U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S- LLC

DATE: NOV. 8, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which intends to operate an Asian grocery store, seeks to temporarily employ the Beneficiary as president/general manager of its new office[1] 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 Petitioner did not establish, as required, that it would be able to support a managerial or executive position within one year of approval of the petition.

On appeal, the Petitioner asserts that the Director mischaracterized the nature of the Beneficiary's proposed duties, did not weigh all relevant factors, and erroneously determined that the new office would not support a managerial position within a one-year period.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, 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.*

The petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner

[1] The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

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.

The term "executive capacity" is defined 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.

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 at 1533.

III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner established that the new office would support a managerial or executive position within one year of approval of the petition. On appeal, the Petitioner maintains that the position is managerial in nature, but it previously claimed that the proposed position satisfies the definitions of both managerial and executive capacity.

In the case of a new office petition, we review a beneficiary's proposed job duties as well as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial or executive capacity. A petitioner has the burden to establish that it would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the evidence must be considered in analyzing whether the proposed managerial or executive position is plausible considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

A. Duties

At the time of filing, the Petitioner stated that it established a majority-owned U.S. subsidiary, [redacted] which was in the final stages of acquiring the assets of an existing grocery store [redacted] owned by [redacted] The Petitioner explained that the Beneficiary would be assigned to [redacted] to "personally manage[] the supermarket business" and indicated that he would allocate 100% of his time to the following duties:

1. Formulate operation policies, including pricing, administration, and employment policies. (10%)
2. Carry out implementation plan to the resolution adopted by board of director; Review the performance of plan and report to board of director[s] (5%)
3. Approve marketing plan and budget plan, and decide any improvement or adjustment on the plan or strategies. (10%)
4. Review monthly sales report, financial and budget report to identify flaws in management structure and decide to improve business structure or re-design management procedure. (15%)
5. Review the performance report of whole business operation to find out weakness in daily operation and draft plan to improve daily operation for better outcome. (15%)
6. Study business trend, follow up on major competitors' activities. Decide to expand or adjust product line to meet customers need. (10%)
7. Decide to hire, fire head of all department; supervise and evaluate the day-to-day performance of managers and supervisory employees. Promote or demote managerial employees based on their performance. (15%)
8. Decide to contract important suppliers and other professions (e.g. CPA, financial advisors, attorneys); Approve important agreement or joint operation agreement. (10%)
9. Directly contact important suppliers. Decide to enter important supply, wholesale or other long-term contract. (15%)

Although these duties accounted for all of the Beneficiary's time, the Petitioner provided a list of five additional duties that he would perform as the "only executive member" of the company, and stated that those duties would also require 100% of his time. These duties included: (1) reviewing and approving the company's business strategy and business plan - 15%; (2) executing resolutions made by member meeting and reporting annual performance - 20%; (3) approving operation structure and establishment of the company - 15%; (4) evaluating the performance of current strategies, reviewing financial and budget reports and deciding "the establishment of subdivision" - 25%; and (5) directing and managing all aspects of executive operation of the company and making all important final decisions - 25%.

In a request for evidence (RFE), the Director advised the Petitioner that it was unclear how two separate sets of responsibilities would each require 100% of the Beneficiary's time and allowed the Petitioner the opportunity to explain and provide additional evidence in support of its assertion that he would primarily perform managerial or executive duties within one year.

In its response, the Petitioner did not attempt to reconcile the two lists of duties. The Petitioner emphasized that is has an ambitious business plan for the grocery store that will include expansion to include a wholesale business, a food court, and online sales, and that such plans can only be implemented by a managerial or executive employee. The Petitioner stated that the Beneficiary "will be the one in charge of the company with the highest discretion to all aspects of management of the business."

In the denial decision, the Director determined that the Beneficiary's proposed duties include non-managerial duties such as "marketing," "budgeting," and "contracting" but did not further address the proposed job duties. On appeal, the Petitioner claims that the Director "overtly twisted the managerial duties," and asserts that the submitted job description is sufficient to establish that the Beneficiary will primarily exercise discretion over the day-to-day operations and that he will delegate tasks, including marketing, budgeting, and contracting, to the store manager and supervisors. The Petitioner maintains that at least 80% of the Beneficiary's time will be spent on qualifying duties.

