U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-S-USA, INC.

DATE: SEPT. 28, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an operator of automated payment systems, seeks to temporarily employ the Beneficiary as the president and CEO of its new office 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 did not establish, as required, that it would employ the Beneficiary in the United States in an executive capacity within one year of approval of the petition.[1]

On appeal, the Petitioner submits a brief disputing the denial. The Petitioner states that the Beneficiary's proposed employment satisfies the statutory definitions of managerial and executive capacity and claims that it will be sufficiently staffed to relieve the Beneficiary from having to perform its operational tasks.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a capacity that is managerial, executive, or involves specialized knowledge, for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.*

[1] The Director initially denied the Petition based on a finding that the Petitioner did not establish that it had secured sufficient physical premises to house its new office. On appeal, we found that the Petitioner overcame the sole basis for denial, but determined that it had not established eligibility for the requested classification based on the evidence of record at the time. Therefore, we withdrew the Director's decision and remanded the matter for further review and issuance of a new decision.

In order to qualify for L-1A nonimmigrant classification during the first year of operations, the regulations require a petitioner to demonstrate that: it has secured sufficient physical premises to house its new office operation; the beneficiary was employed abroad in a managerial or executive capacity; and the proposed employment would involve executive or managerial authority over the new operation. The petitioner must also disclose the proposed nature of the business and the size of the U.S. investment, and establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. 8 C.F.R. § 214.2(l)(3)(v)(C).[2]

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 statute 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.

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

In the denial decision, the Director determined that the Petitioner did not establish that the Beneficiary would be employed in an executive capacity within one year of approval of the petition. Namely, the Director concluded that the Petitioner did not establish that it would progress beyond the startup phase of its operation within one year of filing the petition such that it would have sufficient staff to relieve the Beneficiary from having to primarily perform non-executive job duties. The Director further found that the Petitioner provided an inadequate position description for the Beneficiary, and noted that there was an unresolved inconsistency with respect to the company's intended reporting structure.

On appeal, the Petitioner asserts that the Beneficiary's proposed position satisfies the statutory definition of executive capacity, and also states for the first time that the Beneficiary could alternatively be classified as a managerial employee. The Petitioner asserts that the Director placed

[2] On appeal, the Petitioner erroneously cites to the regulation at 8 C.F.R. § 214.2(l)(14)(ii), which applies to a petitioner seeking to *extend* the validity of a petition that involved the opening of a new office. Here, the Petitioner is not seeking to extend a previously approved petition, but rather is requested an initial approval as a new office.

too much emphasis on the projected small size of the company and did not consider the "key function" the Beneficiary will perform as president and CEO.

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). The regulations recognize that a designated manager or executive responsible for setting up a new office's operations may be engaged in a variety of activities that are not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed during this initial phase of operations. However, a petitioner is expected to provide evidence to demonstrate a realistic expectation that it will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform managerial or executive duties. *See generally*, 8 C.F.R. 214.2(l)(3)(v)(C).

Accordingly, we will address the Beneficiary's proposed duties as well as the Petitioner's business plan, projected staffing levels, and other relevant evidence in order to determine whether the office would more likely than not support a managerial or executive position within one year.

A. Duties

Based on the statutory definitions of managerial and executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties within one year, 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.

In its initial supporting statement, the Petitioner indicated that the Beneficiary would be employed in an executive capacity, responsible for expanding, organizing, and developing the U.S. business and for overseeing "all operational aspects" of the company. The statement includes a breakdown of the Beneficiary's 22 "primary responsibilities" and the percentage of time he would allocate to each duty. These duties included: collaborating with the financial and administrative manager, an accountant, and an attorney to formulate strategies and policies and devise financial goals; maintaining authority over "other executives" as well as the company's purchasing, sales, customer service, and human resources; traveling to meet with customers and business partners; attending industry events to network and learn management trends; identifying and developing business opportunities; developing the company's marketing, sales, and investments; negotiating and executing contracts; and approving manufacturers, vendors, and suppliers.

While the Petitioner claimed that the Beneficiary would approve agendas for shareholder meetings, which points to the Beneficiary's discretionary authority over corporate matters, the Petitioner's

reference to shareholder meetings is unclear given the Beneficiary's position as the company's sole shareholder. Although the Petitioner does not indicate that the Beneficiary would allocate a significant amount of time to this duty, this anomaly raises questions about the overall accuracy of the job description, which highlights the Beneficiary's discretionary authority over corporate and business matters and his direction of executive employees.

