] corporate records indicated that its corporate status had been forfeited. We noted that if the Petitioner was no longer in business, we intended to dismiss the appeal.

In response to our RFE, the Petitioner submits copies of its IRS Forms 941, Employer's Quarterly Federal Tax Returns, and other documents showing that it is conducting business using the name [redacted] However, our review of the [redacted] corporate registration database using the Petitioner's file number listed in its operating agreement continues to show that the "entity status" of this limited liability company is revoked. *See* https:/[redacted] In response to our RFE, the Petitioner did not provide evidence that it is a legal entity in good standing. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G)(*2*). We note that this issue must be addressed and resolved in any future proceeding.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary will be employed in an executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of C-C-D-F- LLC*, ID# 371390 (AAO July 28, 2017)