U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-, LLC

DATE: SEPT. 20, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an aviation technology consulting firm, seeks to temporarily employ the Beneficiary as its managing director under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner had not established, as required, that the Beneficiary: (1) would be employed in an executive capacity for the U.S. entity; and (2) had been employed as an executive for the foreign qualifying organization.

On appeal, the Petitioner asserts that the Director's decision is based on incorrect assumptions and that the evidence establishes that the Beneficiary has been employed abroad and would be employed in the United States in an executive capacity.[1]

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 a 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 does not claim that the Beneficiary has been or would be employed in a managerial capacity.

An individual L-1A petition filed on Form I-129, Petition for a Nonimmigrant Worker, must include evidence that the petitioner will employ the beneficiary in a managerial or executive capacity, including a detailed description of the services to be performed. 8 C.F.R. § 214.2(l)(3)(ii).

The Act defines the term "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 thereof; 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.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Petitioner is a management and consulting firm that provides advisory services in aviation information technologies. It was established in January 2015. The Petitioner states on the Form I-129 that it employs three U.S. workers.

The Director determined that the Beneficiary will be required to perform the actual work of the company, such as managing projects, marketing, and first-line supervisory duties, rather than primarily functioning as an executive.

We will address both the Petitioner's description of the Beneficiary's intended duties as well as the Petitioner's staffing to determine whether the Petitioner has established this eligibility requirement. We note that when reviewing staffing levels as a factor in determining whether an individual is acting in an executive capacity, we must take 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.

A. Duties

When examining the executive capacity of a beneficiary, we will look first to a petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definition of executive capacity has two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See, e.g.*, *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

In a letter submitted in support of the petition, the Petitioner asserted that its objective is to have the Beneficiary "oversee the company's consulting services of aviation market analysis, project management, and air traffic management solutions for North America." The Petitioner stated that the Beneficiary would spend 50 percent of his time on contract management of European customers

"requiring harmonization consulting services with U.S. entities and standards" and 50 percent of his time on contract vehicle establishment "pursuing opportunities with U.S. government and private industry to promote joint business activities with European companies." In a job offer to the Beneficiary, dated November 15, 2016, the Petitioner stated that the Beneficiary's "specific tasks will be to provide technical advice to private and public aviation organizations, identify prospective customers and perform corporate management duties." These briefly described duties indicate that the Beneficiary is the individual who will be performing the consulting services, by providing technical advice, and will be marketing the Petitioner's services by pursuing business opportunities with the U.S. government and private industry. However, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in an executive capacity. *See, e.g*, section 101(a)(44)(B) of the Act (requiring that one "primarily" perform the enumerated executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In response to the Director's request for evidence (RFE), the Petitioner stated that the Beneficiary will "[s]et out the strategic direction of the team," will pursue business opportunities and research agreements which involve seeking new clients from a variety of sources, and will manage the team's project portfolio which "involves maintaining and growing the client base, generating leads, managing project pipeline and connect[ing] with clients on a regular basis through client calls, meetings and networking." The Petitioner added that the Beneficiary will "[s]upervise performance and deliverables of active contracts and projects, and provide recommendations," and will execute human resources policy which involves managing the entire recruitment process, performance quantification, and salary and benefit incentives.

This additional job description is broadly-stated and the Petitioner does not document what proportion of the Beneficiary's duties would be managerial or executive functions and what proportion would be non-qualifying. The Petitioner lists the Beneficiary's duties as including some generally described managerial tasks which may be first-line supervisory tasks (recruiting employees and recommending personnel actions), some vaguely described executive tasks (developing organizational policies and objectives and recruiting employees), and operational tasks (seeking new clients, maintaining and growing the client base, connecting with clients, and managing the project pipeline). The Petitioner, however, does not quantify the time the Beneficiary would spend on these different duties. 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). The Petitioner's descriptions of the Beneficiary's duties and responsibilities and the Petitioner's job offer to the Beneficiary reviewed in their totality demonstrate that the Beneficiary will primarily perform non-qualifying duties such as marketing the company, connecting with prospective customers, providing technical advice, and recruiting resources and employees which may be first-line supervisory duties.

On appeal, the Petitioner asserts that the Beneficiary's responsibilities will be to coordinate the vision and mission of the company and to assist in developing the company structure and brand

within the European and U.S. markets and standardization efforts. The Petitioner notes that the Beneficiary "is expected to negotiate the terms and technical direction of the company's participation in projects and teams and assess whether they are in line with the company's vision and mission," and that his "role also involves developing a growth strategy." The Petitioner, however, does not detail the tasks involved in these duties as it relates to the Petitioner's aviation technology consulting business. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The Petitioner has not provided the necessary detail and explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

The fact that the Beneficiary manages or directs 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 in nature. Sections 101(A)(44)(B) of the Act. While the Beneficiary may exercise some discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that his actual duties would be primarily executive in nature.

