U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-F-, LLC

DATE: JUNE 20, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a retailer of bamboo and hardwood flooring products, seeks to continue the Beneficiary's employment as its president and chief operating officer ("COO") 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 California Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under an extended petition.

On appeal, the Petitioner contends that the Director misconstrued the facts and misapplied the law, pointing to its trend of "positive financial growth" and asserting that the two department managers – the Beneficiary's direct reports – are professional employees.

Upon *de novo* review, we find that the Petitioner has not overcome the basis for denial. Therefore, 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 for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period November 8, 2016, until August 31, 2017. 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. MANAGERIAL OR EXECUTIVE CAPACITY IN THE UNITED STATES

The Petitioner originally claimed that the Beneficiary would be employed in an executive capacity. However, on appeal the Petitioner claims that the Beneficiary will be employed as an executive and as a function manager. We will address each claim in the discussion below.

A. Executive Capacity

First, we will address the Petitioner's original claim that the Beneficiary will be employed in an executive capacity under the extended petition.

"Executive capacity" means 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.

When examining the executive capacity of a given beneficiary, we will review 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 an executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine 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 Petitioner's business, its staffing levels, and its organizational structure.

1. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, we 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.

In the present matter, the Petitioner claimed five employees, including the Beneficiary, at the time this petition was filed. In support of the petition, the Petitioner provided an organizational chart depicting the Beneficiary as president at the top of the organization; the chart does not indicate that the Beneficiary would also assume the position of COO, as originally indicated in the petition. Rather, the chart shows that the position of COO is one of three positions that will be directly subordinate to the Beneficiary and names a different individual – [redacted] – as the COO. Therefore, the chart and the petition are at odds with one another in terms of the Beneficiary's proposed role and the role of one of his direct subordinates. The Petitioner must resolve this inconsistency 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).

The chart also shows that the Beneficiary will have two other subordinates – a bookkeeper and a vice president of sales and marketing – and indicates that the vice president of sales and marketing will oversee two inside sales employees. We note, however, that the two inside sales employees are the same employees who assume the positions of bookkeeper and COO, respectively, thereby indicating that two of the Petitioner's employees assume two different roles within the organization making them subordinate to the Beneficiary in their respective capacities as bookkeeper and COO, while being subordinate to the vice president of sales and marketing in their respective roles as inside sales employees. The chart also contains undefined numeric descriptors next to the names of the two employees that are depicted in these dual roles; both employees have the descriptor ".50 FTE" below each of their respective position titles. Lastly, the chart shows four commission-based inside sales representatives at the bottom of the hierarchy with each in-house sales employee overseeing two of the commission-based sales representatives.

Supporting evidence also included two employment agreements that were executed prior to the filing of the petition. One agreement names [redacted] as the Petitioner's prospective employee and indicates that he/she will assume the position of "Inside Sales and Financial Administration"; the other agreement names [redacted] in the position of "Inside Sales" and makes no mention of her alleged role as the Petitioner's COO. Each employment agreement lists the respective employee's job duties and indicates that both employees will receive the same monthly salary of $2000 per month. We note that neither [redacted] position title nor her list of job duties corroborates the organizational chart's depiction of her in a dual role as the Petitioner's COO and insider sales representative. This additional inconsistency regarding the role(s) of one of the Beneficiary's claimed subordinates must also be resolved through the submission of independent, objective evidence. *Id.*

In a request for evidence (RFE), the Director informed the Petitioner that the record did not adequately establish that the Beneficiary would be employed in a managerial or executive capacity and instructed the Petitioner to provide further evidence to show that the Beneficiary meets the four-prong statutory criteria of either a manager or an executive.

In response, the Petitioner provided a statement claiming that it currently employs seven people – the Beneficiary, two full-time employees, and four commission-based sales people. The Petitioner

identified [redacted] as both a COO and an inside sales consultant and provided a job duty breakdown for each position, indicating that she spends 80% of her time performing the duties of a COO and the remaining 20% performing the duties of a sales consultant. As noted earlier, the claim that [redacted] assumes a dual role within the Petitioner's organization is inconsistent with her employment agreement, which expressly states that she was hired to fill the position of "Inside Sales," which requires her to provide customer service, know the Petitioner's products, develop sales processes and procedures, create a customer database, and perform "other" unspecified duties that "may arise from time to time." Although there is some overlap between these five duties and the four duties that comprise the inside sales consultant job duty breakdown, the two lists are somewhat inconsistent in that the latest four duties do not require the sales consultant to create a customer database, as indicated in the employment agree; also, the employment agreement did not require the sales consultant to "[d]evelop brand awareness" as indicated in the latest job description. As noted earlier, the Petitioner bears the burden of resolving these incongruities through the submission of independent, objective evidence. *Id.*

As with [redacted] RFE job description, [redacted] RFE job description indicates that his/her time will also involve dual roles – the role of financial administrator, which is claimed to consume 80% of his/her time and includes five job duties,[2] and the role of an inside sales representative, which is claimed to consume the remaining 20% of his/her time and includes two duties. Despite these separate job duty breakdowns that distinguish between [redacted] two roles, the employment agreement does not make a similar distinction and lists a total of only the following five job duties: customer service, knowing the Petitioner's products, developing a system to track sales and inventory, creating monthly and quarterly financial reports, and "other" unspecified duties that "may arise from time to time."

