U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF TGT-, LLC

DATE: MAR. 6, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a holding company, seeks to extend the Beneficiary's temporary employment[1] as its chief executive officer (CEO) 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 petition, concluding that the record did not establish, as claimed, that the Petitioner will employ the Beneficiary in an executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred by disregarding the staffing of a subsidiary company. The Petitioner also asserts that the new decision conflicts with the approval of the earlier petition.

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 capacity that is managerial, executive, or involves 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 or executive capacity. *Id.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf, approved for the period from December 30, 2015, until December 29, 2016. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation one year within the date of approval of the petition to support an executive or managerial position.

There are additional requirements when a petitioner seeks to extend an L-1A visa petition that involved the opening of a new office. The new petition must include evidence to show: a qualifying relationship still exists between the employers in the United States and abroad; the U.S. entity has been doing business for the previous year; and the financial status of the U.S. operation. The Petitioner must also submit statements describing the Beneficiary's past and intended future duties in the United States, and details of the staffing of the new operation. *See* 8 C.F.R. § 214.2(l)(14)(ii).

## II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that it will employ the Beneficiary in an executive capacity. Prior to the denial of the decision, the Petitioner had referred to the Beneficiary's position strictly as an executive position, and discussed his work in terms of the statutory and regulatory definition of an executive capacity. On appeal, the Petitioner contends more generically that the Beneficiary "would be performing in a managerial or executive capacity," but does not offer any details as to how the position would be managerial. Because the Petitioner has not set forth a specific claim as to how it will employ the Beneficiary in a managerial capacity, we restrict our analysis to the original assertion that the Petitioner seeks to employ the Beneficiary in an executive capacity.

An executive capacity is 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.

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 Beneficiary's claimed executive capacity of the Beneficiary, we will review the Petitioner's description of the Beneficiary's job duties. The Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The definition of executive capacity has two parts. First, the Petitioner must 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 describes itself as a holding company with two U.S. subsidiaries: a painting company franchise and a cleaning service franchise.

The Petitioner's business plan included this job description for the Beneficiary's position:

> The CEO . . . will be responsible for determining the policies and procedures on how the company and its subsidiaries will operate. He will direct the organization by setting a company budget, setting the financial goals and policies for the company, overseeing the marketing campaign, and promoting the development of the company by participating in trade shows and exhibits. The CEO will also staff the company and oversee all employees who work for the company, including its three departments. He will determine who to hire and fire, what positions will be staffed with direct employees and independent contractors as well as make salary and fringe benefits determinations, making these decisions for the holding company and its subsidiaries. He will also administer the business and is responsible for overseeing the company files, both for the holding company and its subsidiaries, preparing various financial reports, such as the budget variance report and cash flow analysis reports, which will be provided to the CEO on a monthly basis for his review. The CEO will use these reports to make decisions on when the company will expand and acquire or develop additional businesses, and whether or not the company can give bonuses, raises, and hire additional employees.

The fifth sentence in the above job description is very similar to a passage in the job description for a subordinate position: "The administrator is responsible for overseeing the company files, preparing various financial reports, such as the budget variance report and cash flow analysis reports, which will be provided to the CEO on a monthly basis for his review." The appearance of the same responsibility in two different job descriptions raises questions about their accuracy.

After the Director requested further information, the Petitioner stated:

> [The Beneficiary] determines all policies and procedures, including setting prices for the cleaning services the company provides, when to negotiate prices, how to handle client's nonpayment, as well as scheduling office meetings, setting sales goals, procedures for ordering equipment and supplies as well as policies on handling customer complaints . . . .
>
> He also determines whether to hire direct employees or seek assistance from third party contractors and service providers . . . . [The Beneficiary] makes the decisions regarding marketing initiatives such as direct mail program and the corporate comeback campaign. This requires [the Beneficiary] to set up the mailing cycle per territory, arranging production and delivery of marketing products, [and] analyzing the territory [on] a quarterly basis to optimize the direct mail program.

> . . . [The Beneficiary] determines the number of employees the companies need, [and] the minimum requirements for those positions . . . . [The Beneficiary] also determines the employee's salaries as well as whether bonuses will be rewarded. He prepares a forward-thinking budget . . . .

Some of the tasks described are not those of an executive. Some, such as hiring decisions and setting prices, may be compatible with a managerial capacity; however, a petitioner claiming that a beneficiary will perform as a "hybrid" manager/executive will not meet its burden of proof unless it has demonstrated that the beneficiary will primarily engage in either managerial or executive capacity duties. *See* section 101(a)(44)(A)-(B) of the Act. While in some instances there may be duties that could qualify as both managerial and executive in nature, it is the Petitioner's burden to establish that the Beneficiary's duties meet each criteria set forth in the statutory definition for either managerial or executive capacity. A petition may not be approved if the evidence of record does not establish that the beneficiary will be primarily employed in either a managerial or executive capacity.

