U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A- LLC

DATE: MAY 25, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a real estate development and construction project management services business, seeks to extend the Beneficiary's temporary employment as its manager 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 record did not establish, as required, that the Beneficiary will be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner submits additional evidence and asserts that the Director mischaracterized the nature of the Beneficiary's job duties and placed undue emphasis on the size of the petitioning company.

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

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 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 under the extended petition. Specifically, the Director found that the Petitioner did not meet its burden to provide a detailed description of the Beneficiary's proposed duties and to establish that someone other than the Beneficiary would perform the day-to-day operational duties inherent to the business.

On appeal, the Petitioner asserts that its descriptions of the Beneficiary's duties were sufficiently detailed, that the Director incorrectly assumed that the Beneficiary would perform non-qualifying tasks, and that the Director overemphasized the Petitioner's staffing levels without considering the overall growth of the business or its use of contractors who perform operational duties.

The term "managerial capacity" is defined as "an assignment within an organization in which the employee primarily":

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) 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;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) 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. Further, "[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." *Id.*

The term "executive capacity" refers to an assignment 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, we 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 managerial or 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).

The Petitioner must first show that the Beneficiary will perform certain high-level responsibilities outlined in the statutory definitions of managerial or executive capacity. *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.

The Petitioner identified the Beneficiary's job title as "manager" on the Form I-129, Petition for a Nonimmigrant Worker, but did not state the nature of the business, its current number of employees, or its gross and net annual income. In a statement in support of the petition, the Petitioner described the Beneficiary's role as follows:

> As Manager of [the Petitioner], he will perform the same duties as he has been both for the Peruvian company and the U.S. company, which will continue to operate under his full direction until his return prior to the expiration of his renewed L-1A visa. He will exercise complete oversight of the company's operations, serve as architect for all projects, supervise all operations, establish its financial and investment goals and policies, supervise all employees, and serve as its chief executive officer.
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> As owner, architect and project manager of [the foreign entity], [the Beneficiary] continues to bring a wealth of experience and talent so that the future of the company in the U.S. looks bright.

The Petitioner has also stated that the Beneficiary, as manager, performs the following duties as set forth in its limited liability company operating agreement:

> The manager shall be the chief executive officer and shall direct the management of the company, establish its goals and policies, direct its operations, supervise its staff and employees, and perform and direct the performance of, those functions necessary to achieve the company's goals.

These brief descriptions of the Beneficiary's duties established his level of discretionary authority over the company, but, in significant part, paraphrase the statutory definitions of managerial and executive capacity. Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *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); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Neither the Petitioner's statement nor the duties outlined in the company's operating agreement were sufficiently detailed to explain the nature of the Beneficiary's day-to-day tasks within the context of the business.

Further, because the Petitioner stated that the Beneficiary would be serving as an architect for all projects, it was unclear how much of the Beneficiary's time would be spent on non-managerial architecture and design tasks as opposed to performing the stated general managerial or executive duties. Whether the Beneficiary is a managerial or executive employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

The Director therefore issued a request for evidence (RFE) in which she asked for a detailed statement of the Beneficiary's job duties, the percentage of time he spends on specific tasks, and an explanation of how his duties qualify as managerial or executive.

In a letter submitted in response to the RFE, the Petitioner referenced its initial statement and the operating agreement, emphasizing that the Beneficiary is "fully responsible for all operations and the achievement of the company's goals and objectives."

In a separate statement, the Petitioner described the Beneficiary as its "Project – General Manager" and noted that his responsibilities to the company-at-large including establishing its "vision mission and strategies to achieve goals," "planning and control of financial and production area," reviewing systems to improve production, executing and implementing contracts and managing clients, vendors, subcontractors and staff, with authority to hire and fire. The Petitioner further listed the Beneficiary's project-related responsibilities as follows:

Planning
- Approve architectural plans for renovations and new projects
- Decide scope of work in contact with property owner
- Apply for permits and track them
- Create Gant diagrams to estimate time x project
- Work with subcontractors to get estimate budget
- Planning HHRR, quality standards, and security process
- Planning purchases schedule and comparatives
- Such other functions as necessary to complete project.