While we agree with the Petitioner that the submitted position description does not include primarily non-qualifying duties, the description as a whole is overly broad and does not list the specific tasks the Beneficiary would perform, such that they could be classified as managerial or executive in nature. Further, the Petitioner did not attempt to reconcile its initial claim that two different sets of duties would each require 100% of his time. Several of the duties merely paraphrase the statutory definition of executive capacity and therefore have limited probative value in terms of explaining the nature of the Beneficiary's expected duties. For example, the Beneficiary's responsibilities to "direct and manage all aspects of executive operation[s]"; "approve the company's business strategy"; "evaluate performance of current strategies"; and "formulate operation policies" are too vague to explain how the Beneficiary will spend his time on a day-to-day basis. 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.).

With respect to the Beneficiary's claimed managerial tasks, the Petitioner has not established that certain related non-managerial tasks inherent to operating the business would be delegated to subordinate employees within one year. For example, the Petitioner states that the Beneficiary will "approve a marketing plan and budgeting plan," review a "performance report," and review monthly sales, budget and finance reports. The Petitioner states that the store manager and his direct subordinates perform the actual marketing, budgeting, and other operational tasks. Although the Petitioner states that one of the store manager's duties will be to prepare sales reports, it has not identified which employees would prepare marketing and budget plans for the Beneficiary's approval. The Beneficiary is also responsible for studying business trends and competitor activities, and dealing directly with suppliers. These duties are not clearly managerial in nature and would not be delegated to subordinates.

In sum, the submitted job description was problematic because it accounted for 200% of the Beneficiary's time; included a combination of overly broad responsibilities and duties that involve "overseeing" activities that are not clearly delegated to subordinates; and finally, included duties that, without further explanation, have not been shown to be managerial or executive in nature.

We acknowledge that the Beneficiary, as the Petitioner's senior employee, would have authority to establish plans, policies, and objectives for the company, supervise any employees hired, and make major decisions regarding its finances and overall direction. However, the Petitioner has not established that these types of responsibilities would primarily occupy the Beneficiary's time within one year. 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.

On appeal, the Petitioner contends that the Director did not give sufficient weight to all of the Beneficiary's listed job duties and emphasizes that the provided job descriptions do not include clearly non-qualifying duties. However, the position description alone is insufficient to establish that a beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as a petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the proposed position.

Here, the Director's decision reflects that she properly considered the totality of the evidence to determine whether the Petitioner met its burden to show that it would have a reasonable need for the Beneficiary to primarily perform the claimed managerial or executive duties within one year. For the additional reasons discussed below, the Petitioner has not met this burden.

B. Projected Staffing and Business Plan

As noted, the totality of the evidence must be considered in analyzing whether the proposed duties are plausible considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

As a preliminary matter, we note that the Petitioner's business plan is predicated on the acquisition of an existing grocery store known as and the expansion of the retail grocery business to include a wholesale business, a food court, and online sales. The Petitioner indicates that its majority-owned subsidiary, was in the "final stage" of acquiring the assets of and submitted a "Purchase of Business Agreement" signed on December 17, 2017. The purchase agreement indicated that the closing date for the $600,000 purchase would be on January 15, 2018, but the Petitioner did not submit evidence that the purchase was completed or that funds were paid to the seller as of the date of filing on January 18, 2018.

Later, in response to the RFE, the Petitioner submitted a lease agreement for the grocery store's retail premises signed by in March 2018, but this evidence alone is insufficient to show that the purchase was completed according to the terms of the purchase agreement. Therefore, while our discussion below is based on an assumption that the Petitioner owns a majority interest in the

which, in turn, owns and operates the [redacted] we note that there are omissions in the record regarding the completion of the store purchase. The Petitioner did not provide any additional evidence demonstrating that [redacted] was operating the store at the time of the RFE response. This is relevant because the Petitioner's business plan is based on an assumption that [redacted] would immediately take over the operation of the store and move forward with its hiring and expansion plans.

