U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-S- LLC

DATE: MAR. 6, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which intends to operate a software development and IT consulting business, seeks to temporarily employ the Beneficiary as president of its new office[1] 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 California Service Center denied the petition, concluding that the Petitioner did not establish, as required, that it would be able to support a managerial or executive position within one year of approval of the petition, and that it had secured sufficient physical premises to house the new office.

On appeal, the Petitioner submits additional evidence in support of its assertions that its leased office will accommodate the four employees it intends to hire during its first year of operations. The Petitioner further contends that the totality of the evidence already submitted was sufficient to establish that the Beneficiary would perform primarily executive duties within one year.

Upon *de novo* review, we will withdraw the Director's determination that the Petitioner did not meet the physical premises requirement applicable to new offices.[2] However, as the Petitioner has not overcome the remaining ground for denial, we will dismiss the appeal.

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[1] The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

[2] *See* 8 C.F.R. 214.2(l)(3)(v)(A). The Director determined that the Petitioner's 250 square foot office would not accommodate the company's proposed four-person staff. However, the Petitioner provided a detailed floor plan and color photographs which show that the office has been set up to provide desks and computer workstations for four employees. As the Petitioner has no documented need for additional space, such as a warehouse or storefront, we find that it met its burden of proof.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification for a new office, 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. Section 101(a)(15)(L) of the Act. The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

The petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

The statute defines "managerial capacity" as 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 "executive capacity" is defined as 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.

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

The Director determined that the Petitioner did not establish that its new office would be able to support a managerial or executive position within one year of approval of the petition.

In the denial decision, the Director acknowledged the Petitioner's intent to hire three employees, but found that the Petitioner did not establish that the Beneficiary would have subordinate managers or sufficient staff to carry out the daily and routine operations of the business. The Director concluded that the record did not demonstrate that the Beneficiary would be performing primarily managerial or executive duties within one year.

On appeal, the Petitioner asserts it provided a sufficiently detailed description of the Beneficiary's duties to establish that they would be primarily executive in nature. Further, the Petitioner states that the Director overlooked detailed information regarding the company's projected staff, which was included in its response to the Director's request for evidence (RFE).

In the case of a new office petition, beyond the description of a beneficiary's proposed job duties, we review the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial or executive capacity. A petitioner has the burden to establish that it would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the evidence must be considered in analyzing whether the proposed managerial or executive position is plausible considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

A. Duties

Based on the definitions of managerial and executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

In its supporting letter, the Petitioner provided the following description of the Beneficiary's proposed duties as president:

> Strategic Development (60% time spent)
> - Oversee the strategic direction of the company, using industry expertise to react to changing trends in the software industry;
> - Determine the direction for new markets, including growth strategy and investment decisions;
> - Direct budgetary expectations and expenditures of specific software application projects and direct subordinates to report on progress of same;
> - Make decisions related to capital allocations, including those related to operations management and impact of financial performance;
> - Represent the company in official capacity at promotional events and/or municipal or state development forums surrounding the software industry in Northern California, including [redacted] and surrounding areas;
> - Oversee the development and content of [the Petitioner's] website and monitor the company's presence in both the internet and social media outlets, and,
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> Personnel Management (40% of time spent)
> - Oversee all employees of the organization, including three (3) within the first year of operations;

- Direct all personnel recruitment policies including the hiring and firing of all personnel and determine all promotional and/or raise considerations; and,
- Effectively manages the human resources of the organization according to authorized personnel policies and procedures that fully conform to current laws and regulations.

The Petitioner provided a broad overview of the Beneficiary's duties that provides little insight into what he would be doing on a day-to-day basis as part of his daily routine by the end of first year of operations. The Petitioner did not identify the specific tasks he would perform to oversee the company's "strategic direction," or what types of investment and growth strategies he would implement. 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).

We acknowledge that the Beneficiary, as the Petitioner's senior employee, would have authority to establish strategies and objectives for the petitioning company and make major decisions regarding its finances, personnel, and overall direction. However, the Petitioner has not established how the company would grow to the point where these types of responsibilities would primarily occupy the Beneficiary's time within one year. Further, the Petitioner did not indicate who would relieve the Beneficiary from the day-to-day tasks associated with the company's web and social media presence, or assist him with preparation for industry events, duties that are not managerial or executive in nature. As discussed further below, the Petitioner intends to hire only three personnel other than the Beneficiary and there are many activities required for the company's operation which have not been assigned to the subordinate staff.

The fact that the Beneficiary will 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. Therefore, even though 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, a broad overview of his responsibilities is insufficient to establish that his actual duties would be primarily managerial or executive in nature.

B. Projected Staffing and Business Plan

In its letter in support of the petition, the Petitioner indicated that it "will provide consulting and IT services, with a specific focus on the design, development and implementation of database systems, client-server software applications, management information systems, e-Commerce, m-Commerce systems, corporate intranets and internet portals and websites."

