U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-G-A-V-S-, LLC

DATE: JUNE 7, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a marketing and promotional materials business, seeks to extend the temporary employment of the Beneficiary as its chief executive officer and manager 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 new office extension petition, concluding that the record did not establish that the Beneficiary will be employed in the United States in an executive or managerial capacity.

On appeal, the Petitioner asserts that it and the Beneficiary qualify for this visa classification.

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 L-1A nonimmigrant visa petition that involved the opening of a new office may be extended by filing a new Form I-129, accompanied by a statement of the duties performed by the beneficiary for

[1] The Petitioner claims that it is doing business as however, the record does not include evidence that the Petitioner has informed the relevant government entities that it is doing business using this name. We note that a Florida business search shows that was incorporated in 2012, and was administratively dissolved on 2015.

the previous year and the duties the beneficiary will perform under the extended petition, and the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees. 8 C.F.R. § 214.2(l)(14)(ii)(C) and (D).

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

The Petitioner does not clarify whether the Beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. 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.

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 managerial or executive capacity of the Beneficiary, we look first to the Petitioner's description of the job duties. The description of the job duties must clearly describe the duties 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 definitions of managerial and executive capacity, the Petitioner must first show that the Beneficiary performs 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 *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner initially submitted the Beneficiary's position description for However, the record does not include any evidence that this company is related to the Petitioner or that the Petitioner is the successor-in-interest to this company.[2] In response to the Director's request for evidence (RFE), the Petitioner stated that the Beneficiary's job responsibilities for the Petitioner include the following:

- Actively participates in the work of the executive board, directing the business strategies and short- and long-term goals;
- Lead[s] a sales team of high performance, with a focus on attracting and retaining talent;
- Works in the commercial strategic intelligence, defining policies and actions in order to promote growth and improvement of all commercial and financial indicators;
- Facilitates trade negotiations with partners and customers, analyzing situations and events in order to maintain the legality and ethics of the company's business; [and]
- Supervises the fiscal activities of the company.

This description does not include duties that relate specifically to the Petitioner. Rather the duties described are generic in nature and could apply to any number of companies. Duties such as "directing the business strategies and short- and long-term goals," "defining policies and actions in

[2] The Petitioner also provides the by-laws for and notes that this company also does business as As the record does not connect the Petitioner to this second company, any documents relating to this entity will not be considered.

order to promote growth and improvement," and "analyzing situations and events in order to maintain the legality and ethics of the company's business" essentially paraphrase elements of the statutory definitions of managerial and executive capacity. Reciting vague job responsibilities and broadly cast business objectives is insufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The Petitioner has not provided sufficient 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. *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).

Other duties such as leading a sales team, facilitating trade negotiations, and supervising fiscal activities are also inadequately defined phrases. It is not possible to conclude that these duties are managerial or executive duties rather than first-line supervisory duties, or duties that include other operational and administrative tasks necessary to continue the Petitioner's business operations. These duties do not demonstrate that the position is a managerial or executive position.

Moreover, the fact that a Beneficiary may 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. 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 description provided is insufficient to establish that his actual duties would be primarily managerial or executive in nature.

The record on appeal includes a list of projects the Beneficiary claims he completed for the Petitioner, beginning in December 2014 and continuing to January 2017. However, the Petitioner was not organized until September 11, 2015, thus, the Petitioner has not established the relevance of the Beneficiary's duties prior to this date. The projects listed in this document include the Beneficiary's statement that he began interviews with potential employees, hired a new sales team, and provided training for the team in December 2016, and finished designs for the Petitioner's website, supervised some meetings with potential clients, and met with the accountant and payroll department in January 2017. These duties, performed in the two months after this petition was filed, show the Beneficiary performing operational tasks required to conduct the Petitioner's business.

