U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF S-4F-C- LLC

DATE: OCT. 4, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a restaurant operator, seeks to temporarily employ the Beneficiary as the executive director 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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity within one year of an approval of the petition.

On appeal, the Petitioner reiterates the Beneficiary's duties and asserts that the Beneficiary would act in an executive capacity within one year.

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. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

We will first analyze whether the Petitioner established that it would employ the Beneficiary in an executive capacity within one year of the petition's approval. The Petitioner does not assert that the Beneficiary would be employed in a managerial capacity within one year. Therefore, we will restrict our analysis to whether the Beneficiary would be employed in an executive capacity.

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.

In order to determine whether the Petitioner established that its new office will support an executive position within one year, we will review the Beneficiary's proposed job duties, along with the Petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the Beneficiary in the intended executive capacity. The totality of the evidence must be considered in analyzing whether the proposed 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

In support of the petition, the Petitioner stated that it would operate a location preparing and selling sushi by the pound and indicated that it had ten employees as of the date the petition was filed. The Petitioner stated that "in his capacity of the Executive" the Beneficiary would be tasked with some of the following duties:

- "defining and directing new strategies for the restaurant's business tools to achieve strategic sales and marketing goals,"
- "execute the company's marketing strategy,"
- use "the services of a Market Research Analyst to search the new trends on the customers' tastes,"
- "oversee compliance with commercial logistics, and environmental aspects of its products and services,"
- "establish agreement with strategic business partners,"
- Establish "goals, policies, and procedures,"
- Direct "financial and budgetary activities,"
- "manage general activities related to providing services,"

- "determine areas of program improvement,"
- implement "accounting practices and financial policies,"
- "develop strategies and programs to [*sic*] the company's expansion plans,"
- "identify business opportunities,"
- "negotiate or approve contracts and agreements,"
- "hire and train professionals,"
- make "investment decisions" and "prepare plans of action,"
- "direct efficacy of wholesale, export, and distribution activities,"
- "direct the dissemination of marketing support service," and
- "engage in long-range planning."

The proposed duties submitted for the Beneficiary are overly vague and they do not effectively convey his actual day-to-day executive tasks. The Beneficiary's job description includes several generic duties that could apply to any executive acting in any business or industry; such duties do not provide insight into the actual nature of his role. The Petitioner provided few specifics related to how the Beneficiary's day-to-day duties fit specifically within the company's first year business plans. For instance, the Petitioner did not specify the actions the Beneficiary would take during its first year of operation to assure that the business would develop as necessary to support him in an executive capacity within one year. In fact, the Beneficiary's duty description includes few references to the company's intended business, the operation of a fast casual sushi restaurant.

The Petitioner submits few examples of the strategic sales and marketing goals he would define, the marketing plan he would act on, compliance with commercial, logistics, and environmental aspects he would oversee, or goals, policies, procedures he would set. Further, the Petitioner did not articulate "general activities" he would manage, areas of cost reduction and program improvement he would focus on, accounting practices and financial policies he would implement, expansion plans he would develop, or contracts or agreements he would negotiate. It also did not detail "professionals" the Beneficiary would hire and train; in fact, the record includes no first year hiring plans. The record requires more detail as to the Beneficiary's specific tasks to allow an assessment of whether he would act primarily in an executive capacity within one year. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive 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).

Further, the Petitioner provides tasks for the Beneficiary that do not appear credible in light of its plans to operate one fast food sushi location, including him directing "efficacy of wholesale, export and distribution activities." The Petitioner submitted evidence of the foreign employer's operations indicating that it also operates a fast food sushi location in Brazil and submitted invoices reflecting that it purchases beverages and fresh fish for this one location. Likewise, the Petitioner's business plans indicate that it would operate a similar location in the United States; as such, it is not clear what wholesale, export, and distribution activities the Beneficiary would be engaged in. Likewise, the Petitioner also states that the Beneficiary "will direct dissemination of marketing support service in accordance with corporate marketing strategy." First, the Petitioner has not articulated a clear

marketing strategy and its mention of disseminating "marketing support service" appears to bear little relation to its plans to open one location selling sushi and other similar food items by the pound. Likewise, the Petitioner stated that the Beneficiary would approve "distribution partnerships," but again, based on its proposed plans it is not clear what the Petitioner would be distributing. The Petitioner must resolve inconsistencies and ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The fact that the Beneficiary would manage the business does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(44)(B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. *Id.* Even though the Beneficiary would exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, these elements are not sufficient to establish that the actual duties the Beneficiary would perform within one year of the petition's approval would be primarily executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. 1103, 1108. Here, the Petitioner provided a vague job description that does not adequately convey the Beneficiary's actual proposed day-to-day tasks or establish that he would devote his time primarily to executive duties within one year.

