U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-I- LLC

DATE: MAY 31, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a plastics manufacturer, seeks to extend the temporary employment of the Beneficiary as its president and chief executive officer under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the Vermont Service Center denied the petition, concluding that the record did not establish that the Beneficiary will be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner submits a statement asserting that it clearly needs the Beneficiary in a managerial and executive capacity.

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.

An individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, must include evidence that the petitioner will employ the beneficiary in an executive or managerial capacity, or in a position requiring specialized knowledge, including a detailed description of the services to be performed. 8 C.F.R. § 214.2(l)(3)(ii).

An L-1A nonimmigrant visa petition that involved the opening of a new office may be extended by filing a new Form I-129, accompanied by a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition, and the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees. 8 C.F.R. § 214.2(l)(14)(ii)(C) and (D).

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

The Petitioner asserts that the Beneficiary's duties and responsibilities cover all aspects of the management of the company, including personnel, overseeing accounting and tax matters, plus representing the firm in public with banks and trade associations, and otherwise acting as the chief officer of the company.

A. Definitions of Executive and Managerial Capacity

Section 101(a)(44)(B) of the Act defines the term "executive capacity" as "an assignment within an organization in which the employee primarily":

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

Section 101(a)(44)(A) of the Act defines the term "managerial capacity" 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.

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.*

B. Duties

The Petitioner initially stated that the Beneficiary "will continue to serve in the United States as President/General manager of our company" and that he "will manage our U.S. Corporation by planning, developing and establishing all policies and business objectives and goals in accordance with the corporate policies."

The Petitioner further described the requirements for the position of general manager as:

- Direct, coordinate, oversee, and control all the activities of the U.S. company;
- Develop and implement corporate policies, marketing strategies and plans to ensure maximum profitability of the U.S. operation;
- Hire personnel at management level;
- Be in charge of financial relationship and financial matters;
- Evaluate and develop business strategies;
- Manage staff and assign specific duties;
- Review financial statements, sales and activity reports, and performance data to measure productivity and goal achievement and to determine areas with cost reduction need and program improvement;
- Establish and implement policies, goals, objectives, and procedures and confer with Board Members as necessary;
- Determine staff requirements and interview, hire new additions and oversee training of personnel;
- Monitor business to ensure that services are being provided efficiently and effectively, while staying within budgetary limits;
- Direct and coordinate financial and budgetary activities;
- Identify new and profitable business investments on behalf of the corporate group; and
- Negotiate and enter into business agreements on behalf of the U.S. subsidiary company, using independent judgment.

This description of the Beneficiary's duties is general and does not describe the Beneficiary's tasks in relation to this specific company. General assertions such as: "[d]irect, coordinate, oversee, and control all the activities of the U.S. company"; "[e]valuate and develop business strategies"; "[d]evelop and implement corporate policies, marketing strategies and plans to ensure maximum profitability of the U.S. operation"; and "[e]stablish and implement policies, goals, objectives, and procedures and confer with Board Members as necessary," essentially paraphrase portions of the

statutory definition of executive capacity, without conveying an understanding of the Beneficiary's actual day-to-day duties.

Additionally, duties such as "[m]onitor business to ensure that services are being provided efficiently and effectively, while staying within budgetary limits"; and "[d]irect and coordinate financial and budgetary activities"; and "[b]e charge of financial relationship and financial matters," all appear to relate to budgetary and financial tasks, but the Petitioner does not specify who will actually perform the routine tasks associated with its budget and financial matters, other than the Beneficiary.

Other duties, such as hiring personnel at the management level and determining staff requirements, and interviewing and hiring new additions are short-term, one-time responsibilities that would not make continued demands on the Beneficiary's time. Further, duties such as identifying new business investments and negotiating and entering into business agreements are not sufficiently defined to conclude that these duties are executive or managerial rather than duties that require the performance of operational and administrative duties.

In the same support letter, the Petitioner also indicated that the Beneficiary "will participate end [*sic*] the day-to-day operations of the company, and will be responsible for all relevant decision making on behalf of [redacted]" and "will be responsible for studying the market for derivative opportunities for expansion." The Petitioner further listed additional duties and allocated the Beneficiary's time to those duties as follows:

(15%) Networking with businesses and clients in Chile to continue to expand our business presence in the country.
(30%) Increasing sources of supply in order to provide a more complete product line and better pricing a terns; [*sic*]
(10%) Visiting company (S) site alongside client's managers, to evaluate and review project specifications[;]
(20%) Prepare corporate budget and monitoring financial aspects[;]
(10%) Monitoring the activities of all managers and employees, and review reports provided by management[;]
(5%) Evaluate and review the service ultimately provided by the company to ensure they meet customer needs[;]
(10%) Arranging export finance for clients.

This additional information does not further clarify the Beneficiary's actual day-to-day duties. Not only does this portion of the job description lack detail, it refers to the Beneficiary making decisions on behalf of [redacted], to networking with businesses and clients in Chile, and to arranging export financing for clients. However, the Petitioner has not described itself as affiliated with '[redacted]' or explained why the Beneficiary would be required to make decisions on its behalf. The Petitioner also does not refer to itself as an exporter or doing business with clients in Chile, elsewhere in the record. Therefore, we have reason to doubt the accuracy, reliability, and

origin of this portion of the job description and the allocation of the Beneficiary's duties and responsibilities specified therein.