Other duties such as scheduling meetings and preparing marketing plans, are supposed to be delegated to lower-level workers whom the Petitioner has not yet hired. The duties describe a level of day-to-day involvement with routine business activities that is not consistent with an executive capacity.

In a separate statement, the Petitioner stated that the Beneficiary "will determine when to hire a market research analyst" who "will be responsible for measuring the success of the marketing plan." This implies that the marketing plan will precede the hiring of the analyst. The Petitioner did not explain who, if not the Beneficiary himself, prepared the marketing plan.

The Director denied the petition, acknowledging the Beneficiary's discretionary authority over the company but finding that it cannot suffice simply to describe his "duties in terms such as 'establishing goals and policies,' which simply paraphrase statute." The Director also found that the petitioning entity lacks support staff to relieve the Beneficiary from performing non-qualifying activities. (We will discuss staffing in more detail below.)

In the appellate brief, the Petitioner asserts that it has provided a sufficiently detailed description of the Beneficiary's intended duties, but does not elaborate on the point. Instead, the Petitioner refers back to prior statements and asserts that the necessary information is there.

Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the

beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Id.*

The provided job descriptions presume the existence of subordinate employees who would, for instance, prepare reports for the Beneficiary to review. As we shall discuss below, the Petitioner has not hired these subordinates. We have already shown that the Beneficiary's job description includes a number of non-qualifying elements. The Petitioner correctly notes that the Beneficiary's duties need not be *entirely* those of a manager or executive, but only *primarily* so. But the Petitioner has not established that the qualifying elements of the Beneficiary's position outweigh the non-qualifying parts. Once again, in this extension petition, we must consider the position as of the time of filing the petition, rather than at some future point of time.

The Petitioner has not established that it was able to support a primarily executive position for the Beneficiary a year after the approval of the earlier new office petition.

B. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the 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 a beneficiary 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 an 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.*

An organizational chart in the Petitioner's business plan showed an "initial personnel structure" that included the following titles:

- Operations Manager
- Administrative and Finance Manager (also called Administrator)
- Market Resource Analyst
- Marketing Team

- Human Resources
- Accountant
- Administrative Assistant

The Petitioner also listed the following titles for each of its two subsidiaries:

- General Manager
- Quality Inspector
- Team Leader
- House Cleaners (for the cleaning service)
- Paint Technicians (for the painting company)

The record, however, does not show that all the listed positions were filled at the time of filing in December 2016. Payroll records show that the cleaning service had several employees in the months prior to the filing date, but the Petitioner has acknowledged that the painting company "is not yet operational."

The petitioning entity itself had only two employees at the time of filing—the Beneficiary himself and the operations manager, who had the following job description:

> The . . . operations manager will oversee all of [the Petitioner's] subsidiaries. The operations manager will be responsible for ensuring that all employees[] follow the policies and procedures created by and from time to time amended by the CEO. He also oversees the day-to-day operations of the company's subsidiaries from reports from each subsidiary's general manager, ensuring that all customers are happy, and resolving all customer complaints based on the recommendations and procedures developed by the CEO. He will also assist the CEO by preparing reports on how the employees are performing, discussing any bottlenecks that the company is experiencing, and other matters that need the CEO's attention. In addition to these tasks, the operations manager will also research [the Petitioner's] competitors and prepare reports for the CEO's review that detail their prices and services . . . .

The Petitioner stated that the accountant and front-line marketing positions (but not the market resource analyst) "will be initially outsourced." The record identifies accounting and payroll services the Petitioner has used, and the Petitioner submitted samples of promotional materials for the cleaning service. The Petitioner did not say who prepared these materials, or whether they derived from template materials provided by the cleaning service franchisor. If the franchisor provided marketing materials, then it is not evident that the Beneficiary had executive authority over their preparation.

We will not discuss the other subordinate job descriptions in detail, because those positions were not filled at the time of filing, but those job descriptions included several non-qualifying duties. The administrative assistant would be in charge of maintaining files, answering telephones, scheduling

appointments, and drafting invoices and contracts. The market research analyst would conduct market research and design and implement marketing strategy. The Petitioner did not explain who performed these functions while the positions remained vacant.

Five months after the filing date, the Petitioner indicated that the operations manager had left the company and had not yet been replaced. Therefore, it appears that the Beneficiary had to assume the operations manager's duties, as he was evidently the only remaining employee.