The Petitioner on appeal also refers to the Beneficiary's knowledge and experience as an executive but does not further develop the actual duties that will engage the Beneficiary under this extended petition. Moreover, the Petitioner's general description of the Beneficiary's job duties does not establish what proportion of the duties it believes are managerial or executive in nature, and what proportion is non-managerial and non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). This lack of documentation is important because the Beneficiary stated that he finished designs and provided training to employees, duties that do not fall directly under managerial or executive duties as defined in the statute. The lack of information in the record regarding the

Beneficiary's proposed position and the duties as generally described preclude a determination that the Beneficiary will perform primarily executive or managerial duties for the Petitioner.

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. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows a "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in the pertinent regulations that allows for an extension of this one-year period. If a business does not have the necessary staffing after one year to sufficiently relieve a beneficiary from performing operational and administrative tasks, a petitioner is ineligible for an extension.

The Petitioner's initial organizational chart identified eight individuals in 10 different positions such as president, director, office director, sales director, accounting, payable/receivable, creations, and installations.[3] The Petitioner submitted its third quarter 2016 employer's quarterly report which identified four employees in July and August 2016 and three employees in September 2016.[4] The employees correspond to the positions of president (the Beneficiary's position), director ( ), office director, and sales director. The Petitioner does not clarify which one of the four employees was not paid in September 2016.

In response to the Director's RFE on this issue, the Petitioner asserted that it planned to employ a staff of eight in the upcoming year. The Petitioner also claimed that it had joined with third party companies to handle specific aspects of production. The Petitioner submitted two service contracts it had entered into: (1) dated 2016, for design creation and publishing; and (2) dated 2016, for wrapping vehicles. The record does not include any supporting evidence demonstrating that the Petitioner paid either of these companies for services rendered. Additionally, the record does not include supporting evidence showing that either of these two companies performed services for the Petitioner and invoiced the Petitioner for their services.

The Petitioner also submitted a revised organizational chart showing the Beneficiary in the position of chief executive officer of marketing and supervising a "director" and an office director. The

[3] The organizational chart also included a line showing the Beneficiary over the position of chief financial officer, a position he filled and showing that this position was over a "financial DPTO," a position filled by the individual in the "director" position. As the record does not further elaborate on the duties of any of the positions listed and there is no definitive distinction of duties between the two positions held by the Beneficiary and the two positions held by these positions will not be further discussed.

[4] The petition was filed on November 4, 2016, but the record does not include the Petitioner's fourth quarter employer's report. Thus the third quarter employer's report is the most pertinent report, of the reports provided, to this proceeding.

"director" is depicted as over four departments, two of which (accounting and sales director) are filled. On appeal, the Petitioner submits a third organizational chart which promotes [redacted], the previous "director/financial DPTO," to operations director reporting directly to the Beneficiary as chief executive officer. Mr. [redacted] new position of operations director is shown over a "director," the individual previously in the position of office director, and a customer service division. These two positions are depicted over several additional positions. The record, however, does not include sufficient evidence that the Petitioner employed any of the individuals identified on the third organizational chart when the petition was filed.[5]

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." Section 101(a)(44)(A)(iv) of the Act. The record does not include job descriptions for the positions subordinate to the Beneficiary. Thus, it is not possible to ascertain whether the duties of the subordinate positions are supervisory, managerial, or professional positions.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, or more specifically, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). Here, the Petitioner has not articulated a specific and essential function for the Beneficiary to manage. Additionally, the Petitioner has not allocated the Beneficiary's time amongst the broadly described duties he is expected to perform. Nor does the record provide evidence of who carries out the operational tasks of any specific essential function. Thus, the record does not include sufficient probative evidence to establish that the Beneficiary will manage a specific function.

Finally, if the Petitioner is claiming that the Beneficiary will perform primarily in an executive capacity, under the statute, he must have the ability to "direct the management" and "establish the goals and policies" of the organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and the beneficiary must

[5] The record on appeal includes a one-page document, dated January 11, 2017, listing 10 individuals with their hourly salary depicted, if applicable. However, this document is dated more than two months after 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).

primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The record does not include probative evidence that the Petitioner employs managers for the Beneficiary to direct.