B. Staffing

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

The Petitioner's initial organizational chart identified two departments: (1) an aviation information technology department headed by the Petitioner's chief executive officer and which included two other individuals;[2] and (2) the data communications and airports department to be headed by the Beneficiary which included one other individual. In response to the Director's RFE, the Petitioner submitted a revised organizational chart showing that the Beneficiary's department included two additional vacant subordinate positions, and information that the Petitioner was actively interviewing to fill the two additional positions. However, a Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and

[2] The record includes a subcontractor agreement with signed by the chief executive officer of that company. The chief executive officer of is the individual listed on the Petitioner's organization chart in the aviation technology department. Thus it appears that a subcontractor fills this position. The record does not include evidence of the employment of or the contractual relationship with the other individual listed in the Petitioner's aviation technology department.

continuing through adjudication. 8 C.F.R. § 103.2(b)(1). As the two additional positions were vacant when the petition was filed, these positions will not be considered.[3]

The Petitioner also identified the employee in the Beneficiary's proposed department as an airport operations specialist who would write and maintain concept of operations to support the application of developed technology to communication, navigation, and surveillance services and who would conceptualize airport terminal processes and operations to support business development in this new market. The Petitioner, however, does not describe this subordinate position as a managerial position and further does not explain how this individual would relieve the Beneficiary from performing the initially described consulting work, the marketing of the Petitioner's services to potential clients, and the operational duties necessary to manage the project pipeline.

On appeal, the Petitioner reiterates that the Beneficiary will lead the execution and quality of results, marketing strategy, management of customers' portfolios, and human resources, as well as directing the execution of recruitment policy. The Petitioner asserts that the individual in the airport operations specialist position will perform the technical work and that the chief executive officer performs the project management. The Petitioner does not explain the new division of duties amongst these three individuals or otherwise provide evidence establishing that the chief executive officer and airport operations specialist will relieve the Beneficiary from performing the previously described non-qualifying duties.

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, the Petitioner has not established that the Beneficiary has a subordinate level of managerial employees to direct or sufficient staff to relieve him from significant involvement in the day-to-day operations of the company.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, we must take into account the reasonable

[3] On appeal, the Petitioner emphasizes that the Beneficiary will execute the recruitment policy and that his leadership is required to develop and organize a solid departmental structure which will attract the resources needed and make them part of the team. The Petitioner, however, does not adequately develop this aspect of the Beneficiary's duties and does not establish how carrying out the Petitioner's recruiting policy is an executive task.

needs of the organization, in light of the overall purpose and stage of development of the organization. At the time of filing, the Petitioner was a consulting firm that had been operating for almost two years and claimed that it employed three individuals. The record includes evidence that the Petitioner employed the airport operations specialist for a limited period in 2016, but does not include evidence of payments made to other employees. Although the Petitioner's organizational chart lists two individuals reporting to the Petitioner's chief executive officer, the record does not include evidence that the Beneficiary is in their chain of command, nor does the record demonstrate that these two individuals will relieve the Beneficiary from performing operational tasks.

The record does not include sufficient probative evidence establishing that the Petitioner employs or contracts with subordinate staff to perform the actual day-to-day non-executive operations of the company. It does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the Beneficiary as managing director, the chief executive officer, one other employee, and two possible subcontractors. The Petitioner has not established that the Beneficiary will be employed in an executive capacity.

III. EMPLOYMENT ABROAD IN AN EXECUTIVE CAPACITY

The Director further found that the Petitioner did not establish that the Beneficiary has been employed abroad in an executive capacity. In the denial decision, the Director found that the submitted job descriptions indicate that his role with the Petitioner's foreign subsidiary involves consulting and managing customer portfolios, rather than primarily directing the management of the organization.

A. Duties

The Petitioner's initial evidence included three different descriptions of the Beneficiary's duties with the foreign entity. On the Form I-129, the Petitioner stated that the Beneficiary has been: "providing technical advice to governmental organizations . . . and research, validation, and standardization of future solutions for the aviation industry"; performing marketing duties, including identifying prospective customers, creating marketing plans and pursuing business opportunities; performing contract management duties, including monitoring project deliverables and invoicing; and handling corporate management responsibilities identified as "legal, accounting."