The Petitioner submitted an organizational chart depicting its projected staffing levels for its first five years of operations. The Petitioner indicates that during the first year, it will employ the

Beneficiary, an administrative assistant and two software developers. At the end of five years, the Petitioner intends to employ a general manager directly subordinate to the Beneficiary. The general manager would supervise a project manager, administrative assistant, and marketing specialist, and the project manager would supervise a four-person team including a senior software developer and three software developers.

The Petitioner indicated that the part-time administrative assistant, will require "high school/college," will be paid $24,000 per year, and will perform the following duties:

> Provide marketing and administrative support to the President, Business Development Manager, and the Sales and Marketing team on a wide variety of initiatives. Gather information and manage data on repositioning, pricing, sales prices, domestic and international transportation lanes. Utilize internal and external information technology sources including industry databases and Internet research. Provide data analysis . . . . Provide optimal customer service to customers and vendors. Provide weekly market updates to the marketing and sales team on their leads and the logistics activity that has been booked. Understand the operations procedures associated with intermodal logistics. Work as part of a team to liaise effectively between departments, customers and vendors to advance the corporate strategy. Assist in the organization of events, travel booking, meetings, marketing collateral, expense report processing, ordering supplies and special projects as assigned.

The duties attributed to this position are inconsistent with the Petitioner's projected organizational structure and the stated nature of its intended business. First, the Petitioner does not indicate that it intends to hire a business development manager, nor does it project the staffing of a "sales and marketing team" during its first five years of operation. Further, the description appears to describe a position within a transportation and logistics company, rather than a software and IT consulting company. Therefore, the Petitioner has not provided a credible description of the actual duties to be performed by its proposed administrative assistant.

The Petitioner indicated that the software developers will be full-time employees whose qualifications will include "college."[3] They would be paid $30,000 annually to lead development of original software, direct software programming, develop documentation, coordinate software installation, modify and upgrade existing software, consult with engineering staff, consult with clients and other departments on project status and proposals, and prepare reports and correspondence concerning project specifications, activities, and status.

Based on this projected staffing, the Petitioner has not established how it would develop to the point where it could support the Beneficiary in a position that is primarily managerial or executive in nature within the first year.

[3] The Petitioner indicated that other employees to be hired in the future, including the senior software developer, marketing specialist, project manager, and general manager, will require a bachelor of science, as opposed to "college."

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. Here, the Petitioner does not claim that the Beneficiary will act as a function manager, but does claim that the Beneficiary will allocate much of his time to personnel management.

The Petitioner does not indicate that any of the employees to be hired during the first year will perform managerial or supervisory functions. Although the Petitioner indicated that the software developers will "lead" and "direct" certain activities, they are at the bottom tier of the company's organizational chart with no projected subordinate staff.

In evaluating whether a beneficiary manages professional employees, we must 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"). Section 101(a)(32) of the Act, states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee.

The Petitioner indicates that its software developers qualifications will include "college" while other employees to be hired in the future will specifically require a bachelor of science. Further, the Petitioner indicates that it intends to pay its full-time software developers only $30,000 annually, or $14.42 per hour. In addition, the Petitioner provided a generic description of their duties that included a reference to "engineering" staff that the company does not intend to employ. The information provided is insufficient to establish that the software developer positions are professional positions requiring the completion of at least a bachelor's degree in a specific related field. The record does not establish that the Beneficiary will supervise professionals, supervisors, or managers within one year in order to qualify as a personnel manager.

The Petitioner also claims that the Beneficiary will be employed in an executive capacity. 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, even though the Beneficiary holds the senior position within the company, and the Petitioner indicates that he will primarily focus on the company's strategic direction, the Petitioner has not shown that it will have a level of managerial employees who would perform the day-to-day oversight of the business within one year, or that it will employ sufficient staff to relieve the Beneficiary from focusing much of his time on the day-to-day operations of the enterprise.

Section 101(a)(44)(C) of the Act requires that 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 if staffing levels are used as a factor in determining whether an individual will be acting in a managerial or executive capacity. However, it is appropriate for USCIS to consider the proposed 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. *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 Petitioner intends to employ a president, a part-time administrative assistant whose job description is not credible, and two software developers by the end of the first year of operations. The Petitioner has not indicated who will be responsible for marketing and selling the company's IT consulting services or software products and development services, developing and delivering project proposals to clients, or handling routine matters associated with the company's day-to-day finances. In light of these deficiencies, the Petitioner has not shown how the anticipated staff would relieve the Beneficiary from significant involvement in the company's non-managerial and non-executive functions of the new office and it appears that all sales and business development functions would be left to him if the company is going to achieve its projected $320,000 in sales during its initial year.

The Petitioner has consistently stated that the Beneficiary will occupy the senior position in the new office, but has not submitted a job description or supporting evidence sufficient to demonstrate that he would primarily engage in managerial or executive duties, or that the new office would support a managerial or executive position, after the initial year of operations.

III. CONCLUSION

The Petitioner did not establish that its new office would be able to support a managerial or executive position within one year of approval of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of L-S- LLC*, ID# 990181 (AAO Mar. 6, 2018)