The Petitioner also provided an updated organizational chart, which shows that the position of vice president of sales and marketing is now vacant; the chart also contains different numeric descriptors next to each of [redacted] and [redacted] position titles. The numeric descriptor [redacted] is assigned to the bookkeeper and COO position titles, respectively, while [redacted] is assigned to each of the "Inside Sales" positions.

Lastly, the Petitioner provided various payroll documents, including employee earnings records, payroll summaries, and payroll journals for time periods leading up to the filing of this petition. However, it did not provide evidence to show that it employed or retained the contracted services of anyone beyond the three full-time employees, which include the Beneficiary, [redacted] and [redacted] As such, the record does not establish that the Petitioner had five employees at the time of filing, as claimed in the petition.

In the denial decision, the Director pointed to the now vacant position of vice president of sales and marketing, noting that payroll records for the individual who occupied this position did not go

[2] Although the RFE job description lists six job duties as part of the accounting and administrative role, one of the job duties was listed twice, thereby indicating that a total of five job duties were attributed to this role.

beyond May 2017, which is two months prior to the filing of this petition. The Director also observed the dual roles that were assigned to two of the Petitioner's employees and interpreted the numeric indicators as representing percentages of time that each employee allocates to each of his/her roles. We find that there is no basis upon which to either affirm or disagree with this interpretation of the numeric indicators, as the Petitioner did not define or establish the significance of these qualifiers in any of its submissions. In any event, the Director pointed out that the Petitioner did not consistently list the same numeric indicators in its two organizational charts, noting that in the first chart each employee split time evenly between his/her respective roles, while in the second chart each employee was shown as allocating considerably more time to one role over the other so that a considerably higher portion of time was assigned to the role that corresponded to a higher level position within the organization than to each employee's sales-based position. The Director concluded that the Petitioner's organizational structure was not sufficient to support the Beneficiary in an executive position and further noted that the Beneficiary's proposed employment would not involve primarily overseeing a professional, managerial, or supervisory staff.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and they must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. 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, the evidence is not persuasive in demonstrating that the Petitioner has attained a level of organizational complexity to elevate the Beneficiary to an executive position where he would direct the management of the organization and focus on the organization's goals and policies. There is insufficient evidence to show that the Petitioner has the necessary support staff to relieve the Beneficiary from having to engage in the non-executive operational tasks of the organization. Although the Petitioner claimed five employees at Part 5, No. 14 of the petition, the record contains evidence of only three in-house employees; the only evidence that the Petitioner had five employees is a company-generated quarterly report for the 2017 second quarter. However, as this petition was filed during the third quarter of 2017, the 2017 second quarterly wage report does not pertain to the relevant time period and cannot be used to verify the Petitioner's claim. The record also shows that the Petitioner paid $185 in commission to one contracted sales representative in July 2017, when the petition was filed. Although the Petitioner's September bank statement contains copies of commission checks issued to three other commission-based sales representatives, the commissions were earned in August 2017, after the petition was filed, and amounted to only $268 per sales person; the low commission earned by the contracted sales representatives indicates that they

worked few hours and did not assume a primary role in the Petitioner's sales efforts. Rather, it appears that the Petitioner's in-house employees primarily assumed the sales role at the time of filing.

On appeal, the Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in a managerial or executive capacity. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for us 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 company that does not conduct business in a regular and continuous manner. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when discrepancies in the record are noted, as was the case in this matter. *See Systronics*, 153 F. Supp. 2d at 15.

The Petitioner also points out that it is currently only in its second year of operation and contends that the Director did not consider its early phase in its development when denying the petition. We find, however, that the Petitioner disproportionately relies on its underdeveloped organizational hierarchy without providing sufficient evidence to demonstrate that its level of organizational complexity at the time of filing was sufficient to relieve the Beneficiary from having to primarily engage in the Petitioner's operational and administrative tasks. While we agree that the Petitioner's reasonable needs are relevant to this discussion, the Petitioner was no longer a "new office" at the time this petition was filed. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). Thus, if the Petitioner cannot establish that it has the necessary staffing beyond the new office phase to sufficiently relieve the Beneficiary from performing operational and administrative tasks, it would be deemed ineligible for an extension. Moreover, the Petitioner's reasonable needs will not supersede the requirement that the Beneficiary must be "primarily" employed in an executive capacity, spending the majority of his time on executive duties. *See* sections 101(a)(44)(B) of the Act. In the present matter, the Petitioner has not established that a two-person support staff was sufficient to support the Beneficiary in an executive capacity at the time of filing.

2. Duties

In the L Classification Supplement, the Petitioner stated that the Beneficiary's proposed employment will include the following: developing the U.S. market, supervising the Petitioner's supervisors and managers, setting the company's sales and operational goals, making hiring and firing and other personnel decisions, exercising discretion over daily operations, communicating with shareholders and executives of the foreign parent entity, resolving issues regarding quality and customer relations, and providing guidance and training to all employees.

