U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-H-, LLC

DATE: SEPT. 19, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a remodeling and construction company, seeks to extend the Beneficiary's temporary employment as its chief executive officer (CEO) under the L-1A nonimmigrant classification for intracompany transferees.[1] *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, 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 record establishes that the Beneficiary will be employed in an executive or managerial capacity.

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 managerial or executive capacity, or in position involving specialized knowledge, 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 or executive capacity. Section 101(a)(15)(L) of the Act.

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period October 19, 2015, to October 18, 2016. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary 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 one year within the date of approval of the petition to support an executive or managerial position.

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 would employ the Beneficiary in a managerial or executive capacity under the extended petition. Specifically, the Director concluded that the Beneficiary's job description was too general and did not convey his actual day-to-day tasks. The Director also found that the Petitioner's staffing levels did not reflect that the Beneficiary would oversee subordinate managers, supervisors, or professionals. Further, the Director concluded that the Beneficiary would more likely than not be involved in all the operational non-managerial aspects of the business based on its current staffing levels.

On appeal, the Petitioner submits additional evidence related to the Beneficiary's investigation of a new business venture and asserts that the totality of the evidence is sufficient to establish that the Beneficiary's duties will be primarily managerial and executive in nature.

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.

The law defines the term "managerial capacity" as an assignment in which an 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; has the authority to hire and fire or recommend those as well as other 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. 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.*

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) takes 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.

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). Beyond the required description of the job duties, 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. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the business and its staffing levels.

A. Duties

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.

The Petitioner stated that when it opened its new office in the United States, it planned on launching a home physical therapy service business with a partner, but that it "experienced difficulty with its business partner." The Petitioner indicated that it lieu of this planned business it launched a remodeling and construction business known as ' and an import and export business known as ' ' in August 2016.[2] The Petitioner explained that the remodeling and construction business would focus on a wide variety of services including handy man services, pool renovation and maintenance, plumbing, and other general construction services. Further, the Petitioner indicated that its export business would focus on importing various goods to South America, including aircraft, hospital equipment, security technology, antique and race vehicles, and fitness equipment.

The Petitioner stated that the Beneficiary would spend his time performing some of the following general responsibilities: overseeing these businesses, directing prices and "sales promotions," coordinating "financial and budget activities," establishing "company policies, goals, objectives, and procedures," negotiating "contracts with suppliers," and "staying apprised of the latest developments in the industries." In response to the Director's request for evidence (RFE), the Petitioner attempted to provide more detail with respect to the Beneficiary's duties indicating in a support letter the Beneficiary's decision to shift the company's focus and explaining business opportunities in its region. The Petitioner noted that the Beneficiary had not yet launched the proposed import business, but stated this would take place in March 2017. However, the Petitioner provided invoices related to various handyman, property maintenance, and equipment maintenance jobs, asserting that it earned

[2] The Petitioner filed this Form I-129, Petition for a Nonimmigrant Worker, in October 2016.

approximately $74,000 from these transactions in 2016.[3] The Petitioner stated that the Beneficiary will "assume less direct day-day role in the company and focus on the plan to improve the division's profitability and oversee the business development activities of the company," such as launching "www.

On appeal, the Petitioner submits a letter from the president of a pipe manufacturer, indicating the company's need for an individual to "oversee the management and oversight of hiring and training plant employees, set the production schedule and to have the depth to understand our process." He explained that the Beneficiary would "be a perfect fit for [the company's] IT3 System Plant Manager." In addition, the Beneficiary provides a letter on appeal stating that he would be tasked with "management of scheduled work and employees, developing relationships with customers, initiating contracts with prospective customers, [and] oversight and approval of work performed by employees," while also playing "a more direct advisory role in equipment repair of work performed by employees" of

