U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-L-D- LLC

DATE: MAY 31, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a real estate developer, seeks to continue the Beneficiary's temporary employment as its general manager under the L-1A nonimmigrant classification for intracompany transferees. 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 it will employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. On appeal, the Petitioner asserts that the Director erred by disregarding evidence of the Beneficiary's high level of authority, and by misinterpreting the company's growth as an attempt to remedy deficiencies in the petition.

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 capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. 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.*

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.

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.

III. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. At various times in this proceeding, the Petitioner has referred to the Beneficiary's position as both managerial and executive, and therefore we will consider the requirements of both types 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, we examine 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.

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

At first, the Petitioner listed the Beneficiary's responsibilities, such as recruitment, training, and supervision of subordinates. After the Director advised that the Petitioner had not provided much

information about the Beneficiary's actual duties, the Petitioner submitted the following description (note: errors in the original have not been corrected):

1) Selection and Supervising the contractor's work, which requires 40% of [the Beneficiary's] work hours. . . . [The Beneficiary] conducts site visits with Project Manager. . . . When potential problems are spotted during review, [the Beneficiary] will organize meeting with [the Petitioner's] architect, project manager, as well as the construction team to work on the solution . . . .
2) Regular meeting and assigning manager level employees' work, listening to their reports on work progress, evaluating employee's work load, making decision on employee promotions, or new hiring needs. These takes up 15% of [the Beneficiary's] work hours.
3) Meeting with Architects to make final decision on land and housing design and blueprint for new projects, up to 15% of [the Beneficiary's] work hours;
4) Meeting with Accountant to review financial statements and tax returns . . . , taking up to 10% of [the Beneficiary's] work hours;
5) Liaison with Real Estate professionals to gain a knowledge of real estate market. Regular meeting with real estate consultant to make final decisions on price of purchasing lands and sale of properties. This takes up to 5% of [the Beneficiary's] work hours;
6) Regular meeting with purchasing office for material market information, compare different products and make decisions on final suppliers. This takes up to 10% of [the Beneficiary's] work hours.
7) Reporting project progress and financial status of company to Board of Directors . . . and other necessary duties of General Manager. This takes 5% of [the Beneficiary's] work hours.

The Director found that the Petitioner had not provided enough specific details about the nature of the Beneficiary's work and the time devoted to various tasks. Also, the Director determined that the Petitioner had not shown how the Beneficiary's duties are primarily those of an executive or manager. Several of the tasks described appear to be at a supervisory level, or involve operational tasks that the Beneficiary performs himself instead of delegates to others. Also, the Petitioner did not have a purchase officer when it filed the extension petition, so the above list cannot be completely accurate with respect to the Beneficiary's duties at the time of filing.[1]

On appeal, the Petitioner submits a third job description, which basically expands upon the second version of the job description excerpted above. This latest version, however, strays even further from the Beneficiary's duties at the time of filing the extension petition. It refers to a second newly-created position that did not yet exist when the Petitioner filed that petition. Also, some of the Beneficiary's tasks remain ill-defined, such as "liaison with other executives, consultants and professionals."

[1] As will be discussed below, the Petitioner later submitted a new chart that added a purchase officer position.

The nature of the Beneficiary's duties is necessarily affected by the subordinate staff available to relieve the Beneficiary from primarily performing non-qualifying tasks. Below, we will discuss questions and concerns relating to the Petitioner's claims regarding that staffing.

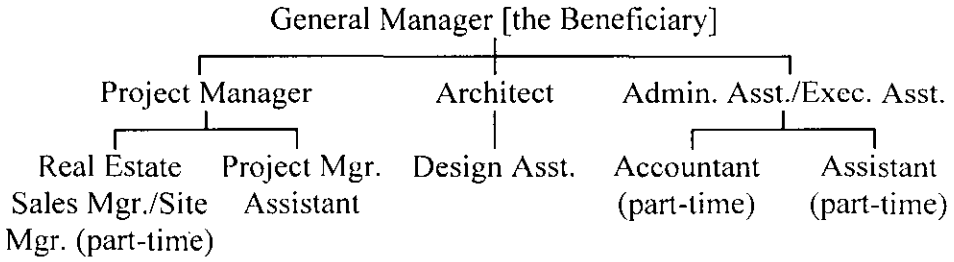
B. Staffing

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. The Petitioner does not contest the Director's finding that the Petitioner is not a function manager (who manages an essential function within the organization). Instead, the Petitioner's emphasis on subordinate staffing indicates a claim that the Beneficiary is a personnel manager.

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.

The Petitioner also asserts that the Beneficiary is an executive. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate management structure for a beneficiary to direct and a beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise.

The Petitioner initially submitted an organizational chart showing the following structure:



Later, in response to a request for evidence, the Petitioner submitted a new chart that added a purchase officer position, and showed the office assistant and accountant reporting directly to the Beneficiary instead of to the administrative/executive assistant. The titles of some existing employees changed as well; for instance, the "architect" became the "design manager," and the "real estate sales manager" became the "real estate consultant."

