U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF [redacted]

DATE: MAY 25, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, described as a construction equipment exporter, seeks to extend the Beneficiary's temporary employment as its general 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 would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred by denying the petition based solely on the size of the company. The Petitioner contends that the Beneficiary will perform primarily higher-level executive and managerial duties and supervise two subordinate professionals.

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 under the extended petition or provide sufficient information regarding the Beneficiary's subordinate employees' duties to demonstrate that they would relieve her from significant involvement in the company's day-to-day operations.

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 statute defines an "executive capacity" 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.

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).

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 1533.

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it exports construction equipment and had four employees at the time of filing. The Petitioner submitted a list of the Beneficiary's duties as general manager and later re-submitted essentially the same list of duties after the Director advised that the description was lacking specifics regarding the Beneficiary's day-to-day tasks. The duties listed in response to the Director's request for additional evidence were as follows:[1]

1. Execute strategic plan by implementing short and long term goals that align with the scope of service, mission and values of the company. 10%
2. Initiates strategies as necessary, according with the business plan, as to employ new personnel, put into operation new regulations, between others 5%
3. Direct and coordinate the ma[j]or company activities including hire, supervise and evaluate the professional performance of the executives. 10%
4. Schedule meetings and presentations to meet and evaluate potential suppliers 5%
5. Research and analyze the market in the Florida area, in order to incorporate new productive negotiations for the company 5%
6. Prepare and present the annually [*sic*] projection and global strategies of the company 5%
7. Analyze, develop and execute new alliances to increase the international business opportunities and profitability for the company. 5%
8. Periodic review of financial statements and data related to the incomes and expenses in order to take financial decisions. 15%

[1] The initial duty description included one additional duty ("Prepare the Business Plan for start operations in the new company") and some of the initial time allocations were also different.

9. Implement innovating techniques to ensure and improve the company goals. 5%
10. Monitor general operations executed in order to align procedures to the plan projects. 10%
11. Direct, formulate and continuously update the company policies and procedures in favor of the financial improvement. 5%
12. Design and apply the incentives and promotions plan of the employees and planning the training required. 10%
13. Provide positive and constructive feedback to the personnel by coaching, mentoring, counseling or corrective guidance and action, as appropriate. 5%
14. Ensure a safe work environment for employees by enforcing the execution of all safety programs and makes recommendations for changes as necessary. 5%

We agree with the Director's determination that the submitted position description lacks sufficient detail and does not demonstrate that the Beneficiary will primarily perform managerial or executive duties under the extended petition. On appeal, the Petitioner does not address the Director's findings regarding the Beneficiary's job duties, and instead contends that the Director erroneously based her decision solely on the size of the company.

The Beneficiary's duties are so broadly described that they could refer to any senior position in almost any company. The regulations require a detailed description of what this particular employee does on a day-to-day basis within the scope of this petitioner's operations. It is not sufficient for the Petitioner to state that the Beneficiary will "direct and coordinate the ma[j]or company activities" "execute strategic plans," "initiate strategies . . . according with the business plan," "direct, formulate . . . company policies and procedures," "implement techniques . . . to improve company goals," and "monitor general operations." These responsibilities, which account for nearly half of the Beneficiary's time, provide very little insight into the nature of her daily tasks. 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).

In addition, several of the duties, without additional explanation, suggest that the Beneficiary would be involved in non-qualifying duties. These duties include researching and analyzing the local market, scheduling meetings and presentations to meet and evaluate potential suppliers, and "developing new alliances." The Petitioner did not provide sufficient detail to establish that these responsibilities reflect managerial or executive responsibilities, rather than performance of routine purchasing, market research or sales tasks. Moreover, the Petitioner states that the Beneficiary would allocate 15% of her time to reviewing financial statements and information, but it has not yet filled any proposed positions in its administration department and it is unclear who would actually compile this financial information for the Beneficiary's review.

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, the Petitioner focuses on the Beneficiary's authority over subordinates with managerial job titles and her overall responsibility for setting goals and policies and overseeing the company's operation. But without meaningful information regarding the specific tasks she will perform we cannot determine that executive-level duties would be her primary duties. While the Beneficiary may have the appropriate level of authority over the company as its senior employee, the submitted job description is too general to demonstrate that the Beneficiary would be primarily focused on the policies and goals of the company rather than on its day-to-day administrative and operational activities.