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it had five employees. In a supporting letter, the Petitioner clarified that [redacted] would be retaining the five current [redacted] employees and would recruit a "new manager and cashiers," with the expectation that it would employ 10 workers by the end of 2018. The organizational chart submitted at the time of filing indicated that the Beneficiary would serve as the Petitioner's president and as the general manager of [redacted] with responsibility for overseeing the [redacted] store manager. The other grocery store employees included a produce manager, a grocery manager, a produce stocker, and two cashiers. The Petitioner also submitted an IRS Form 941, Employer's Quarterly Federal Tax Return, showing that [redacted] employed six workers and paid $17,354 in salaries and wages during the third quarter of 2017. The Petitioner did not provide updated information regarding current staffing in response to the RFE, nor did it provide evidence that the [redacted] employees were transferred to [redacted] payroll.

The Petitioner's business plan indicates its intent to invest $200,000 on inventory, obtain new supplier agreements, adjust product offerings to meet customer demand, hire a professional manager, and to engage in more aggressive marketing and promotional efforts. The business plan also mentions that it intends to adopt new technology for online ordering for in-store pickup and to expand to wholesale of goods to restaurants. The business plan included a recruitment plan for 2018 which indicated that the Petitioner would hire a store manager, grocery supervisor and two cashiers in March 2018, and an office secretary in June 2018.

In response to the RFE, the Petitioner submitted an organizational chart that reflected current staff as of March 2018, and intended hiring for 2018 and 2019. This chart indicates that the Beneficiary would directly supervise the existing store manager, an office secretary to be hired later in 2018, and an assistant manager who would be hired in 2019. The store manager's subordinates include a produce manager, four cashiers (two current and two to be hired in 2018), a grocery supervisor to be hired in 2018, and two buyers to be hired in 2019. The chart includes a produce stocker who reports to the produce manager. Finally the chart includes a wholesale line of business projected to start in 2019, a food court slated to open in 2019, and "more stockers (if necessary)" to be hired in 2019.

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. 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."[2] Section 101(a)(44)(A)(iv) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

The Petitioner does not claim that the Beneficiary would be a function manager, but does indicate that he is authorized to hire and fire employees and that he would supervise subordinates with managerial job titles. Based on a review of the Petitioner's organizational charts and business plan, the Petitioner's staff at the end of the first year would include a store manager, a produce manager, a grocery supervisor, a produce stocker, four cashiers, and an office secretary. However, we note that the Petitioner has not sufficiently documented the store's existing staff, stated whether they will work full-time or part-time, or shown that these staff were transferred to payroll as part of the store acquisition.

The Petitioner indicates that the store manager would supervise the cashiers and the produce and grocery departments, and that he would decide on pricing policies, prepare sales reports, and oversee the day-to-day retail operations. However, it also indicates that the store manager would "arrange stocking and display in the store." The Petitioner has no other current or proposed employee whose duties include performing stock-related duties other than a produce stocker. In fact, the Petitioner does not claim it will hire any grocery stocking employees until 2019. Therefore, while the store manager likely performs some supervisory functions it is unclear whether he could singlehandedly supervise the store's day-to-day operations while also having to perform routine stocking duties.

Similarly, the Petitioner states that the produce manager "supervises sales of fresh produce, including meats, seafood, vegetable and fruits" but the Petitioner provided evidence that it has a standalone seafood and meat counter in its store and only one subordinate employee in the entire department, with no plans to hire additional staff. The Petitioner has not shown that one subordinate employee is able to perform all non-qualifying duties associated with the handling of meat, seafood, and fresh produce, such that the produce manager would be performing the supervisory duties of the department. Finally, the Petitioner indicates that the proposed grocery supervisor position will "manage grocery sales in the store," check quality of "grocery, appliances and general products," and monitor grocery inventory. The Petitioner indicates that he will eventually manage wholesale orders, fulfillment of online orders, and supervise buyers and other employees, but these employees would not be hired within one year. It is more likely than not that the position will be primarily responsible for purchasing inventory for the store.

[2] In evaluating whether a 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 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." Here, the Petitioner indicated that the store manager has a "college" education, but did not establish that the position requires a degree or that the employee who holds the position has a bachelor's degree.

Although the Beneficiary would be supervising one employee with supervisory duties, the Petitioner has not shown that he would be *primarily* supervising subordinate staff within one year, or that the subordinate staff would sufficiently relieve him from significant involvement in the store's day-to-day operations. The evidence must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. Here, the evidence shows that the Beneficiary's subordinates would more likely than not perform the actual day-to-day tasks of operating the grocery store. While the store manager may be available to relieve the Beneficiary from performing some first-line supervisory duties, the record does not establish that one subordinate supervisor would be sufficient to remove the Beneficiary from involvement in the store's non-managerial functions.