The Petitioner also provided a business plan, which states that, in addition to assessing marketing opportunities, the Beneficiary will be responsible for "gathering intelligence on customers and competitors, generating leads for possible customers and clients, and following up with sales activity." The Petitioner did not clarify whether the Beneficiary would continue to carry out these operational tasks beyond its first year of operation; however, it does not appear that such tasks have been assigned to the proposed subordinate positions.

Further, while the plan stated that the Petitioner would provide various services to its clients, including data analysis and reporting and call center support, it does not indicate that it would hire staff to perform these duties during the first year of operations. In discussing its management and staffing projections, the business plan states that the Petitioner will "assemble different disciplines, accomplished professionals with expertise in all areas of the business, including [m]arketing, [f]inance, IT [s]upport[,] and [l]ogistics." Although the business plan indicates that the Petitioner's "professional staff" will relieve the Beneficiary from having to perform the operational tasks, it does not explain who will provide the marketing and logistics services, which were not assigned to the three proposed positions the Petitioner intends to staff during the initial year.

As noted, the Director initially denied the petition based on a different ground of ineligibility and did not address the Beneficiary's employment capacity in the original decision. After we remanded the petition, the Director issued a request for evidence (RFE) informing the Petitioner that it did not provide an adequate job description for the Beneficiary's proposed employment in that it used general terminology and indicated that the Beneficiary would perform a number of non-managerial and non-executive job duties. The Director further noted that the job description contained in the Petitioner's supporting statement appears inconsistent with the list of duties attributed to the Beneficiary's position in the business plan.

In response, the Petitioner provided an additional breakdown of the duties that will comprise the Beneficiary's "proposed executive position." The Petitioner listed the eight elements that would comprise the proposed position and provided the percentage and hourly time allocations assigned to each component. First, the Petitioner indicated that 20% of the Beneficiary's time would be spent working with the company's three in-house employees – financial and administrative manager, technical support supervisor, and the office supervisor – to oversee the company's financial, marketing, and sales activities. Not only does this statement neglect to clarify the specific duties the Beneficiary would perform during the course of his oversight, but it also leaves out a portion of the original job description where the Petitioner indicated that the Beneficiary would collaborate with outsourced professionals, including an accountant and an attorney. As in the original job description, the Petitioner generally stated that the Beneficiary would design and approve the

company's strategic and operational plans. The Petitioner indicated that 10% of the Beneficiary's time would be allocated to this element as opposed to the original 5% that was allocated to a similar set of duties in the original description.

Next, the Petitioner broadly stated that 15% of the Beneficiary's time would be spent establishing relationships with "strategic partners and distributors," negotiating terms for pricing and shipping of the Petitioner's products, and developing prospective business. The Petitioner did not explain how these seemingly operational and sales-based activities should be classified as executive-level duties. The Petitioner went on to broadly state that the Beneficiary would develop corporate policies and "create performance review plans" for 10% of his time, "[d]etermine the U.S. company's organizational chart, job descriptions, and authority levels" for 10% of his time, and [e]nsure that the company matches its profit objectives" or another 10% of his time. While these statements indicate that the Beneficiary would have discretionary authority in all matters concerning the Petitioner's business, they are vague and do not reflect the specific duties that the Beneficiary would perform daily within the scope of a business that plans to operate and sell automated bill payment machines.

On appeal, the Petitioner resubmits the job description provided in response to the latest RFE and provides a new job description in the form of an hourly sampling of a single work day in an effort to supplement the information it already provided.

As with the prior job description submitted in response to the RFE, we find that the new job description contains ambiguities as to the Beneficiary's actual duties and is somewhat inconsistent with the job description that was originally submitted in support of the petition. The new job description does not state that the Beneficiary would oversee "other executives," as was originally claimed and it does not expand on the Beneficiary's actual role with respect to the purchasing, sales, and customer service functions. The Petitioner also does not state who will carry out these operational functions and provides only general information about the Beneficiary's role in their execution. Although the original job description stated that the Beneficiary would develop the Petitioner's marketing, sales, and investments, the new job description does not expand on this broadly stated job duty. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the actual duties themselves reveal the true nature of the employment. *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 original job description indicated that the Beneficiary would be directly involved in marketing and selling the Petitioner's products. While the new job description indicates that the Beneficiary will "receive an updated report on the sales accomplished as well as discuss updates on product marketing," the Petitioner does not state who would actually be tasked with the sales and marketing functions. We therefore cannot rule out the possibility that the Beneficiary would perform both of these operational tasks, as indicated in the original job description. While no beneficiary is required to allocate 100% of their time to managerial-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product

or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The job descriptions are also inconsistent with regard to the Beneficiary's role in making investments. While the original job description indicated that the Beneficiary controls investments, the latest job description does not indicate that the Beneficiary would carry out job duties associated with investing. Regardless, the original job description did not provide specific information about the Beneficiary's actual duties with respect to investment of funds. Lastly, while the original job description indicated that the Beneficiary's responsibilities would include negotiating and executing contracts or approving manufacturers, vendors, and suppliers, the new job description did not make a similar claim.

