U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-USA INC.

DATE: MAR. 27, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a four-employee investment management and advisory firm, seeks to continue the Beneficiary's temporary employment as its president and chief executive officer (CEO) 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 record did not establish, as required, that the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that it has met its burden of proof, and that the Director erred by arbitrarily finding otherwise.

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 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, approved for the period July 5, 2016 until June 14, 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. DEFINITIONS

"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.

"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.

III. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner initially stated that it seeks to employ the Beneficiary in an executive capacity. On appeal, the Petitioner asserts that the Beneficiary "can easily be deemed an executive if not at the very least a manager." We find the Petitioner has not met its burden of proof for either type of capacity.

When examining the managerial or executive capacity of a given beneficiary, we will look 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). Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) examines 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.

Based on the statutory 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 1533.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Duties

The Petitioner provided the following description of the Beneficiary's responsibilities, with the approximate time devoted to each (note: inconsistencies in grammar and capitalization have not been corrected):

1. Establish development strategies for the company including presiding over and leading the decision-making process for the company in conjunction with the Chairwoman of the Board as it relates to important strategic, tactical and staffing moves. (35%)
    a. Monitor industry trends, researches state and local markets, establishes and adjusts objectives and strategies of the company according to the results of this research;
    b. Develops annual and semi-annual work plans to achieve said objectives and to implement said strategies;
    c. Establishes company personnel policies and other internal policies and procedures; and
    d. Ensure that the company operations are in compliance with both federal and state laws and regulations wherever the company conducts business.
2. Directs and Oversees Implementation of Company Strategies and Work Plans (25%)
    a. Direct and oversee the implementation of company strategies and work plans, and ensure revenues are on track to meet or exceed company expectations; organize regular employee meetings, explaining company policies and tactics at such meetings and gathering employee feedback;
    b. Direct, manage and coordinate the daily work activities of department leaders and work teams, including giving advice related to market and strategy developments, property management, maintenance, safety, etc.;
    c. Keep the Chairwoman apprised of the operational status and work progress of the company and sit in on special board meetings where needed; and
    d. Regular and consistent review and appraisal of overall performance, management effectiveness and financial health of the company.

3. Recruit, Hire, Train and Lead Senior Executive and Management Team to Ensure Effectiveness of Overall Operations of the Company (25%)
    a. Responsible for the hiring and staffing of key management personnel, which include other C Level Executives, Department Managers and other mid-level cadres; and
    b. Reviews, trains and evaluates performance of key management personnel including promotion, disciplinary actions, including termination of necessary dependent on the performance of the staff[.]
4. Public Relations (15%)
    a. Define the company culture, develop plans and oversee implementation of plans to promote the company culture;
    b. Define the company brand, set brand development strategies and supervise the implementation of brand development strategies;
    c. Oversee, direct and manage the relationship building with outside vendors, press and advertising agencies; and
    d. Oversee and direct the company's public relations activities.

In addition to the above list, the Petitioner listed several pages of additional items under the headings "Corporate Strategy and Planning," "Organizational Management," "Financial Management," "Human Resources Management," "Marketing and Public Relations," and "Community and Public Relationships."

The record does not establish the extent to which the Beneficiary was able to perform the described functions at the time of filing. As we will discuss in more detail further below, as recently as six weeks before the filing date the Petitioner apparently had no business income.

The Director denied the petition, stating that the Petitioner had not provided enough information to show that the Beneficiary's day-to-day activities are primarily those of a manager or executive.

On appeal, the Petitioner asserts that it "provided a lengthy description of the beneficiary's duties" and "detailed information on its future corporate strategy and planning, showing that it would be able to support and sustain the President and Chief Executive position." The Petitioner also asserts that there is no "evidence in the record that contradicts the petitioner's statements." The Petitioner asserts that the Beneficiary "can easily be deemed an executive if not at the very least a manager."

The Petitioner asserts that its claims have not been contradicted; however, we find that they are also unsubstantiated to a significant extent. The Petitioner asserted that the Beneficiary would devote 15% of his time to public relations, with the company marketing its services through a website and "news, television and internet media." The record does not establish that the Petitioner has established any such media or online presence. Also, the record does not show that the Petitioner has hired, or plans to hire, any dedicated marketing staff. Promotional activities undertaken by the Beneficiary himself would not constitute managerial or executive duties.

Also, the Petitioner claimed that the Beneficiary would spend a substantial amount of time establishing and implementing strategies, but the record does not provide much evidence about what those strategies are, beyond the basic purpose of the corporation (encouraging Chinese investment in U.S. real estate).

The Petitioner contended that the Beneficiary would "ensure revenues are on track to meet or exceed company expectations," but the record does not show that the Beneficiary has done so. The company's expectations, as expressed in its business plan, projected first-year revenues of $1 million. But the Petitioner has not documented any revenue, or revenue-generating business activity that would require or justify primarily managerial or executive oversight.