In the foreign employer's letter in support of the petition, the foreign employer certified that the Beneficiary is employed by and has been working as its managing director since May 11, 2015.[4] The foreign employer identified the Beneficiary's specific tasks as: assessing and executing incorporation procedures, tax, and legal duties to maintain the company in business; managing customers' portfolio and performing marketing activities in the European aviation and airport

[4] The foreign entity was incorporated on November 5, 2015, and the Petitioner acquired a 51 percent interest in the foreign entity on November 18, 2015. Although the foreign entity may have been operating as an unincorporated enterprise prior to November 5, 2015, the Petitioner does not provide this information.

markets; and maintaining liaison with the Petitioner regarding sharing of technology solutions, intellectual property, brand, and customer contracts.

Finally, the Beneficiary, on his resume, stated that he is a co-founder of the foreign entity, an engineering consultancy firm specializing in research, validation, and standardization of future solutions for the aviation industry and that he manages contracts and customers related to network infrastructure and airport net-centric information sharing systems. In each of these iterations of the Beneficiary's duties for the foreign entity, the Beneficiary is providing technical advice and performing the necessary operational and marketing tasks to support the foreign entity's business. These are non-qualifying duties.

In response to the Director's RFE, the Petitioner submitted a second letter from the Beneficiary's foreign employer. The foreign employer stated that the Beneficiary mainly performed executive duties, including: 40 percent of his time spent on developing market opportunities for the company, signing contracts for services and labor, and contacting new customers through his professional network and attendance at conferences and events; 30 percent of his time outlining strategic lines of the company business and developing the company's core business in Europe; 20 percent of his time on the recruiting process for employees and contractors, supervising the duties and performance of hired resources, and reporting periodically to the management board; and 10 percent of his time incorporating the company, managing the relationship with the Petitioner, and maintaining the tax and legal obligations.

This description does not provide sufficient information regarding the Beneficiary's duties to establish that he performs primarily executive duties. The foreign entity indicated that the Beneficiary spends the majority of his time (70 percent) developing marketing opportunities, signing contracts, contacting new customers, outlining strategic lines of the company business and developing the company's core business in Europe. The foreign employer does not provide a detailed description of the Beneficiary's specific tasks as they relate to these duties or explain how marketing the business and developing the foreign entity's core business meets the four-prong statutory definition of executive capacity. Similarly, the foreign employer does not provide sufficient information regarding the Beneficiary's recruiting involvement and supervision of other employees or contractors to conclude that the duties are executive in nature. The duties as described include non-qualifying duties as well as undefined duties that appear to include operational duties necessary to establish and continue the foreign entity's operations. The Petitioner has not established that the tasks described fall within the parameters of executive capacity as defined by the statute.

On appeal, the Petitioner asserts that the Beneficiary "established the company structure and transformed it from a one-individual venture to a team of collaborators" and that he has gradually moved his work from being an executive at the foreign entity to directing project performance and product development strategy of both the Petitioner and the foreign entity. The Petitioner contends that the Beneficiary has been exclusively responsible in establishing the business, putting together the highly-trained team, guiding its members, directing the management of the organization and

ultimately, establishing long-term strategic alliances and that it is the foreign entity's affiliation with the Petitioner which is the best evidence of his executive capacity in the European company. Establishing a company and helping it grow and expand is insufficient to establish that the Beneficiary's daily activities comprise duties that are primarily executive in nature. Reciting the Beneficiary's general responsibilities and accomplishments or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The Petitioner also does not explain the previous versions of the Beneficiary's duties for the foreign entity that describe his position as marketing the company, recruiting involvement, and supervision of employees and contractors. Nor does the Petitioner address the Beneficiary's own description of his duties abroad, which indicates that he manages contracts and customers related to network infrastructure and airport net-centric information sharing systems. The different versions of the Beneficiary's duties and responsibilities do not provide a consistent description of the Beneficiary's primary role at the foreign entity. The record is insufficient to establish that the Beneficiary performs or performed primarily executive duties for the foreign entity.

B. Staffing

The record includes the foreign entity's organizational chart which identifies the Beneficiary as heading the business management department.[5] The chart shows that three individuals report to the Beneficiary, an "accounting and EU tax compliance specialist," a marketing and communications employee, and a technology strategy employee. The record also includes brief descriptions for each of these employees' duties.

The accounting and EU Tax compliance specialist position is described as keeping company account entries (sales, expenses, and quotes) up to date, verifying the asset and liability accounts, maintaining records of company transaction documentation (invoices, expense records, and quotes), and generating tax forms verifying compliance with EU fiscal law, and submitting forms to tax authorities. The Petitioner on appeal describes this position as conducting the operational tasks of the day-to-day structure. The Petitioner's statement on appeal is vague but it appears that this individual may perform some of the administrative tasks necessary for the foreign entity's operations. The evidence of record does not suggest that this individual manages other staff or a particular function.