In addition to the inconsistencies listed above, the new job description on appeal contains a number of ambiguities that preclude us from gaining a meaningful understanding of the tasks the Beneficiary would perform within one year of filing the instant petition. First, while the Petitioner claims that the Beneficiary would meet daily with the financial and administrative manager to resolve issues concerning product shipments and to receive updates about sales and product marketing, it does not state who would sell and market the merchandise and who would actually engage in the logistics of arranging product shipment. As noted above, the Petitioner did not assign these operational tasks to any of the positions in its proposed support staff. Given that these tasks appear to be critical to the Petitioner's operations, it is not unreasonable to assume that the Beneficiary would be directly involved in selling and marketing the Petitioner's products and making arrangements with necessary third parties to deliver those products to the Petitioner's customers.

Further, while the new job description on appeal indicates that the Beneficiary would also meet with the financial and administration manager to "resolve any questions and problems the employees have" and address customer service issues, neither element can be readily classified as an executive-level task; nor is it apparent that addressing employee concerns in a three-person staff would be a necessary component of the Beneficiary's daily or weekly practice as the time allocation suggests.

The issue of the Beneficiary's direct involvement in overseeing lower-level employees arises again when we consider the Beneficiary's daily interaction with the technical operations supervisor to follow up on technical issues and equipment installation schedules and to resolve inventory-related concerns. If, as the organizational chart indicates, the financial and administration manager is in a supervisory role with respect to the technical operations supervisor, it is unclear why the Beneficiary would have to address concerns that are associated with the operational tasks of a lower-level non-professional employee. This inconsistency further highlights the incongruity between the projected organizational chart and the Beneficiary's proposed job duties.

The Petitioner also indicates that the Beneficiary would allocate his time daily to meeting with an outsourced accountant to resolve auditing issues, plan bill payment, analyze accounts payable and

receivable, and create a marketing budget. However, the Petitioner has not provided sufficient evidence to justify having daily or even weekly meetings with an outsourced accountant to address infrequent or intermittent events, such as undergoing audits or devising a marketing budget. The Petitioner projects that it will spend $4000 annually on "bookkeeping," which does not support the Petitioner's claim that the Beneficiary would meet daily with an outside accountant.

Likewise, we question the likelihood that the Beneficiary would hold daily meetings with outside legal counsel to resolve licensing or compliance issues, "address any legal ramifications" with late-paying customers, or review trademark or intellectual property issues. The Petitioner does not explain what licensing issues and intellectual property concerns it expects to encounter routinely within the context of its business to warrant the Beneficiary's daily or even weekly meetings with outside legal counsel. Moreover, the Petitioner's business plan does not included any projected expenses for outside legal counsel. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

In sum, instead of clarifying prior ambiguities, the newly submitted job description creates more ambiguities and is, at least in part, inconsistent with the originally submitted job description. The new job description is therefore insufficient to establish that the Beneficiary would allocate his time primarily to managerial or executive-level tasks within one year of filing the instant petition.

B. Projected Staffing

Further, despite the Petitioner's claims, the record does not demonstrate a realistic expectation that the organization will rapidly expand as it moves away from the developmental stage to full operations, such that there would be an actual need for an employee who performs primarily managerial or executive duties.

Here, the record contains two organizational charts depicting a similar organizational hierarchy. The first chart was included in the Petitioner's supporting statement and shows the Beneficiary at the top of the hierarchy, a financial and administrative manager as the Beneficiary's direct subordinate, followed by a technical support supervisor and an office supervisor at the bottom of the chart as the financial and administrative manager's direct subordinates. The Petitioner provided job descriptions for each of these positions, which state that all three employees would report directly to the Beneficiary and thereby suggest a different reporting structure than the one illustrated in the organizational chart. In response to the latest RFE, the Petitioner provided a second organizational depicting the same organizational hierarchy and adds two outsourced service providers – accounting and legal services – subject to oversight of the financial and administrative manager.