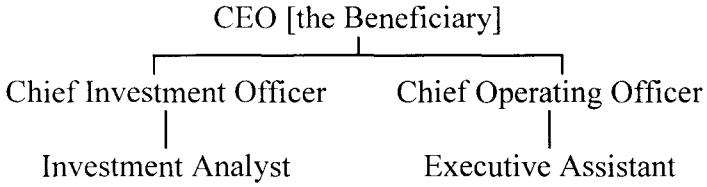
The Petitioner has not shown that the duties of the Beneficiary's position were primarily managerial or executive as of the time of filing.

B. Staffing

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

The Petitioner's business plan anticipated 12 employees in the first year, including an operations vice president, a financial manager, and an administrative manager, but the record does not show that the Petitioner had filled those positions at the time of filing. On the petition form, the Petitioner specified that it only had four employees in the United States.

The Petitioner initially stated that the Beneficiary "oversees and directs the activities of the following C Level Executives as well as the subordinate employees hired at [the petitioning company]." The Petitioner then named four employees, thereby indicating that they were the "C Level Executives." The Petitioner's organizational chart, however, identified only those four employees, with no "subordinate employees" below them:



Payroll records from the month of filing (June 2017) confirm that the Petitioner had no other employees at that time.

The Beneficiary's multi-page initial job description indicated that he "[w]orked diligently with our investment, legal and admin teams in developing the company's budget." The Petitioner did not

specify which of the above four employees constituted the "investment, legal and admin teams," or identify any others who were on those teams. Likewise, the reference to "key management personnel, which include other C Level Executives, Department Managers and other mid-level cadres" implies a larger staff than what the Petitioner has documented.

The Petitioner's 2017-2018 business plan included job descriptions for the four subordinates:

> Chief Investment Officer
> Salary: $4,000 monthly
> . . . [T]he Chief Investment Officer . . . oversees the company's investment portfolios and reports to the Chief Executive Officer . . . on a regular basis. The main responsibilities include managing and monitoring investment activities, managing pensions, working with external analysts and maintaining good investor relations. [He] also develops short-term and long-term investment policies.
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> Chief Operating Officer
> Salary: $5,000 monthly
> [The] Chief Operating Officer . . . oversees the company's ongoing operations and procedures. [He] is the second-in-command and responsible for the efficiency of business. The main responsibilities include regular reporting to the Chief Executive Officer (CEO); designing and implementing business strategies, plans, and procedures; evaluating performance by analyzing and interpreting data and metrics; and participating in expansion activities (investments, acquisitions, corporate alliances etc.)
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> Investment Analyst
> Salary: $3,300 monthly
> . . . [T]he Investment Analyst . . . works directly with [the] Chief Investment Officer . . . to select specific investments in real estate and other investment opportunities. In this role, [he] evaluates both individual investment transactions and broader market opportunities. He reports to [the Chief Investment Officer] on a weekly basis. He also participates in the due diligence and monitoring of the external investment firms through which [the Petitioner's] strategies are generally implemented, and conduct research on various companies, properties, and industries within both developed and emerging markets.
>
> Executive Assistant
> Salary: $3,000 monthly
> . . . [T]he Executive Assistant . . . performs administrative duties for our executive management team and reports daily to [the Chief Operating Officer]. Her responsibilities include screening calls; receiving and replying emails; managing calendars; making travel and meeting arrangements; and preparing reports and financial data.

A quarterly work summary described some responsibilities of the two higher-ranking subordinates:

> [T]he Chief Investment Officer [is] responsible for Chinese branch office in the United States on product investment risk analysis and investment market analysis management. Responsible for [the petitioning] company's product design, market management, portfolio analysis and management. Also, responsible for the management and supervision of project risk management investment and management of assets.
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> The Chief Investment Officer . . . is responsible for the analysis of the project location background, [redacted] Office market, the credit rating of the tenants, value projected, rent roll, project debt and financing, sales comps condo comps, and sales comps lease comps. Working with external analysts and maintaining good investor relations and other professional teams, and also assisting [the Beneficiary in] formulating [the Petitioner's] short-term and long-term investment policies.
>
> . . . [T]he Chief Operating Officer . . . is responsible for the day-to-day operation of [the petitioning company] and regularly reports to [the] CEO . . . . Developing financial budgets, controlling operating costs, accounting for the investment return of [redacted], analyzing profit summary, cost summary, profit distribution, and hold profit analysis. Reporting the company's total operating data, budget, and summary weekly to [the] CEO . . . . Assigned . . . to meet with loan company, and discuss loan related details.

The Petitioner's business plan indicated that the company "is primarily targeting at providing consultation service to Chinese investors." The Petitioner did not explain which of its employees would deal with these customers, and the record does not show that the company had any such customers at the time of filing.

The organizational chart identified five contractors who, by definition, are not "subordinate employees." The Petitioner did not fully explain the roles these contractors play for the petitioning company, or, in some cases, document the extent of their involvement with the company. The contractors' activity documented in the record largely pertains to helping the Petitioner purchase investment properties.

