



**U.S. Citizenship
and Immigration
Services**

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

MATTER OF S-S- LLC

DATE: JUNE 22, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, flooring, tile, and construction company, seeks to extend the Beneficiary's temporary employment as its president 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 the Beneficiary would be employed in an executive capacity under the extended petition.

On appeal, the Petitioner submits a brief, asserting that the Director erred by applying regulations that pertain to the extension of a "new office" petition. The Petitioner claims that the Beneficiary will be employed in an executive capacity.

Upon *de novo* review, we find that, while the Director's reference to the Petitioner as a new office may have been in error, this error was harmless, as any petitioner seeking an extension of an L-1A petition must establish that the beneficiary will be employed in a managerial or executive capacity. As discussed below, we find that the Petitioner did not meet this eligibility requirement. Therefore, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 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. 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, executive, or specialized knowledge capacity. *Id.*

An L-1A classification petition must be accompanied by evidence establishing that: the beneficiary has been employed abroad in a position that was managerial, executive, or involved specialized knowledge for at least one continuous year in the three years preceding the filing of the petition; the beneficiary is coming to work in the United States in a managerial or executive capacity for the same employer or a subsidiary or affiliate of the foreign employer; and, the beneficiary's prior education, training and employment qualifies him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that the Beneficiary would be employed in the United States in an executive capacity. The Petitioner does not claim that the Beneficiary would be employed in a managerial capacity.

The term "executive capacity" is defined as "an assignment within an organization in which the employee primarily":

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) 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. Further, 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) 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 managerial 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).

Based on the statutory definition of 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 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 filed the Form I-129 claiming 14 employees and a net income of \$689,313. In a supporting cover letter, the Petitioner described the Beneficiary's proposed employment by paraphrasing the components of the term "executive capacity" and claiming that the Beneficiary would oversee the daily operations, develop contacts with potential clients, identify business opportunities, hire employees, and manage employee relations. The Petitioner did not state how much of the Beneficiary's time would be allocated to developing contacts with potential clients, which is a sales-driven, rather than an executive function. The Petitioner also did not specify how the Beneficiary would manage employee relations or state whether directly managing personnel would be a component to this responsibility.

The Director issued a request for evidence (RFE) advising the Petitioner that the initial supporting evidence was not sufficient to establish eligibility. The Director explained that the job description was overly broad and thus insufficient to establish that the Petitioner would employ the Beneficiary in an executive capacity. Accordingly, the Petitioner was instructed to provide a list itemizing the Beneficiary's job duties and to indicate what percentage of time he would allocate to each duty.

Although the Petitioner's response statement indicated that the submitted evidence would include the Beneficiary's job duties, the list of supporting exhibits pertaining to the U.S. entity did not indicate that a supplemental job description was being provided, nor did the response include any additional information about the job duties the Beneficiary would perform under the extended petition. We note that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In denying the petition, the Director noted that paraphrasing the statutory definition of executive capacity is not sufficient to establish that the Beneficiary's actual duties would be primarily executive in nature.

On appeal, the Petitioner contends that the denial contains errors of law and fact, claiming that the Director erroneously applied "new office" regulations when adjudicating the original petition and thus previously granted the Beneficiary a one-year stay based on this error. We note, however, that any errors or issues that pertain to a prior adjudication of a different nonimmigrant petition should have been addressed at the time of such adjudication and cannot be addressed here. Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. 8 C.F.R. § 103.2(b)(16)(ii).

Here, the Director focused, in part, on the lack of a detailed job description, noting that the only job description the Petitioner submitted was one that merely paraphrased the statutory definition and did not delineate the Beneficiary's specific job duties. Under 8 C.F.R. §§ 214.2(l)(3)(vii) and (l)(14)(i), the Director had the discretion to request additional evidence and specifically advised the Petitioner

that the position description was deficient prior to denying the petition. We note that 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). Therefore, despite the Director's reliance on regulations that pertain to the extension of a new office petition, the error does not affect the instant discussion, which turns, in part, on the Beneficiary's job description and whether it adequately conveys an understanding of the job duties the Beneficiary would perform under the extended petition.

Although the Petitioner provides another job description on appeal, the content is similar to the job description that was previously submitted and also contains job duties that cannot be readily identified as those of an executive. Namely, the Petitioner claims the Beneficiary will price jobs with the office manager, negotiate client contracts, supervise employees and subcontractors, assign employee job duties, and make sure that all necessary materials are at the respective job sites. However, aside from the discretionary authority that is clearly a component to these job duties, it appears that the Beneficiary would carry out sales- and customer service-related tasks and oversee a staff of non-supervisory and non-professional employees.

Further, as discussed below, the Petitioner does not claim to employ other employees who actually sell its products and services to customers. While the Beneficiary is not required to allocate 100% of his time to executive-level tasks, the Petitioner must establish that the non-executive 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). Here, the Petitioner provided a vague job description that broadly paraphrases the statutory definition and indicates that an undisclosed portion of the Beneficiary's time would be allocated to non-executive functions. Therefore, we cannot conclude that the Beneficiary would devote his time primarily to tasks that are within an executive capacity.

Further, despite the Petitioner's contention that the Director failed to take into account a previously submitted "detailed description of [the Beneficiary's] job and duties," we find that the Director was correct in finding that the prior job description was deficient and that it lacked a proper account of the actual job duties the Beneficiary would carry out on a daily basis.

In sum, the Petitioner did not provide a sufficiently detailed job description prior to the denial and it did not cure this deficiency on appeal, despite being notified that this information is critical to a determination of the Beneficiary's executive capacity in the proposed position.

B. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining a beneficiary's claimed executive capacity, 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 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.*

The Petitioner claimed a total of 14 employees at the time of filing in September 2016, but did not provide a corresponding organizational chart or list of employees and job titles to establish whom it employed at that time. The Petitioner provided its quarterly federal tax return for the first quarter of 2016 and a corresponding employee data sheet for the same time period. We note that while the first quarterly tax return indicates that the Petitioner had nine employees during that quarter, the employee data sheet names a total of 14 employees and shows all 14 as being in "active" status.

The Director's RFE addressed the issue of staffing composition, asking the Petitioner to provide an organizational chart naming the employees and illustrating the company's staffing levels. The Petitioner was also instructed to provide employee job descriptions and to substantiate its staffing claims by submitting state quarterly wage reports, including the report for the 2016 third quarter during which the petition was filed.

In response, the Petitioner provided an organizational chart depicting a three-tier structure comprised of seven employees (including the Beneficiary) and eight subcontractors. The chart depicts the Beneficiary at the top-most tier, followed by the office manager/bookkeeper/estimator at the second tier, and the remaining five employees – including a consultant, two tile and marble installers, and their two helpers – and eight subcontractors at the third tier. The chart also contains a phrase or word, depending on the position, indicating the tasks carried out or services provided by the various employees and subcontractors. The Beneficiary's position in the chart described his position as "Job Supervision/Scheduling/Hiring/Firing/Sales/Contract Coordinator" and indicated that his direct subordinate's role is "Office Manager, Bookkeeper, Estimator." The chart indicated that all other employees and contractors are involved in the installation of tile, marble, glass, or countertops.

Despite the RFE request, the Petitioner did not provide employee job descriptions, its quarterly wage report for the third quarter of 2016, or evidence showing payments made to the eight subcontractors

identified in the organizational chart. In light of this lack of critical evidence, we are unable to verify the Petitioner's claim that it had 14 employees at the time of filing. We are also unable to gauge whom the Petitioner employed or what duties its employees performed to relieve the Beneficiary from having to allocate his time primarily to nonexecutive functions. 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 denying the petition, the Director determined that the Petitioner did not provide evidence to verify its staffing or establish that the staffing it had in place at the time of filing was sufficient to support the Beneficiary in an executive capacity.

On appeal, the Petitioner claims that it has "every single employee on its payroll, under the W-2 system" and further explains that some employees are issued Form 1099s "[f]or tax reduction purposes." However, the Petitioner does not provide corroborating evidence to establish who was included in its payroll and what services they provided when the petition was filed. Rather, the Petitioner provided an organizational chart, which shows that there is a single employee – the office manager/bookkeeper/estimator – who separates the Beneficiary from the remainder of the staff. However, the record does not establish that this single employee is sufficient to comprise an entire managerial tier through which the Beneficiary can be said to direct the management of the organization.

Nor does the Petitioner's organizational hierarchy appear to be sufficient to elevate the Beneficiary's position to that of an executive, despite his placement within the organization. In fact, the evidence that the Petitioner provided does not establish that anyone other than the Beneficiary himself is available to sell the Petitioner's products and services. The staffing evidence also indicates that the Beneficiary directly oversees the employees and contractors who provide the Petitioner's installation services, as the Petitioner indicates he performs job supervision and scheduling. While the organizational chart depicts the office manager in a supervisory position with respect to the company's various lower-level employees and contractors, her actual job duties are not included in the chart and the little information provided about the office manager position does not include any supervisory functions. Thus, despite the organizational placement of the Beneficiary's direct subordinate and her managerial position title, it is unclear that she actually functions as a manager or supervisor, particularly in light of the Petitioner's claim that the Beneficiary would assign employee job duties and supervise the company employees.

As previously indicated, the lack of job descriptions for any subordinate staff precludes a comprehensive understanding of who performs the operational tasks and how the Petitioner is able to support the Beneficiary in a primarily executive capacity, particularly when the Beneficiary's job duties include supervising the company's entire staff as well as its subcontractors.

While the Beneficiary may establish the goals and policies of the company and exercise wide latitude in discretionary decision-making, the record does not establish that these would be the Beneficiary's primary duties. Based on the Petitioner's organizational chart and broad job

description, it appears that the Beneficiary would function as a first-line supervisor who would oversee company staff and carry out other non-executive functions as needed. Therefore, even if the Beneficiary has the discretionary authority over the Petitioner's staff and its respective operations, the record is not persuasive in establishing that the Petitioner's organization at the time of filing was sufficient to support the Beneficiary in a primarily executive position where his primary concern would be directing the management of the organization.

For the reasons discussed above, the evidence submitted does not establish that the Beneficiary would be employed in an executive capacity under the extended petition.

Finally, while not a basis for dismissing the Petitioner's appeal, we note that Part 7 of the Form I-129 contains the signature of [REDACTED] the Petitioner's attorney of record in this proceeding, as the person authorized to sign the petition on behalf of the Petitioner. However, there is no evidence that Mr. [REDACTED] is an employee of the Petitioner or that he is otherwise authorized to act in the capacity of a corporate representative. The regulation at 8 C.F.R. § 103.2(a)(2) requires a petitioner to sign the benefit request and by doing so, it certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. There is no regulatory provision that waives the signature requirement for a petitioning U.S. employer or that permits a petitioning U.S. employer to designate an attorney or accredited representative to sign the petition on its behalf.

Therefore, the attorney's signature, without an accompanying signature of someone representing the Petitioner's corporate interests as a prospective employer, is not sufficient for the proper filing of a Form I-129. Any future filings must include a Form I-129 signed by someone who is designated as an authorized signatory of the petitioning entity.

III. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in an executive capacity under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of S-S- LLC*, ID# 451617 (AAO June 22, 2017)