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 with the Beneficiary in the matter at hand. 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.*

In the present matter, while the record indicates that the Beneficiary would have discretionary authority to make business decisions as the organization's senior employee, it does not establish that the Petitioner would hire a subordinate level of managerial employees for the Beneficiary to direct such that he could primarily focus on setting broad goals and policies, rather carrying out the Petitioner's daily operational functions, within a one-year period. In fact, while the Petitioner's business plan addresses the issue of staffing in the "Management Summary" section, pointing to the pivotal role of a "management staff," the record does not contain evidence establishing that the Petitioner seeks to expand its staff beyond hiring a financial and administrative manager, whose managerial role is not clear based on the content of the provided job description. The same section of the business plan makes vague references to a "professional staff" that will eventually relieve the Beneficiary from having to perform the organization's operational tasks. However, the business plan does not list the projected positions or duties to be performed by the staff or state that the Petitioner would grow beyond three support staff during its initial year.

In addition, despite the financial and administrative manager's managerial position title, the reporting structure that was described in each of the employee job duties indicates that the subordinates would not directly report to the financial and administrative manager, as both organizational charts suggest; rather, the employee job descriptions indicate that the Beneficiary would directly supervise all three employees. Further, as we discussed above, the Petitioner's limited projected staffing structure indicates that the Beneficiary would likely have to continue to perform a number of its key operational functions, including, but not limited to, sales, marketing, and the logistical tasks involved in arranging third party shipping and receiving of merchandise. We therefore cannot conclude that the Petitioner would be able to support the Beneficiary in an executive position at the end of the one-year period following the filing of this petition.

The Petitioner also has not established, in the alternative, that the Beneficiary would be employed in a managerial capacity within one year. 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." 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*).

As discussed, the Petitioner's staffing projections do not support the claim that the Beneficiary's primary concern at the end of the one-year period in question would be to oversee a staff of supervisory, professional, or managerial subordinates. Rather, it appears that the Petitioner's projected support staff would perform managerial or supervisory job duties, notwithstanding their position titles.

Alternatively, the Petitioner argues that the Beneficiary would assume the role of a function manager, contending that rather than focusing on the number of employees the Beneficiary would oversee, we should look to the function the Beneficiary would perform. The Petitioner further argues that a beneficiary's performance of "secretarial functions" is "irrelevant" if that individual manages an essential function. We disagree and find that the record does not support the claim that the Beneficiary would be employed as a function manager.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a petitioner must clearly describe the duties to be performed in managing the essential function, or more specifically, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform duties related to the function. See *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016).

As already addressed, the Petitioner has not provided an adequate job description that specifically lists the Beneficiary's proposed job duties. Furthermore, the Petitioner has not specifically identified the essential function it claims the Beneficiary would manage and it neither claims nor establishes that the Beneficiary would primarily manage an essential function. Rather, in multiple places throughout the appeal brief, the Petitioner states that the Beneficiary would actually *perform* a key function. While the management of support personnel is generally only ancillary to the primary concerns of a function manager, the Petitioner must provide evidence that its organization would expand within its first year of operation such that it would have the support staff necessary to carry out the underlying duties associated with the essential function that the Beneficiary would manage. Our discussion above specifically addresses the various deficiencies in the job descriptions provided and explains why the Petitioner's projected support staff falls short of establishing that such staff would sufficiently relieve the Beneficiary from having to perform its operational tasks within one year.

On appeal, the Petitioner cites to an unpublished decision in which we determined that a beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even

though he was the sole employee. The Petitioner has not established that the facts of this petition are analogous to those in the unpublished decision. Moreover, while 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on U.S. Citizenship and Immigration Services, unpublished decisions are not similarly binding. Likewise, with regard to the Petitioner's reference to *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1574 (N.D. Ga. 1988), we find that the Petitioner has similarly neglected to furnish evidence to establish that the facts of the instant petition are analogous to those in *Mars Jewelers*, where the district court found in favor of the plaintiff. That said, as with our own unpublished cases, we are not bound to follow the published decision of a U.S. district court in matters arising within the same district. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

We find that the Petitioner's arguments on appeal do not adequately address the deficiencies discussed above and therefore it has not overcome the basis of the Director's decision.

III. CONCLUSION

The appeal must be dismissed as the Petitioner has not established that its new office would employ the Beneficiary in a managerial or executive capacity within one year.

ORDER: The appeal is dismissed.

Cite as *Matter of E-S-USA, Inc.*, ID# 574143 (AAO Sept. 28, 2017)