In the RFE response, the Petitioner stated that the Beneficiary will make "executive decisions" pertaining to personnel, sales, marketing, client relations, vendor selection, research and product development, and customer service. The Petitioner also provided a job duty breakdown, stating that

the Beneficiary's time would be distributed among the following duties: 30% directing and supervising supervisory personnel; 20% reviewing company performance and setting sales and operation goals; 20% developing new business and communicating with clients, retailers, and vendors; 15% developing marketing and analyzing product trends; and 15% making personnel decisions and engaging in "other supervising and directing duties."

The Petitioner also addressed the four prongs of the definition of executive capacity, stating that the Beneficiary will meet the first prong – directing the management of the organization – by personally supervising the management staff, holding meetings to discuss key issues, such as company operations, sales, marketing, customer service, and finance, and by making himself available to address management's questions and concerns. The Petitioner stated that the Beneficiary would meet the second prong – establishing its goals and policies – by reviewing the company's performance, using his experience to determine areas that need improvement, talking to clients and business partners, and soliciting recommendations from management and independent contractors on how to improve the business operation and increase sales and customer satisfaction. Next, the Petitioner addressed the third prong – exercising wide latitude in discretionary decision-making – by reiterating the Beneficiary's role as an evaluator of company performance and stating that the Beneficiary would research market trends, study customer preferences, select products, set pricing, make presentations to retails, and personnel decisions. Finally, the Petitioner stated that the Beneficiary will receive only general supervision from higher level executives, thereby satisfying the fourth prong of the definition; the Petitioner added that the Beneficiary will exercise "broad executive power," by supervising and controlling matters with regard to the company's personnel, sales and marketing, client relations, vendor selection, and product development.

In the denial decision, the Director determined that the Beneficiary would not primarily perform executive-level duties. We agree with the Director's decision and find that the Petitioner did not provide a job description that conveys detailed and realistic information about the Beneficiary's proposed job duties within the scope of the operation as it existed at the time of filing. First, the claim that the Beneficiary would allocate 30% of his time to overseeing "supervisory personnel" is unrealistic, as neither of the Beneficiary's subordinates possessed a supervisory or managerial position at the time of filing based on the job duties listed in their respective employment agreements or based on the Petitioner's staffing at the time of filing. As noted above, the record indicates that the Petitioner retained the help of commission-based sales representatives – four at most – who worked a limited schedule, as indicated by the low amount of commissions they were paid. Aside from these sales representatives, the Beneficiary's subordinates had no one else to supervise or manage and thus the Petitioner did not have a sufficient staff of "supervisory personnel" to justify allocating 30% of the Beneficiary's time to "supervising a supervisory personnel." Likewise, the Petitioner did not describe the types of "personnel decisions" or "other supervisory and directing duties" the Beneficiary would carry out within the scope of its operation. Lastly, the Petitioner did not establish that communicating with clients and vendors or developing marketing and analyzing product trends are executive-level job duties.

While the Beneficiary is not required to allocate 100% of his time to executive-level tasks, the Petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in an 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).

Here, the Petitioner broadly relied on the Beneficiary's key role in overseeing the company's business activities and making personnel and business decisions to establish that he would be employed in an executive capacity. However, the fact that the Beneficiary will manage or direct the Petitioner's organization does not necessarily establish that he would be employed in an executive capacity within the meaning of section 101(a)(44)(B) of the Act.

On appeal, the Petitioner argues that a similar job description was submitted in support of the previously filed new office petition, which was approved without the issuance of an RFE. We note, however, that the regulatory requirements that apply to a new office petition vary greatly from those that apply a new office extension petition. Most notably, when a new business is established and commences operations, the regulations recognize that a designated executive responsible for setting up operations will be engaged in a variety of activities that are not normally performed by employees at the executive level and that often the full range of executive responsibility cannot be performed. However, the regulations do not allow for an extension of this initial new office period during which it is acceptable for a beneficiary to carry out primarily non-executive tasks. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). The fact that the Petitioner offered the same job description to support a new office petition and the instant extension petition further supports our finding that the Petitioner has not adequately progressed to the next phase of its development and that the Petitioner's organizational needs cannot reasonably be met if the Beneficiary's time is devoted primarily to tasks of an executive nature.

B. Managerial Capacity

Finally, although not previously claimed, on appeal the Petitioner asserts that the Beneficiary qualifies a function manager.

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

The term "function manager" applies generally when a beneficiary will be primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

Although the Petitioner points to the Beneficiary's top-most placement within the organization and the discretionary authority he has over its personnel and business matters, these elements do not establish that the Beneficiary will assume the role of a function manager, as the Petitioner has not articulated the essential function that the Beneficiary will manage, nor has it established that the Beneficiary will manage, as opposed to perform, the underlying duties of that function. Therefore, the Petitioner has not established that the Beneficiary will be employed in a managerial capacity under an approved petition.

III. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial capacity or executive capacity under an extended petition. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.

Cite as *Matter of E-F-, LLC*, ID# 1292123 (AAO June 20, 2018)