In the denial notice, the Director noted that the Petitioner's staff is considerably smaller than what the business plan projected. The Director also found that the Petitioner had not established that the Beneficiary's immediate subordinates are primarily managers or executives, but instead appear to perform "necessary tasks to provide a service." The Director concluded that the Beneficiary is neither a personnel manager nor a function manager.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 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. 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) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*4*). If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*2*)-(*3*).

The Petitioner has not specified whether the Beneficiary would be a personnel manager or a function manager. As noted above, the Petitioner made no claim of managerial capacity until the appeal, at which time the Petitioner asserted, without elaboration, that the Beneficiary qualifies as "at the very least a manager."

To determine whether the 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 United States 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."

In this instance, the Petitioner has asserted that all of the Beneficiary's subordinates hold bachelor's or master's degrees, but the Petitioner has not established that the positions *require* at least a bachelor's degree.

The Petitioner also has not articulated a specific function that the Beneficiary will manage. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. 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). In this matter, the Petitioner has not described or provided evidence that the Beneficiary manages an essential function.

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 generally have a subordinate level of managerial employees for a beneficiary to direct, unless the petitioner can demonstrate that beneficiary "directs the management" in some other way. A beneficiary must also 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.*

The Petitioner asserts that it "provided an organizational chart for the U.S. company, illustrating that [the Beneficiary] oversees and directs the activities of four C Level Executives." We acknowledge the Petitioner's claim that all four of the Beneficiary's subordinates are executives, but the organizational chart is not, on its own, evidence of their executive capacity. The Petitioner has not explained how an executive assistant who answers the telephone and schedules meetings is an executive; there is no indication that her position meets that standard. Likewise, the investment analyst appears to have significant operational-level duties relating to market research and transactions.

The remaining two employees, the chief investment officer and chief operating officer, perform higher-level functions, but those functions are vaguely defined. Examples include "managing and monitoring investment activities" and "implementing business strategies." Also, most of the subordinate positions listed in the business plan remain unfilled, which raises the question of who performs the non-executive, non-managerial functions of those lower-level positions.

On appeal, the Petitioner asserts that it has proven that "the four subordinate employees are on the payroll of the Company," and provided "job descriptions of each subordinate employee." The Petitioner, however, does not address the key finding that, given the company's minimal staffing, "[i]t appears that the Chief Investment Officer and the Chief Operating Officer would have to assist their subordinate employees in daily servicing customers and renters of the business."

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-managerial or 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).

In this case, the issue is not the company's size by itself, but the significant discrepancy between the company's *projected* staffing and what actually existed at the time of filing. The Petitioner has not

explained who performs the functions of the unfilled positions. If the highest officials perform those functions, then they are not primarily managers, executives, or supervisors. If no one performs them, then the business is not fully functioning. Either circumstance is disqualifying.

The Petitioner has not established that it will employ the Beneficiary in a managerial or executive capacity.

IV. DOING BUSINESS

Beyond the Director's decision, the record reveals another ground for denial of the petition. It concerns the question of whether the Petitioner was doing business at the time of filing. "Doing business" means the regular, systematic, and continuous provision of goods, services, or both, and does not include the mere presence of an agent or office. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H).

The record does not show that the Petitioner was actively doing business when it filed this petition in June 2017. This is a disqualifying circumstance. The Petitioner initially filed and was approved for a "new office" petition in May 2016. The Petitioner cannot repeatedly categorize the same office as a "new office," and it already filed a "new office" petition for this office. A petition to extend the validity of a new office petition must include evidence that the United States entity has been doing business for the previous year. *See* 8 C.F.R. § 214.2(l)(14)(ii)(B). Although this petition does not seek an extension as such, the Beneficiary's absence from the United States at the time of filing does not relieve the Petitioner from having to show that its new office has begun doing business during the year covered by the last petition.

A petitioner must establish eligibility at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). Plans for future business activity are important to the petition, but future plans by themselves cannot warrant approval of a new office extension petition; there must also be ongoing business activity, beyond the preliminary or start-up stage, at the time of filing.

In this instance, the Petitioner forecasted $1 million in revenue during its first year of operations, but it did not report any income on its 2016 tax return or on a balance sheet prepared on April 30, 2017, six weeks before filing the petition on June 14 of that year. The balance sheet also listed over $4 million in assets, but holding assets does not, by itself, constitute doing business, because ownership of assets does not amount to provision of goods or services. Likewise, the purchase of commercial real estate for future business use is not, by itself, doing business, because that purchase provides no goods or services. It is not an income-generating activity, but rather a preparatory step toward future activity in that vein.

The lack of sufficient evidence to show that the Petitioner has begun doing business is an additional ground for denial of the petition.

V. CONCLUSION

The Petitioner did not establish that it will employ the Beneficiary in an executive or managerial capacity, or that it was doing business at the time it filed the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of F-USA Inc.*, ID# 1129010 (AAO Mar. 27, 2018)