B. Staffing

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) examines the claimed managerial or executive capacity of a beneficiary, 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 record establishes that the Petitioner employed four full-time employees: the Beneficiary, a purchase and sales manager, an operation manager, and a customer service employee. The Petitioner's organizational chart showed openings for the positions of purchase assistant, administrative manager, administrative assistant, and accountant.

The Petitioner has referred to the Beneficiary's position as both executive and managerial, and emphasized that she would supervise subordinate managers and professionals. 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

[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

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.

The Petitioner submitted evidence that the purchase and sales manager as a bachelor's degree in business administration and provided a list of her duties, which are mainly non-managerial market research and sales duties. Although the Petitioner indicated that this employee would eventually supervise a purchase assistant, it has not yet filled that position. The duties attributed to the sales manager are very general and the Petitioner has not established that a business degree would be required to perform them.

The Beneficiary's other direct subordinate, the operation manager, also has a degree in business administration. Although the Petitioner depicts the customer service employee as his subordinate on the organizational chart, his position description does not include supervisory duties. The operation manager's duties, like the Beneficiary's, are highly generalized, and do not sufficiently explain what tasks he performs within the context of this petitioning company. For example, his description contains multiple references to his interactions with "the management team," "department heads," a "chief executive officer" (in addition to the Beneficiary's position of general manager), and appears to describe an operations manager role in a much larger and more complex organization. As we cannot determine what specific role he fills within the context of this business, we cannot conclude that the operations manager position requires at least a bachelor's degree in business.

Overall, the Petitioner has not shown that the Beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act when seeking classification as an L-1A manager based on the supervision of personnel.

On appeal, the Petitioner claims that the Beneficiary "performs an essential and controlling function with respect to a complex business enterprise." 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a petitioner must at 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).

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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 matter, the Petitioner has not provided evidence that the Beneficiary manages an essential function. The Petitioner submitted an overly broad job description that described neither the Beneficiary's actual duties nor a specific function with any specificity. The Petitioner cannot establish her eligibility as a function manager with a blanket claim that she controls the company's major functions based on her role as the senior employee. 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 capacity within the meaning of section 101(a)(44) of the Act. As discussed, while 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, the position description is insufficient to establish that her actual duties would be primarily managerial in nature.

As emphasized by the Petitioner on appeal, 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 its 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 claims to export construction equipment but has not submitted evidence related to these business activities. The Petitioner's 2015 tax return states that the company's business activity is wholesale of lumber and construction materials. Photographs of the Petitioner's warehouse show various small shipping boxes that do not appear to contain construction equipment. In fact, one boxed item is identifiable as a stroller. On appeal, the Petitioner submits a profit and loss statement for 2016 indicating that it achieved $517,928 in sales revenue, but it remains unclear what the Petitioner sells or whether it is actually engages in import and export activities as there is little evidence of individual business transactions in the record. The Petitioner also states that it has acquired real property assets in excess of $880,000 and submitted evidence that the company purchased a condominium or office unit during its initial year of operation. The Petitioner did not provide any further explanation regarding the real estate segment of its business and none of the employees have job duties that appear to relate to real estate activities.

This ambiguity regarding the nature of the Petitioner's activities, when weighed in combination with the lack of specific, detailed position descriptions for the Beneficiary and the company's three other employees, makes it difficult to evaluate the Petitioner's reasonable needs and its ability to support a

managerial or executive position at the end of its initial year of operations. Further, half of the positions on the Petitioner's organizational chart remained unfilled. It is unclear who would perform the shipping, packing, and inventory duties of the vacant purchase assistant position, and who is actually responsible for purchasing the goods the Petitioner sells, or who performs the administrative, financial, import and export functions attributed to the future administrative manager position. For these reasons, we cannot determine that the Petitioner's current staff would relieve the Beneficiary from significant involvement in the day-to-day operations of the business.

On appeal, the Petitioner contends that the Beneficiary's position has all the necessary elements of a managerial or executive position, but, again, does not sufficiently elaborate regarding the nature of the business or the Beneficiary's actual duties. As explained above, these broad statements are not sufficient to meet the Petitioner's burden. 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. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of* [redacted] ID# 384944 (AAO May 25, 2017)