As a preliminary matter, the Petitioner's shifting description of the Beneficiary's managerial or executive role leaves serious question as to the actual duties he has performed during the first year and the duties he would perform under the extended petition. The Petitioner asserts on appeal, and provides a corroborating letter, reflecting that the Beneficiary is being considered for a managerial position with another company. The Petitioner also submits a contract dated in May 2016 indicating that the Petitioner will act as an independent contractor for and a few invoices reflecting that it performed equipment maintenance services for this client. However, the Petitioner provides insufficient detail regarding the Beneficiary's proposed work for The language of the client letter suggests that this is a newly proposed position with the company; and therefore a material change to the petition and his potential employer, rather than a continuation of the Petitioner's previous services for the client. However, if the Beneficiary's newly proposed role with the Petitioner is indeed an extension of its previous arrangement with it appears the he would be substantially performing non-qualifying operational duties by directly providing services to the Petitioner's client.

Further, given the Petitioner's assertions on appeal relative to the Beneficiary's proposed new capacity with it is not clear how much time he would devote to this role as opposed to his asserted role as CEO of the Petitioner. This change is presented in light of the Petitioner's previous shifting focus as to its business activities, including handyman services, construction services, import and export activities, and now the Beneficiary's proposed role as an apparent representative for a piping technology company. In fact, the letters presented on appeal from the Beneficiary and the president of appear to conflict. In the former case, the Beneficiary indicates that he will act in a more direct advisory role in equipment

[3] The Petitioner provided copies of its independent contractor agreements with and indicating the Petitioner would provide maintenance and repair services for these companies. Based on the documentation submitted, these two entities and the Petitioner all share the same business location at in Texas. The Petitioner states that it leases an "office and shop" at this address, but has not provided a copy of the lease agreement or explained how this location is shared among three companies.

repair, while the letter from [redacted] indicates he will undertake a management and oversight role involving hiring and training its plant employees and setting production schedules.

Based on the Petitioner's conflicting explanations of the Beneficiary's duties, it is not possible to discern whether he is likely to spend his time primarily on qualifying managerial or executive duties. The Petitioner must resolve discrepancies 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). On appeal, a petitioner cannot offer a new position to a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. A petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

Further, to the extent that the Petitioner provided duties for the Beneficiary's claimed capacity as CEO, it has provided insufficient details and supporting evidence to establish that he would primarily perform managerial or executive tasks. For instance, the Petitioner does not explain pricing or sales promotions he set, financial or budget activities he directed, policies, goals, objectives, and procedures he established, or contracts he negotiated with suppliers. The Petitioner references the Beneficiary's decision to move the business away from its initial business model to various other ventures, but this does not represent an ongoing executive or managerial duty, but merely a one-time decision. In addition, as we have discussed, the Petitioner submits evidence specific to its provision of equipment maintenance services for [redacted] and this client references the Beneficiary providing these services along with his background in engineering. The Petitioner does not indicate an employee responsible for these equipment maintenance services other than the Beneficiary, and given its statements and those of [redacted] on appeal, it appears more likely than not that he will be providing these services to the client. The Petitioner may intend to grow to a point where the Beneficiary will be relieved of this responsibility, but the evidence does not support this conclusion at the time of filing.

In short, to the extent the Petitioner references certain qualifying managerial or executive duties, these are not sufficiently supported by details and supporting evidence. The Petitioner has not clearly articulated what the Beneficiary does on a daily basis. 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).

The Petitioner has not established that the more detailed position description provided in response to the RFE accurately or completely reflected the Beneficiary's actual duties as of the date of filing. Even though the Beneficiary holds a senior position within the organization, the fact that he 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. 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; however, the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial or executive in nature.

B. Staffing

The Petitioner asserted that it employed two employees subordinate to the Beneficiary at the time of filing, an administrative assistant and a construction worker. In response to the RFE, the Petitioner further stated that it had hired a construction manager in November 2016 and also indicated that it planned to hire a contract buyer and a purchasing coordinator to work in its planned export business.

The Petitioner has referred to the Beneficiary's position as both executive and managerial, emphasizing in response to the RFE that he would oversee the subordinate construction manager. 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."[4] Section 101(a)(44)(A) of the Act. 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.

