U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-G- LLC

DATE: JUNE 23, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an international food trading company, seeks to extend the Beneficiary's temporary employment as its president under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the Vermont Service Center denied the new office extension petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in an executive capacity.

On appeal, the Petitioner submits a brief with a projected business and personnel plan, claiming that the Beneficiary will primarily perform executive job duties.

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 position involving specialized knowledge, for one continuous year within three years preceding the Beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. 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. *Id.*

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 AN EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity. The Petitioner's original supporting statement as well as its submissions in response to the Director's request for evidence (RFE) both indicate that the Beneficiary would be employed in an executive capacity.

The term "executive capacity" is defined 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)(B) of the Act. Further, 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 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).

Based on the statutory 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 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 filed the Form I-129, Petition for a Nonimmigrant Worker, claiming four employees and a gross income of $163,889. In a supporting cover letter, the Petitioner stated that the Beneficiary is its "highest-ranking executive officer" with unfettered discretionary authority over all matters concerning

the Petitioner's personnel, finances, operations, marketing, administration, and investments. The Petitioner also provided a breakdown of the Beneficiary's duties, claiming that the Beneficiary would allocate 20% of his time to making and implementing decisions concerning the company's structure, strategies, policies, and objectives, communicating with potential customers and distributors, and reviewing reports and making final decisions on contracts. The Petitioner made multiple references to the foreign entity's board of directors, claiming that the Beneficiary will "confer" with the board to review the U.S. entity's progress, discuss capital investments, ensure business development, and secure product lines. As these references were included with other job duties, the specific amount of time the Beneficiary plans to spend conferring with the foreign entity's board is unclear.

Further, we note that in light of the Beneficiary's status as the foreign entity's majority stockholder, owning 95% of its stock such that "there is no higher person within the decision-making or executive hierarchy," it does not appear that the Beneficiary would answer to a board of directors, particularly when the only named director is the Beneficiary's spouse, who owns the remaining 5% of the foreign entity's stock. As such, the claim that the Beneficiary would allocate any time at all to conferring with the foreign entity's board of directors is not supported by the record.

The Petitioner also indicated that the Beneficiary would direct and oversee the company's finances through staff and a subordinate financial manager, make discretionary decisions regarding personnel and the sale and purchase of merchandise, implement public relations actions to ensure good communication among staff and with customers, and meet with subordinate managers to review employee performances and evaluate their strengths and set goals. In addition, the Petitioner provided job descriptions for a sales manager and an operations manager, but did not employ a financial manager at the time the petition was filed. While one of the job duties of the operations manager would be to work with the Beneficiary "to organize the Company's financial information," it is unclear that this position would be responsible for the job duties of a financial manager and thus we cannot determine how the Beneficiary would direct the company's finances without a financial manager.

The Director issued an RFE advising the Petitioner that it did not provide sufficient evidence to establish that it would employ the Beneficiary in an executive capacity. The RFE acknowledged that the Petitioner submitted a job description, but noted that information provided was overly broad. Accordingly, the Petitioner was instructed to provide a list itemizing the Beneficiary's job duties and to indicate what percentage of time he would allocate to each duty.

In response, the Petitioner provided a statement listing the actions the Beneficiary took over the course of the Petitioner's first year of operation as well as a list of the executive decisions the Beneficiary expected to make as operations continue, and a new breakdown of the Beneficiary's proposed job duties. The Petitioner assigned a percentage of time to five areas of responsibility and listed four to five job duties in each category. The five categories and their time allocations are as follows: (1) supervising the management of the operation by presiding over shareholder meetings and setting and implementing policies and objectives to increase productivity – 25%; (2) appointing

and supervising company managers – 15%; (3) acting on behalf of the company by negotiating with clients and suppliers and promoting and representing the company at public engagements – 20%; (4) making decisions about the Petitioner's finances by establishing a budget and making decisions about banking and expenditures – 25%; and (5) making marketing decisions including approving marketing campaigns, implementing public relations activities, and organizing events to seek out new customers – 15%.

Again, we question the validity of claiming that the Beneficiary would allocate a significant amount of his time to shareholder meetings in light of the fact that the Beneficiary owns 95% of the company and his spouse owns the remaining 5%. It is unclear what policies the Beneficiary would implement or why he plans to allocate one fourth of his time to meeting with his spouse to make those policies. It is also unclear why the Petitioner repeated virtually the same job duty – conferring with the minority shareholder regarding company policies – when describing the Beneficiary's role in serving as the company's representative.