The marketing and communications specialist's duties are described as designing marketing material, creating, distributing, and updating corporate documentation, visitor cards, and logo, working with the Beneficiary on the company communications and material by verifying

[5] The organizational chart also shows the Petitioner's chief executive officer on the same tier as the Beneficiary in the technical consultancy services division. The chart shows one individual reporting to the chief executive officer. Both the Beneficiary and the Petitioner's chief executive officer report to the foreign entity's board of directors.

translations, and supporting the marketing campaigns by providing the brochure layout, corporate design, and language verification with prospective customers. The Petitioner on appeal claims that the individual in this position prepares proposals for European calls for tender. The Petitioner does not clarify whether preparing proposals is an additional duty for this position or whether preparing proposals is the primary focus of this position and that participating in marketing campaigns is a supplementary or intermittent duty. The record here does not include sufficient probative evidence establishing that the individual in this position manages others or a particular function.

The technology strategic advisor position is described as applying Internet services skills and expertise to support the Beneficiary in strategic decision-making in terms of technology choices to achieve customer goals, advising on technology feasibility of entering new products and markets in web services, data analytics, and automation domains, and providing access to a professional network of developers, researchers, business managers, and investors in communication technology. The Petitioner, states on appeal that the individual in this position provides technical consultancy services to the company's customers. The limited information in the record regarding this position suggests that this individual performs operational tasks related to technology tasks and customer service. The record does not include sufficient evidence to establish that the individual in this position manages others or a particular function.

The record also includes a document showing the number of hours these individuals work per week and their rate of pay. Although the document includes the dates May 11, 2015, to December 31, 2016, in its heading, it does not show when these individuals joined the foreign company, a company the Petitioner referred to as initially a one-individual venture. Accordingly, the Petitioner has not established when the subordinate employees began working for the foreign entity.

The Petitioner asserts that the Beneficiary's executive position requires that he directs the management of this team and the organization as a whole, and that he also establishes the company's goals and policies, while exercising wide latitude in discretionary decision-making.

The evidence does not support a conclusion that the Beneficiary's subordinates are managers who primarily manage others or specific functions. Instead, the Beneficiary's subordinates appear to perform the day-to-day functions of the foreign entity's consulting business, such as bookkeeping, and other administrative, technical, and operational tasks. The record does not include evidence of an organizational structure sufficient to support the Beneficiary in a position that is primarily an executive position. Nor does the record establish that the foreign organization employed a sufficient number of employees to develop the foreign entity's marketing opportunities, manage the foreign entity's contracts and customer portfolios, and recruit resources to perform consulting work, thereby relieving the Beneficiary from performing the necessary duties of the organization to keep it operational. The record does not establish that the Beneficiary's employment for the foreign entity has been in a primarily executive capacity.

IV. ONE-YEAR OF EMPLOYMENT ABROAD

Beyond the Director's decision, the record does not establish that the Beneficiary has at least one continuous year of full-time employment abroad within the three years preceding the filing of this petition. *See* 8 C.F.R. § 214.2(l)(3)(iv).

The Petitioner stated on the Form I-129, that the Beneficiary began work for the foreign entity in May 2015. The Beneficiary noted in his resume that from 2013 to present he worked as an aerospace technology consultant in [redacted] and in Spain as a "[f]reelance contractor public, private and academic stakeholders involved in initiatives for advancement in the current global air transportation market." The Beneficiary indicated that this work was in addition to his employment with the foreign entity. In response to the Director's RFE questioning the Beneficiary's one-year of continuous foreign employment, the Petitioner stated that the Beneficiary's presence in the United States was due to his wife's (a G-4 visa holder) complicated pregnancy, but he traveled frequently back to the foreign company's office in Spain and was fully engaged in his role as chief executive officer of the foreign entity.

Periods of time spent in the United States for business or pleasure, although not interruptive of the one-year of continuous employment abroad, shall not be counted toward fulfillment of the one-year of required continuous employment abroad. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A). Therefore, the Petitioner needs to show not only that the foreign entity employed the Beneficiary, but also that he spent a total of one year abroad between commencing his employment with the foreign entity in May 2015 and the filing of this petition in December 2016. During this period of approximately 19 months, the Beneficiary spent well over half of his time (at least 400 days) physically present in the United States in G-4 status.

Accordingly, the Petitioner has not established that the Beneficiary meets this eligibility requirement. For this additional reason, the petition cannot be approved.

V. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary has been employed abroad, or would be employed in the United States, in an executive capacity. In addition, the Petitioner has not established that the Beneficiary has one year of full-time continuous employment abroad in the three years preceding the filing of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of S-, LLC*, ID# 613194 (AAO Sept. 20, 2017)