After the Director requested further information, the Petitioner stated that the company's "rapid growth has led to an increase in staffing," and that the Beneficiary "is relieved of all non-qualifying duties by both full-time direct employees and independent contractors within the company." All the documented staffing was at the cleaning service. With respect to the Petitioner's own headquarters, the Petitioner stated the Beneficiary "will determine when to hire a market research analyst," and "will create the job descriptions for all upper management positions, positions that he will hire within the next year."

The Director denied the petition, stating that "the record . . . does not show who handles the day-to-day activities of the petitioning entity," because all of the subordinate positions there are vacant. The Director noted the Petitioner's use of contractors, but found that they handled only a limited range of financial and human resources functions. The Director also acknowledged that the cleaning service is staffed and operational, but found that the Petitioner itself lacks sufficient staffing for its own operations (as distinct from those of the cleaning service).

On appeal, the Petitioner states that its prior petition was approved, based on the same organizational structure shown in the present petition. The Petitioner states: "Failure to discuss why this structure worked in the previous petition and did not apply in this case was clear error."[2] We need not speculate as to whether the earlier petition was approved in error, because there is a critical distinction between this petition and the last one. The Petitioner filed its first petition as a "new office" which had been doing business for less than one year. There are specific regulations for such cases, which take into consideration a given petitioner's early stages of development. *See* 8 C.F.R. § 214.2(l)(3)(v). Such a petitioner need not show that the new office already has a managerial or executive position, only that it will support such a position *within one year* after approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

To extend the status of a beneficiary of a new office petition, there are different regulations at 8 C.F.R. § 214.2(l)(14)(ii). While a new office petition can rely on future projections, after a year that petitioner is no longer a new office and must meet all eligibility requirements at the time of filing, and at all times throughout adjudication. *See* 8 C.F.R. § 103.2(b)(1). In a new office petition, the vacancy of key positions at the time of filing is not a disqualifying factor, because the regulations

[2] We note that the Director did not fault the claimed organizational structure. Rather, the Director found that the positions described in that structure are unfilled, and therefore no subordinates relieve the Beneficiary from having to perform non-qualifying tasks.

permit up to one year to fill them. To extend status past that point, however, we must consider the company's *existing* structure rather than its *planned* structure. The Petitioner's *intention* to fill the vacant positions at an unspecified later time cannot establish eligibility *at the time of filing* and continuing forward.

Because the Director decided the two petitions under different circumstances and different regulations, there is no conflict between the two outcomes that we must resolve. The Director approved the Petitioner's first (new office) petition based on expectations of what would occur during the following year, and denied the second petition because the Petitioner had not met those expectations.

The Petitioner contends that the Director denied the petition "solely because of the number of employees in the holding company." This is not an accurate characterization of the Director's decision, as we have shown in this discussion. We note that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa petition for classification as a multinational manager or executive. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-executive operations of the company. *See, e.g., Family Inc.*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner asserts that, by concentrating on the holding company alone, the Director "did not consider the entire organization." The Petitioner correctly asserts that we must take the cleaning service into consideration, because it is part of the petitioning organization under the Beneficiary's authority. The record shows that the cleaning service was operational at the time of filing and has continued to grow. The Petitioner, however, had not claimed that the Beneficiary would be a manager or executive of the cleaning service. Rather, he was to be the CEO of a larger enterprise with self-contained subsidiaries, including the cleaning service. The holding company itself was to employ an operations manager, an administrator, a market resource analyst, and an administrative assistant, all above and apart from the cleaning service. Instead, all of these positions are vacant, and the company employs no one but the Beneficiary to perform the various non-qualifying functions of those positions. The status of the cleaning service does not resolve this issue.

We disagree with the Petitioner that the Beneficiary's authority over the cleaning service is, by itself, sufficient to establish the executive nature of his position. The Beneficiary can only direct the management of the cleaning service if there is a management for him to direct. The cleaning service has an employee with the title "general manager," but the Petitioner has not established that this employee, who performs functions such as scheduling and data entry, is truly a manager rather than a dispatcher or supervisor.

The approval of the Petitioner's new office position was contingent on the premise that, within a year, the company would have its own internal management structure while also operating two fully

staffed and functional subsidiaries. This has not happened, and the Petitioner has not established that, when it filed its second petition, it could support an executive position.

## III. CONCLUSION

The Petitioner did not establish that it will employ the Beneficiary in an executive capacity.

**ORDER:** The appeal is dismissed.

Cite as *Matter of TGT-, LLC*, ID# 1037816 (AAO Mar. 6, 2018)