We further note that the Petitioner did not provide consistent information regarding the Beneficiary's involvement in managing the company's finances. Namely, while the Petitioner's initial job description indicated that the Beneficiary would allocate 15% of his time to overseeing the company's financial performance, the job description provided in the RFE response indicated that the Beneficiary would allocate 25% of his time to making decisions about financial activities. The Petitioner did not resolve the inconsistency between the two descriptions through the submission of independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Also, a number of the responsibilities listed in the RFE response were not actual daily tasks, but rather described intermittent activities that the Beneficiary would carry out on an as-needed basis. For instance, the Petitioner stated that the Beneficiary would select and hire managers and decide their pay scales, initiate and enforce policy changes within the organization, and determine when to change banking institutions. While we do not dispute that the Beneficiary's majority ownership and position as the Petitioner's highest ranking official allows him unfettered authority to make decisions regarding these business components, the Petitioner did not establish that its four-person staff at the time of filing would warrant frequent changes in staff, policy, or banking institutions such that effecting these changes would be part of the Beneficiary's daily or weekly routine.

The Petitioner also stated that the Beneficiary would "[d]eliver speeches and present information at meetings and conventions to promote the Company's business," promoting the company at "official functions" as part of his role in acting on behalf of the company, heading public relations activities, and organizing and attending events and functions to attract new customers. However, these activities are more akin to marketing tasks that are designed to promote the organization, expand its customer base, and ultimately increase sales. These operational tasks cannot be classified as executive-level job duties that are indicative of directing the management of the organization. While the Beneficiary is not required to allocate 100% of his time to executive-level tasks, the Petitioner must establish that the non-executive tasks he would perform would only be 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 a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In the present matter, the Petitioner did not comply with the RFE instructions, which asked that time constraints be allocated to individual job duties. Instead, the Petitioner assigned time constraints to five broad categories, thereby precluding us from gauging how much time the Beneficiary would allocate to executive versus non-executive functions.

In denying the petition the Director determined that the record lacks sufficient evidence to support the conclusion that the Beneficiary's proposed position would require the Beneficiary to primarily perform tasks of an executive nature.

On appeal, the Petitioner contends that the Beneficiary will oversee its growth and expansion, which will include overseeing the company's three current employees and additional employees that the Petitioner seeks to hire. The Petitioner also provided an additional job description, which overlaps somewhat, but not entirely, with the previously provided list of job duties. The Petitioner states that the Beneficiary's duties consist of general management, financial management, and sales components. In describing the Beneficiary's role with respect to the general management component, the Petitioner indicated that the Beneficiary would establish goals and policies with the aim of "[e]xpanding the product portfolio and partner network," increasing marketing channels and gaining more clients, ensuring supply of merchandise through communication with Vietnamese suppliers, and introducing new products to the U.S. market.

The Petitioner does not provide examples of the types of policies the Beneficiary would establish or disclose the Beneficiary's level involvement in ensuring that the Petitioner meets these goals. The Petitioner also claims that the Beneficiary will interview job candidates, manage employment contracts, and continuously evaluate staff performances. While the prior job descriptions focused on the Beneficiary's direct role in overseeing managerial subordinates, the new job description seemingly indicates that there is a human resources component to the Beneficiary's proposed position that applies to all staff, rather than just the company's managers. This new claim, which indicates that the Beneficiary would carry out various personnel management functions is inconsistent with the information that was previously offered and indicates yet another non-executive component to the Beneficiary's proposed position.

The Petitioner's description of the Beneficiary's role with respect to the general management component also includes a number of job duties that are too vague to provide a meaningful understanding of the actual underlying tasks. For example, the Petitioner claims that the Beneficiary will "[c]oordinat[e] with newly hired employees to implement . . . business plans"; "[a]nalyze operations to evaluate the performance of [the Petitioner] in meeting objectives"; "[e]stablish[] qualitative and quantitative goals in accordance with the Company's mission"; and "[e]valuat[e] the quality with which the Company's products are sold." While all of the mentioned duties indicate

that the Beneficiary has a high degree of discretion in how the Petitioner's products are marketed and sold to its clients, we are unable to determine, based on the limited information that the Petitioner offers, the Beneficiary's actual tasks and the nature of those tasks. The actual duties themselves 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).

The Petitioner also continues to imply that the Beneficiary answers to a higher authority from the foreign entity, claiming that the Beneficiary may be called upon to address "overseas directives." The Petitioner does not, however, provide evidence establishing who initiates those "directives," which is particularly problematic in light of the Beneficiary's status as the majority owner of the foreign entity. The record also lacks evidence to establish that the Beneficiary's claimed role with respect to the sales component would be executive in nature. While the Petitioner claims that the Beneficiary would direct, rather than perform, market analysis as well as develop and implement marketing strategies and monitor activity reports, the record lacks evidence to establish that the employees who were part of the Petitioner's organization at the time of filing were assigned the underlying marketing tasks that the Beneficiary would purportedly oversee. As such, we cannot overlook the possibility that the Beneficiary himself would be required to perform these, and possibly other, non-executive functions based on the needs of the organization and the lack of other employees to fulfill those needs.