B. Business Plan and Projected Staffing

In the case of a new office petition, we review the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended 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 executive in nature within one year of the petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed executive position is plausible based on 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 discussed, the Petitioner indicated in the Form I-129 that it employed ten individuals as of the date the petition was filed. The Petitioner submitted an organizational chart indicating that the Beneficiary would oversee an operational manager who would supervise three cashiers and a chef. The chef was shown to oversee two cooks, two "sushiman," and a "novice." The chart also reflected that the company would engage contractors, including an accountant, an "IT supplier," "maintenance," and "marketing."

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 managers 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. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The Petitioner did not submit a sufficient duty description for the Beneficiary's asserted managerial subordinate. The Petitioner submitted a brief and vague duty description for the Beneficiary's lone subordinate, the operations manager, which does not demonstrate that he would act as a subordinate manager. For instance, the Petitioner stated that the operational manager would be tasked with overseeing "the operation and profitability of the company," ensure "rapid response and high client level satisfaction," manage "company staff and resources," "locate, select, and procure merchandise for resale," and "represent management in purchase negotiations." This vague duty description does not demonstrate how the Beneficiary's lone subordinate will primarily relieve him from the non-qualifying operational aspects of the business. The Petitioner indicated that the Beneficiary would delegate duties to his operational manager, but did not detail what duties these would be within the first year. Further, given the Petitioner's proposed plans to operate one sushi location and the Beneficiary's asserted duties, it does not appear credible that the Petitioner would require two managerial level employees, namely the Beneficiary and an operational manager, to focus on the company's procurement of goods for sale.

As such, the Petitioner's asserted organizational structure as of the date of the petition was filed does not reflect that the Beneficiary would oversee a subordinate level of managers where he would be primarily relieved from performing non-qualifying operational duties. Beyond this, the Petitioner did not articulate any additional hiring plans during the first year, despite stating in the the Beneficiary's duty description that he would "hire and train professionals to work in the company and establish their duties and responsibilities."

Furthermore, the Petitioner did not sufficiently articulate its first year business plans as necessary to demonstrate that it would likely develop sufficiently during the first year to support the Beneficiary in an executive capacity. As discussed, in the case of a new office petition, the 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 executive in nature *within one year* of the petition's approval. The Petitioner's business plan indicated that the "set and startup operation of [the Petitioner would be] for the period between 2017 and 2020." The Petitioner also stated that "the company expects to reach six figure sales levels by the fifth year," but in apparent contradiction, elsewhere listed in financial projections in the same business plan that it would earn over $660,000 in revenue during the first year. In addition, despite the direct request of the Director, the Petitioner provided no detailed action items, timetables, or business benchmarks that would need to be completed and reached during the first year to effectively develop the business. Further, as noted, the Petitioner did not specify any additional hiring plans during the first year.

We acknowledge that the Petitioner also vaguely listed various contractors in its organizational chart, including an accountant, an "IT supplier," "maintenance," and "marketing." However, the Petitioner did not clearly describe these contractors, how they would support its functioning and growth, or how they could be considered a part of its organizational chart within one year. In response to the RFE, the Petitioner submitted a "Corporate Record, Accounting, and Tax Service Agreement" it executed with a contractor; however, it did not describe the services this contractor would provide or how often they would be engaged within the first year. In sum, the Petitioner has provided little detail regarding its first year business plans and not sufficiently demonstrated how it will grow as necessary to support the Beneficiary in an executive capacity within one year.

The Petitioner has also not sufficiently established the size of the investment in the new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(2). In the submitted business plan, the Petitioner stated that it required an initial investment of $130,000; however, it did not submit supporting documentation to substantiate this investment. In fact, the Petitioner's most recent bank account statement reflected that it had a little more than $3,000 in its bank account. Further, even if the Petitioner had demonstrated that it has secured the initial investment, it also did not clearly articulate how this initial investment would be used during the first year to launch the business, nor did it tie this investment to actions, milestones, and timelines to clearly establish how it would develop sufficiently during the first year to support the Beneficiary in an executive capacity.

The Petitioner has not demonstrated that the Beneficiary would likely act in an executive capacity within the first year. As we have discussed, it has submitted a vague duty description for the Beneficiary that does not sufficiently detail the executive-level duties he would perform within one year. The Petitioner also has not credibly articulated and documented how its sushi location would support the Beneficiary in an executive capacity within one year. The Petitioner's business plans do not adequately detail the first year actions it will undertake to successfully launch the business such that it would support the Beneficiary in an executive capacity within one year. Further, the Petitioner has not submitted sufficient evidence to substantiate its first year investment in the new business.

For the aforementioned reasons, the Petitioner has not established that the Beneficiary would act in an executive capacity within one year of an approval of the petition.

## III. CONCLUSION

The appeal will be dismissed because the record does not include sufficient evidence to establish that the Beneficiary would be employed in an executive capacity within one year of an approval of the petition.

**ORDER:** The appeal is dismissed.

Cite as *Matter of S-4F-C- LLC*, ID# 1400927 (AAO Oct. 4, 2018)