We acknowledge that the Petitioner submitted a resume for its asserted administrative assistant reflecting that she has a bachelor's degree in nutrition. However, the Petitioner did not state that there was a minimum educational requirement for this subordinate position, and this educational background appears completely unrelated to the duties of the position. Therefore, the record does not establish that the Beneficiary would supervise subordinate professionals.

In addition, although we acknowledge that the Petitioner asserts it hired a subordinate manager in late November 2016, this is not relevant with respect to determining whether it had sufficient staff to qualify the Beneficiary as a personnel manager when it filed the petition in October 2016. Otherwise, the Petitioner does not assert or document that the Beneficiary oversaw subordinate managers or supervisors when the petition was filed. Again, a petitioner must establish that the

[4] 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 *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. *See Michelin Tire Corp.*, 17 I&N Dec. at 248, 249.

In addition, to the extent that the Petitioner provided duties for the Beneficiary's subordinates, particularly for the administrative assistant, these duties are not supported by the submitted evidence. The Petitioner initially indicated that it employs this worker is a "payroll/accounting" employee and later assigned the "administrative assistant" job title. For instance, the Petitioner states that the administrative assistant would be responsible for payroll processing, invoicing, purchase orders, winding down the company's previous venture, recommending changes to policies and procedures, overseeing maintenance and repair of equipment and machinery, assisting the construction manager, and ongoing assessment of subcontractors. However, the Petitioner did not have a construction manager or subcontractors when the petition was filed, nor did it have anyone on staff, other than the Beneficiary, qualified to maintain and repair equipment and machinery. The Petitioner has not provided a credible description of this employee's duties.

Further, the Petitioner submitted copies of checks it received from [redacted] and [redacted] which were actually signed by the Petitioner's claimed administrative assistant as a representative of those two companies. These checks post-date her claimed date of hire by the Petitioner and it did not provide an explanation as to why its claimed full-time employee is signing checks for unrelated companies. The Petitioner has not adequately substantiated that the Beneficiary would be relieved from performing non-qualifying operational tasks as of the date of the petition by the administrative assistant and a handyman/construction employee.

In fact, the evidence and the Petitioner's statements strongly suggest that the Beneficiary was still significantly involved in operational level tasks as of the date of filing the petition. First, we note that the Petitioner states and provides supporting evidence indicating that it only had two operational level employees as of the date of the petition. Further, the Petitioner makes various statements indicating that the Beneficiary had not yet been relieved from non-managerial tasks, including noting that its export business had not yet been launched, that he would assume less of a direct role in the future, and that he planned on putting managers in place in both divisions during the coming year.

In sum, 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. The Petitioner has not claimed, in the alternative, that the Beneficiary would primarily manage an essential function of the organization.

Further, although the Petitioner cites to the definition of "executive capacity" on appeal, it has not established that the Beneficiary would be employed in such 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. 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.*

Here, while the Beneficiary appears to have the appropriate level of authority, the Petitioner has not established that, as of the date of filing, he was primarily concerned with the broad policies and goals of the organization, that the day-to-day management rested with a subordinate tier of management, or that he would be relieved from substantial involvement in the day-to-day operations of the business. We acknowledge that 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 discussed, the Petitioner did not consistently or sufficiently describe the Beneficiary's duties and we cannot determine that his role would involve primarily executive-level tasks. The Petitioner has not demonstrated that the Beneficiary has managerial subordinates as of the date of the petition, or that his two operational and administrative subordinates would relieve him from performing non-qualifying operational duties. In fact, the Petitioner appears to claim on appeal that the Beneficiary is likely to be engaged by another company as a manager, and it does not explain how this circumstance would impact his asserted executive capacity with the Petitioner. For all of these reasons, the appeal will be dismissed.

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 E-H- Inc.*, ID# 623078 (AAO Sept. 19, 2017)