The Petitioner has also claimed that the Beneficiary will be employed in an executive capacity. 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 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. 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 the owner or sole managerial employee.

As noted, the Petitioner submitted a broad description of the Beneficiary's duties that merely paraphrases the statutory definition of executive capacity. It has neither defined his actual proposed duties in sufficient detail, nor adequately explained how the proposed staffing levels would allow him to primarily focus on the broad goals and policies of the company within one year.

On appeal, the Petitioner emphasizes that the Director did not consider the significant financial investment made to purchase the store and the Petitioner's reasonable need to transfer a manager or executive to oversee that substantial investment. Section 101(a)(44)(C) of the Act requires us to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." However, 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).

The Petitioner, through its subsidiary, would be operating a 21,000 square foot store with expected sales of over $3 million. The Petitioner did not state its operating hours but it is reasonable to believe that the store is open for business daily and has extended hours well beyond a typical 40 hour workweek. The Petitioner has not explained how a store manager, an office secretary, a grocery supervisor, two produce department employees, and four cashiers would be able to relieve the Beneficiary from involvement in the day-to-day duties of a business of this size and nature. Further, as noted, the Petitioner has not supported its claim that it retained the previous owner's employees or provided evidence of wages paid to them by AGS.

The Petitioner emphasizes that it has a warehouse/stockroom, a fresh produce department, meat and seafood department, grocery, appliances, and frozen foods, and an office. It does not intend to hire stock personnel during its first year of operations and instead indicates that the store manager would perform this function. Further, the Petitioner does not explain who will manage the store during the hours when the store manager is not available or is occupied with stocking duties. For these reasons, we agree with the Director's conclusion that the record contains insufficient evidence to show that the Beneficiary would be removed from significant involvement in the day-to-day operations of the company by the end of the first year.

The Petitioner has consistently stated that the Beneficiary will occupy the senior position in its new office, but has not submitted a job description or supporting evidence sufficient to demonstrate that he would primarily engage in managerial or executive duties, or that the new office would support a managerial or executive position, after the initial year of operations.

IV. PHYSICAL PREMISES

Although not addressed in the Director's decision, we find that the Petitioner submitted insufficient evidence to establish that it had secured sufficient physical premises to house the new office as of the date of filing. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

On the Form I-129, the Petitioner provided a mailing address in Texas and stated that the Beneficiary would work at that address. The Petitioner provided the same address where asked to indicate the Beneficiary's current residential U.S. address. In the RFE, the Director requested that the Petitioner provide a lease agreement or other evidence to satisfy the physical premises requirement.

In response, the Petitioner submitted a commercial lease for the grocery store located in Texas, but this lease was signed by the Petitioner's subsidiary, , nearly two months after the petition was filed.

The Petitioner also submitted a "Property Usage Agreement" signed by the Beneficiary on behalf of the Petitioner and on January 1, 2018. This agreement indicates that as "owner" of the property located at Texas, gave the Petitioner the right to use its premises on a month-to-month basis beginning on January 10, 2018. The Petitioner attached a commercial sublease indicating that was leasing office and warehouse space at this address from another company and was authorized to use it through August 2018.

The Petitioner did not explain why it indicated on the Form I-129 that the Beneficiary would work from his home address in , Texas. Nor did it explain why it did not provide the Houston address on the Form I-129 if it had in fact secured the use of a commercial space prior to the filing of the petition on January 18, 2018. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Absent some explanation or additional evidence that the Petitioner actually

occupied the Houston location, we find the "Property Usage Agreement," insufficient to meet the Petitioner's burden of proof to show that it had secured sufficient physical premises as of the date of filing. For this additional reason, the petition cannot be approved.

V. CONCLUSION

The appeal will be dismissed as the Petitioner has not established that it would employ the Beneficiary in a managerial or executive capacity within one year, or that it had secured sufficient physical premises to house its new office as of the date it filed the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of S- LLC*, ID# 1699828 (AAO Nov. 8, 2018)