As the Director noted in the denial notice, a petitioner must establish that the position offered to a beneficiary meets applicable requirements at the time the petition was filed. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978); *see also* 8 C.F.R. § 103.2(b)(1), which requires a petitioner to meet eligibility requirements at the time of filing, and continuing through the adjudication of the petition. Therefore, the Petitioner must show that its organizational structure was qualifying at the time of filing before we will consider any subsequent changes to that structure.

The Director stated that the Petitioner's initial organizational chart did not show a level of organizational complexity that would warrant an executive position. (The Director did not address the Petitioner's eligibility, or otherwise, as a personnel manager with authority over managers, supervisors, professionals, or some combination thereof.) The Director also noted that, in response to the RFE, the Petitioner made "several material changes" including adding the purchase officer position and changing the "structural hierarchy."

We agree with the Petitioner's observation on appeal that material changes are not inherently disqualifying. Furthermore, the Petitioner asserts that the changes were the natural result of the company's growth and development, rather than an attempt to change the company's circumstances to establish eligibility for benefit sought.

An architect is a professional, as defined at section 101(a)(32) of the Act, and some of the Beneficiary's subordinates are supervisors. This information is consistent with one element of managerial capacity, and the Beneficiary's hiring authority is consistent with another, but these factors by themselves do not suffice to show that the Beneficiary is *primarily* a personnel manager. Concerns remain about how much time the Beneficiary spends overseeing professional and supervisory employees.

The Petitioner has claimed that the Beneficiary spends 15% of his time meeting with architects (both the company's own architect and outside contractors), but the Petitioner has purchased only a few parcels of land for development. At the time of filing, the Petitioner claimed only four parcels of land under development. Likewise, the Beneficiary purportedly spends another 15% of his time on personnel decisions such as hiring, evaluations, and personnel policies, but the Petitioner has not explained how the personnel needs of a company of its size (nine employees at the time of filing, with two added later) would consistently require hours of sustained attention each week.

Review of the record shows several other areas of concern. The Petitioner previously stated that the project manager oversees "warehouse material management operations." On appeal, the Petitioner states that "[t]he purchasing office is responsible for . . . warehouse management." None of the Petitioner's organizational charts show any warehouse workers, and the Petitioner did not document its ownership or rental of warehouse space.

Also relating to space, the Petitioner initially submitted a copy of an office lease agreement for space to accommodate six occupants. The Petitioner did not explain how nine or more occupants fit into a space designed for six, and did not, in the alternative, document any overflow office space. The

Petitioner has since relocated, but the record does not show the capacity of the new location and the relocation does not resolve questions that existed at the time of filing.

Also, apart from questions about the amounts paid to some workers (for example, $36,000 per year appears to be an extremely low salary for a full-time architect claiming a decade of experience), there is a major discrepancy in the Petitioner's tax and payroll documentation for 2015 and 2016. (The Petitioner claimed that the Beneficiary spends several hours each week reviewing tax and financial documents with the company's part-time accountant.) Quarterly returns and IRS Forms W-2, Wage and Tax Statements, show very different personnel costs when compared to the Petitioner's IRS Forms 1065, U.S. Returns of Partnership Income:

	2015	2016
W-2 salaries	$148,278	$266,128
1065 salaries	61,778	86,232
1065 total expenses	87,932	205,096

We cannot ignore that financial documents that the Petitioner itself has submitted provide very different information about salaries paid (and, therefore, the company's staffing), and we cannot tell, from the available documentation, which set of figures (if either) is accurate. They cannot both be true and correct. (We note that the Beneficiary signed the returns, thereby attesting to their accuracy under penalty of perjury.)

While the Petitioner may be an active and viable real estate development company with the Beneficiary controlling the organization, deficiencies and inconsistencies in the record prevent a finding that the Petitioner has met its burden of proof. The Petitioner has not established that it will employ the Beneficiary in a managerial or executive capacity under the extended petition.

IV. PRIOR APPROVALS

Noting approvals of prior petitions on the Beneficiary's behalf, the Petitioner states that the Director identified "no changes of law or facts" to explain the different outcome in this case. It must be emphasized that each petition filing is a separate proceeding with a separate record. In making a determination of statutory eligibility, U.S. Citizenship and Immigration Services (USCIS) is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

Under current binding policy, "[a]n adjudicator's fact-finding authority . . . should not be constrained by any prior petition approval, but instead, should be based on the merits of each case." USCIS Policy Memorandum PM-602-0151, *Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status* 3 (Oct. 23, 2017), https://www.uscis.gov/laws/policy-memoranda. The previously approved petitions are not before us at the Administrative Appeals Office, and therefore we cannot comment on how their records of proceedings may be similar or different to the one under review here.

We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). USCIS is not required to treat acknowledged errors as binding precedent. *Sussex Eng'g. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *See La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 1999).

V. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of W-L-D- LLC*, ID# 1221736 (AAO May 31, 2018)