Control
- Dashboard (weekly report to clients)

- To control and report progress, time, cost, budget and issues analsis [*sic*] of dashboard to make appropriate changes.
- "Change orders" approval and implementation.
- Review and approve invoices from sub[contractors] and crews (expenses report)

Closing
- Closing report for each property including as-built plans, pictures, final rates in cost and time, quality dossier

The Petitioner provided a list of finished and on-going projects, in which it listed its only active project as its one-year contract to provide project management services to

We agree with the Director's determination that the evidence submitted in response to the RFE did not clearly describe the Beneficiary's intended duties under the extended petition or establish that he would primarily perform managerial or executive duties. While the responsibilities attributed to him in his role as "general –project manager" confirm his decision-making authority and oversight of the company as a whole, his project management responsibilities, as listed in response to the RFE, indicate that he will also be significantly involved in providing the company's construction project management services. Those project-related duties closely match the services that the Petitioner would be providing to its client, and suggest that the Beneficiary will be directly providing those services, rather than supervising company employees who provide the services.

While we acknowledge the Petitioner's claim that the Beneficiary would not be performing tasks such as electrical work or carpentry, we cannot overlook the nature of the Petitioner's business as a construction management services provider. The Beneficiary's role in managing a project for a client is not considered a managerial duty performed for the petitioning company; rather, his duties indicate that he directly provides the services that the Petitioner agreed to provide in the parties' master service agreement. The invoices the Petitioner issued to indicate that it regularly charges for at least 40 hours per week of project management services and the Petitioner has not identified anyone, other than the Beneficiary, who is available to provide these services. While the Beneficiary may supervise other contractors on these projects, such duties do not establish his managerial or executive role with the Petitioner.

On appeal, the Petitioner submits a statement in which it clarifies that the Petitioner's business model also includes "flipping" houses and purchasing land for development. The Petitioner submits some evidence indicating that it hires subcontractors to work on these renovation and development projects. While the Beneficiary supervises such contractors, the Petitioner also states that the Beneficiary served as the architect for these projects. Overall, the Petitioner has not explained how

[1] The initial evidence had included a "Master Agreement for Construction Management Services" between the Petitioner (as construction manager), and to provide construction project management services for eight of real estate projects. A sample work order indicates that the Petitioner is responsible for drawing project plans, pulling permits, creating a project plan for scope of work, creating an estimated material budget and an estimated timeline, managing quality of subcontractor deliverables, and managing safety at the worksite.

the Beneficiary's time is divided between performing general managerial or executive duties such as establishing company strategies, managing finances and overseeing the company's own real estate development projects, versus performing the duties of an architect and directly providing construction project management services to clients such as

Therefore, we are unable to determine whether the claimed managerial or executive duties would constitute the majority of the Beneficiary's duties, or whether the Beneficiary would primarily perform non-qualifying operational duties. Although the Director specifically requested this information, the Petitioner's descriptions of the Beneficiary's job duties do not establish what proportion of the duties is managerial in nature, and what proportion is non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

However, as discussed further below, we note that the Petitioner does not claim to have another employee qualified to perform construction project management or architectural services. Therefore, it is unclear how the Beneficiary could primarily perform managerial or executive duties when the Petitioner regularly bills its client for 40 or more hours of project management services (which he provides) on a weekly basis. Therefore, the Director's determination that the Beneficiary likely performs a number of non-managerial duties related to the provision of services was reasonable and supported by the record.

B. Staffing

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.

The Petitioner did not provide evidence of its staffing levels at the time of filing. In response to the Director's request for evidence, the Petitioner stated that it employs a "manager assistant (office manager)" who is also identified in the record as the foreign entity's general manager. The Petitioner stated that this employee is responsible for office administration, collecting and reviewing invoices, purchase orders and contracts, and assisting the Beneficiary with letters, payments, acquisitions, and other documents. The Petitioner provided a copy of the manager assistant's IRS Form W-9 and copies of several checks issued to her.

The evidence submitted on appeal indicates that the Petitioner also hired subcontractors to perform duties related to the renovation of a home owned by the Beneficiary and to the construction of a new home on property owned by the Petitioner.

The Petitioner has referred to the Beneficiary's position as both executive and managerial. 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. 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."[2] Section 101(a)(44)(A) of the Act. 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.

Although requested by the Director, the Petitioner did not provide information regarding the educational requirements for the position subordinate to the Beneficiary. We cannot determine based on the information submitted that the office manager is a professional position and the job description does not establish that she is a supervisor or manager. Similarly, the record does not contain sufficient information regarding subcontractors to establish that the Beneficiary functions as a personnel manager with respect to these individuals. The Petitioner has not shown that the Beneficiary supervises a subordinate staff of supervisory, professional, or managerial employees as required by section 101(a)(44)(A)(ii) of the Act.

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, a petitioner must clearly describe the duties to be performed in managing the essential function, or more specifically, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform duties related to the function. *See Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016). In this matter, the Petitioner has not provided evidence that the Beneficiary manages an essential function.