To establish eligibility under any of these definitions, the Petitioner must demonstrate that it has sufficient staffing to relieve the Beneficiary from performing the operational, administrative, and first-line supervisory duties of the organization.[6] The Petitioner has not included probative evidence that it employed anyone to perform the functions and operations of its business when the petition was filed. The Petitioner did not detail the duties of any of the individuals employed immediately prior to filing the petition. The record does not include probative evidence that the positions of "director," office director, or sales director are professional, supervisory, or managerial positions or that they performed the operational and administrative duties necessary to operate the business. Similarly, the record does not include persuasive evidence that the Petitioner employed outside contractors to perform the design and installation services. As noted above, the record does not include evidence that the Petitioner paid for or received invoices for these services. Further, the Petitioner does not sufficiently identify these outside contractors or their role in the organization on any of the organizational charts it submitted.

The record in this matter does not present a cogent and consistent depiction of the Beneficiary's actual role in the Petitioner's business and does not include reliable information regarding its organizational structure and the number and duties of the Beneficiary's subordinate employees. The record does not contain sufficient probative evidence of the Beneficiary's claimed or proposed work in a managerial or executive capacity for the petitioning entity. The evidence of record does not establish that the Beneficiary's work will be primarily managerial or executive in nature. The Petitioner has not overcome the Director's determination on this issue.

III. EMPLOYER-EMPLOYEE RELATIONSHIP

In addition, while not addressed by the Director, two remaining issues to be examined are (1) whether the Petitioner established that the Beneficiary and the foreign entity have an employer-employee relationship and (2) whether the Petitioner would have such a relationship with the Beneficiary in the United States.

[6] A first-line supervisor is not a managerial employee, unless the subordinate employees are in professional positions. *See* section 101(a)(44)(A)(ii) of the Act. In evaluating whether a beneficiary manages professional employees, we 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"). Therefore, the focus of the review is on the level of education required by the position, not the degree held by subordinate employee.

Section 101(a)(15)(L) of the Act states that only aliens who were "employed" abroad and are coming to the United States "to continue to render services to the same employer or to an affiliate or subsidiary thereof" will merit classification as an intracompany transferee. 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, where he or she will be temporarily employed in a managerial or executive capacity. This is in contrast to provisions in the Act, such as section 101(a)(15)(E), which permits the alien to file a nonimmigrant petition on behalf of himself or herself provided that the alien meets certain other conditions regarding a treaty trader or treaty investor. The fact of ownership and control are critical in determining whether the Beneficiary had an employer-employee relationship with his employer abroad and whether he would have such a relationship with the Petitioner. *See Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440, 451 (2003) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992)).

In the matter at hand, the record indicates that the Beneficiary owns 90 percent of the foreign entity. The Petitioner's Articles of Organization identify the Beneficiary as the Petitioner's manager, and the Beneficiary's foreign employer and [redacted] as its members. The record also includes minutes of several of the Petitioner's meetings, which identify the Beneficiary and [redacted] as the members of the Petitioner's company and which states that they constitute the entire board. The record does not include an allocation of the ownership percentages of the Petitioner by the Beneficiary, [redacted] or foreign entity. However, the record indicates that the Beneficiary assumed the top-most position within the foreign entity's organization and that the same would be true of the Beneficiary's proposed position with the Petitioner. The record does not show that the Beneficiary is subject to a higher authority in either the foreign entity or the Petitioner. Thus, by virtue of owning the majority interest in both the Petitioner and the foreign entity and controlling them both, and absent other evidence relevant to an employer-employee analysis, the record does not establish that the Beneficiary had or would have the requisite employer-employee relationship with either entity. The Petitioner must address this issue in any future filings.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary will be employed in a primarily managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of H-G-A-V-S-, LLC*, ID# 490402 (AAO June 7, 2017)