In response to the Director's request for evidence (RFE), the Petitioner submitted a document titled job description for the position of general manager which stated that the duties and responsibilities of general manager included the following:

- Participates in formulating and administering company policies, directing and coordinating all divisional department activities to develop and implement long-range goals and objectives to meet business and profitability growth objectives.
- Reviews analyses of activities, costs, operations and forecast data to determine goals and objectives.
- Lead and coordinate all activities in the different teams by achievement for goals.
- Develops, reviews, updates and implements business strategic planning, including sales, financial performance and new product development.
- Oversees manufacturing and review level production and operating reports.
- Reviews and supports sales team to design the new products or improvement to provide cost reduction, safety, customer requirements and market growth.
- Generate and present reports of goals at Execute [*sic*] Board.

This description also lacks detail regarding the Beneficiary's specific tasks for the Petitioner. Again, the Petitioner provides a general description that paraphrases the statutory definitions and does not explain how the Beneficiary's duties relate to the Petitioner. The only duties that may pertain to the Petitioner's plastics manufacturing business is the Beneficiary's oversight of manufacturing and review of production and operating reports, as well as reviewing and supporting the sales team and design of new products. However, even these duties do not include the specifics necessary to ascertain that these tasks are managerial or executive, as defined in the statute.

On appeal, the Petitioner emphasizes that the Beneficiary alone is responsible for the success or failure of the U.S. subsidiary. However, reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The Petitioner has not provided sufficient detail or explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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). Overall, the job descriptions do not appear to specifically relate to the Petitioner's business except in the most general way.

Moreover, 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. 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 descriptions alone are insufficient to establish that his actual duties would be primarily managerial or executive in nature.

B. Staffing

Beyond the required description of the job duties, we review the totality of the record when examining 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.

In response to the Director's RFE, the Petitioner submitted its Florida employer's quarterly report for the second quarter of 2016, the quarter ending just prior to filing the Form I-129. The quarterly report shows that the Petitioner employed three individuals in addition to the Beneficiary. The Petitioner also provided job titles and descriptions for each of the three additional employees. One employee's position is identified as "seller" and is shown reporting directly to the Beneficiary. This individual is responsible for seeking out new customers, ensuring customer satisfaction, preparing sales plans and strategies, and monitoring competitors. The Petitioner listed experience as a qualification to perform the duties of this position but does not indicate that a baccalaureate degree is necessary. The two remaining employees' positions are identified as "operatives." The Petitioner indicated that the operatives are the individuals responsible for operating and monitoring the machines and equipment that produce the plastics product on the production line.[1] The Petitioner indicated that these positions require plastics industries operator working experience.

The job descriptions for the Beneficiary's subordinates do not include information suggesting that any of the positions are managerial or supervisory positions. Neither has the Petitioner claimed nor does the record establish that the positions are professional positions.[2]

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[1] On appeal, the Petitioner refers to an individual previously identified as an "operative." The appeal statement combines the first names of the seller and one of the operatives and uses the last name of the operative in describing this individual who the Petitioner now claims is "in charge of accounting." As the record does not include further clarification of the individual or the position described as "in charge of accounting," we will not further discuss this claimed new position.

[2] When evaluating whether a beneficiary manages professional employees, we 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." We focus on the level of education required by the position, rather than the degree held by subordinate employee. Thus, the possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity. Here, the position descriptions and the Petitioner's requirements to perform the position do not indicate that a baccalaureate degree is required to perform the duties of the positions.

To establish executive capacity under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to this definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and the beneficiary 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 has not established how any of the positions held by the Beneficiary's three subordinates are managerial positions. Instead, the Beneficiary's subordinates perform the actual day-to-day tasks of finding new customers and operating the plastics manufacturing production line. Thus, the Petitioner has not established that the Beneficiary directs a subordinate level of managerial employees. The record is deficient in establishing that the Beneficiary will perform primarily executive duties.

Although the Petitioner does not explicitly assert that the Beneficiary's duties are primarily managerial duties, we briefly note that to establish managerial capacity, the Petitioner may demonstrate that the Beneficiary will perform duties primarily as a personnel manager or a function manager. 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. 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.[3]

The Petitioner includes some supervisory duties in its general descriptions of the Beneficiary's proposed duties. And the Beneficiary may very well be the only individual responsible for the supervision of the Petitioner's additional three employees. However, the Petitioner has not provided probative evidence of an organizational structure sufficient to elevate the Beneficiary to a position higher than a first-line supervisor of non-professional employees. Therefore, the Beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions. *See* section 101(a)(44)(A)(iv) of the Act.

[3] The Petitioner does not claim and the record does not establish that the Beneficiary will perform primarily function manager duties. We note, for information purposes, that 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 furnish a written job offer that clearly describes 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). The record does not include this information. Additionally, the record does not include a description of the Beneficiary's daily duties demonstrating that the Beneficiary will manage a specific function rather than perform duties related to the function. *See Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016). Accordingly, the Petitioner has not provided evidence that the Beneficiary manages an essential function.

On appeal, the Petitioner claimed that "[a]s the initial analysis has been finished, new job positions will be [e]stablished." However, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the intended U.S. operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in the regulations allowing for an extension of this one-year period. If the business does not have the necessary staffing after one year to sufficiently relieve the Beneficiary from performing operational and administrative tasks, the Petitioner is ineligible for an extension.

The record documents that the Petitioner is doing business, but it does not contain sufficient evidence of the Beneficiary's claimed work in a managerial or executive capacity for the petitioning entity. A review of the totality of the record does not establish that the Beneficiary's work will be primarily managerial or executive in nature. The Petitioner has not overcome the Director's determination on this issue.

III. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary will be employed in a primarily managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of S-I- LLC*, ID# 379387 (AAO May 31, 2017)