As discussed, the managerial duties attributed to the Beneficiary are general management responsibilities involving oversight of the company as a whole, rather than the management of a specific function. While the Beneficiary is also charged with project management duties, the evidence supports a finding that most of his project management duties are performed as a service for clients and are not related to the management of a function for the Petitioner. Finally, as noted, the record does not establish that the Beneficiary's duties are primarily managerial and therefore, he cannot qualify as a function manager.

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[2] 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."

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an 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. One does not qualify as an executive under the statute simply because one "directs" the enterprise as the sole managerial employee. Here, while the Beneficiary may have the appropriate level of authority over the company as its senior employee, the submitted job descriptions do not demonstrate that the Beneficiary would be primarily focused on the policies and goals of the company rather than on its day-to-day operational activities.

The Petitioner correctly emphasizes that a company's size alone may not be the determining factor in denying an L-1A visa petition without taking into account the reasonable needs of the organization. *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 or a "shell company" that does not conduct business in a regular and continuous manner. *Family*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As the Petitioner requested an extension of a new office petition, the regulations require an examination of the Petitioner's organizational structure and staffing levels. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). 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. There is no provision in USCIS regulations that allows for an extension of this period. If a new office does not have the necessary staffing to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

The Petitioner purchases land and existing buildings, builds or renovates, and re-sells these properties. However, the record indicates that most of the company's income derives from providing full-time construction project management services to other companies. Despite the Petitioner's claim that "operational tasks are conducted by others," the Petitioner has not documented any employees, other than the Beneficiary, who would provide these project management services. While the assistant/office manager would assist with administrative and record-keeping duties, it appears that all other functions involved in coordinating the company's own projects and providing project management services to others would necessarily be performed by the Beneficiary. We cannot conclude that one subordinate employee and subcontractors hired on an as-needed basis would sufficiently relieve the Beneficiary significant involvement in non-qualifying activities.

We interpret the statute to prohibit discrimination against small or medium-size businesses. However, we also interpret the Act to require petitioners to establish that the beneficiary's position

"primarily" consists of managerial and executive duties, and that it has sufficient personnel to relieve a beneficiary from performing operational and administrative tasks. The reasonable needs of a petitioner will not supersede the requirement that a beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008).

We acknowledge that the company has continued to acquire projects and contracts and was doing business throughout its initial year of operations. However, even though the enterprise is in a preliminary stage of organizational development, the Petitioner is not relieved from meeting the statutory requirement that it establish that the Beneficiary's duties were primarily managerial or executive at the time the extension is sought.

On appeal, the Petitioner contends that the Beneficiary's position has all the necessary elements of a managerial position, but does not sufficiently elaborate. As explained above, these broad statements are not sufficient to meet the Petitioner's burden, particularly when the evidence indicates that the Beneficiary performs a number of non-managerial duties in order to provide the company's services. We agree with the Director's determination that the evidence is insufficient to establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

III. EXPORT LICENSE REQUIREMENT

We also find that the Petitioner did not indicate whether an export license is required to operate its business as instructed on page 5, Part 6 of the Form I-129. The form instructions state, "If you do not completely fill out the form . . . you will not establish a basis for eligibility and we may deny your petition." *See* 8 C.F.R. § 103.2(a)(1) (incorporating the instructions into the regulations). By completing page 5, Part 6 of the Form I-129, the Petitioner certifies that it has reviewed the Export Administration Regulations and the International Traffic in Arms Regulations and determined whether it will require a U.S. Government export license to release controlled technology or technical data to the Beneficiary.[3] By signing the Form I-129, the employer certifies under penalty of perjury that the information provided on the form is true and correct.

In the instant case, the Petitioner did not comply with the form instructions and properly complete page 5, Part 6 of the petition. Accordingly, the petition was not properly filed and it cannot be approved for this additional reason.

[3] The Export Administration Regulations, 15 C.F.R. §§ 770-774, and the International Traffic in Arms Regulations, 22 C.F.R. §§ 120-130, require U.S. persons, including companies, to seek and receive authorization from the U.S. Government before releasing controlled technology or technical data to foreign persons in the United States. U.S. companies must seek and receive a license from the U.S. Government before releasing controlled technology or technical data to nonimmigrant workers employed as H-1B, H-1B1, L-1, or O-1A beneficiaries.

IV. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity under the extended petition. Further, the Petitioner did not file a properly completed Form I-129.

ORDER: The appeal is dismissed.

Cite as *Matter of A- LLC*, ID# 350630 (AAO May 25, 2017)