Further, in describing the Beneficiary's role with respect to the financial management component, the Petitioner states that the Beneficiary would be charged with "[m]anaging and coordinating closely with the Company's Logistics Manager, Sales and Marketing Manager, and Office Assistant" and that he would "[f]inancially support the U.S. investors to engage in investment projects in Vietnam." However, the record does not support either of these claims. First, the Petitioner does not explain why it would be required to "[f]inancially support the U.S. investors" nor does the Petitioner clarify who the targeted U.S. investors would be or the role they would play in the Petitioner's sales-driven operation. Second, based on the evidence submitted, the Petitioner did not employ a logistics manager, a marketing manager, or an office assistant at the time the petition was filed. As such, the Petitioner cannot claim that the Beneficiary would manage or coordinate his duties with employees who were not part of the organization during the period in question. 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). While it is likely that the Petitioner now anticipates that it will eventually hire employees to fill all three positions, the only positions that were actually filled at the time of filing were those of sales manager, operations manager, and sales representative. As such, any of the Beneficiary's job duties that are dependent upon employees who were not part of the U.S. organization at the time of filing will not be considered in determining whether the Beneficiary would be employed in an executive capacity.

In sum, despite the Petitioner's submission of a position description that assigned percentages to areas of responsibility, the description contains few specific job duties and instead consists primarily of general information that includes actions the Beneficiary may carry out intermittently as the need arises

as well as job duties that are premised on his supervision of positions that were not yet filled when the petition was filed. In light of the various deficiencies and ambiguities described above, we find that the job descriptions in the record are not sufficient to establish that the Beneficiary's day-to-day job duties would be primarily executive in nature.

B. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining a beneficiary's claimed executive capacity, 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 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.*

In the present matter, the Petitioner initially provided an organizational chart depicting a four-person hierarchy with the Beneficiary at the top of the hierarchy, followed by an operations manager and a sales manager directly below the Beneficiary, and a sales representative at the bottom tier subordinate to the sales manager. Despite their respective position titles and the organizational chart's depiction of the sales manager as overseeing a sales representative, neither employee's job description is consistent with his or her managerial position title as neither was assigned managerial job duties. Merely assigning managerial position titles to the Beneficiary's subordinates is not sufficient to establish that the Petitioner has the requisite subordinate level of managerial employees that would elevate the Beneficiary's position to that of an executive. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Furthermore, a review of the 2016 fourth quarterly wage report shows that two months following the filing of the instant petition, the Petitioner experienced a reduction in its support staffing taking it from four employees in September 2016 when the petition was filed, to only two employees in November and December 2016. The Petitioner's diminished support staff in the months following

the filing of the petition leads us to conclude that the Petitioner would be unable to support the Beneficiary in an executive capacity with only one employee available to relieve the Beneficiary from having to devote his time primarily to the Petitioner's daily operational tasks. As it stands, the record at the time of filing shows that the Petitioner did not have any employees to market its products, manage its finances, oversee the logistics of shipping and receiving merchandise, or to perform administrative tasks that would eventually be assigned to an administrative assistant the Petitioner seeks to hire at a future time.

Based on the Petitioner's staffing composition at the time of filing, we find that the Petitioner lacked the staff necessary to carry out the Petitioner's daily operational tasks and therefore did not establish that the Beneficiary would be able to primarily focus on the broad goals and policies of the organization, rather than being involved in its day-to-day operations. Despite establishing that the Beneficiary has discretionary authority over the business and its staff, the record is not persuasive in establishing that the Petitioner's organization at the time of filing was sufficient to support the Beneficiary in a primarily executive position where his primary concern would be directing the management of the organization.

For the reasons discussed above, the evidence submitted does not establish that the Beneficiary would be employed in an executive capacity under the extended petition.

III. EMPLOYER-EMPLOYEE RELATIONSHIP

In addition, while not addressed in the Director's decision, we will examine the ownership schemes of the Petitioner and the Beneficiary's foreign employer to determine whether the Beneficiary has an employer-employee relationship with each entity.

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 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 factors of ownership and control are critical in determining whether the Beneficiary has an employer-employee 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)).[1]

[1] Factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include: (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) whether and, if so, to what extent the organization supervises the individual's work; (3) whether the individual

In the matter at hand, the record indicates that Beneficiary directly owns and controls Petitioner and the foreign entity as the majority shareholder owing 95% of each entity while his spouse owns the remaining 5%. The record further shows that the Beneficiary assumes the top-most position within the Petitioner's organization, and that the same was true during his employment with the foreign entity. The Petitioner also indicated that the Beneficiary was not and would not be subject to a higher authority within the company. In light of the Beneficiary's ownership and control of both the Petitioner and the foreign entity, the record does not establish that the Beneficiary has an employer-employee relationship with either entity. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in an executive capacity under the extended petition or that the Beneficiary had an employer-employee relationship with his former employer abroad and that he would have an employer-employee relationship with the U.S. entity.

ORDER: The appeal is dismissed.

Cite as *Matter of S-G- LLC*, ID# 428933 (AAO June 23, 2017)

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reports to someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses, and liabilities of the organization. *Id.* at 449-450 (citing *New Compliance Manual*).