U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C- LLC

DATE: APR. 4, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a technology business specializing in digital signage software, seeks to continue the Beneficiary's temporary employment as its chief operating officer under the L-1A nonimmigrant classification for intracompany transferees.[1] 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 California 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 an extended petition.

On appeal, the Petitioner asserts that the Director's decision contains an error of fact with respect to the Petitioner's staffing levels and that the Director erred by evaluating the position as a managerial position rather than as an executive position. The Petitioner maintains that the evidence of record is sufficient to establish that the Beneficiary would be employed in an executive 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 for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). In addition, the beneficiary must seek to enter the United States temporarily to

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period January 13, 2017, until January 12, 2018. 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.

continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.*

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 AN EXECUTIVE CAPACITY

The primary issue to be addressed is whether the Petitioner established that the Beneficiary would be employed in an executive capacity. On appeal, the Petitioner states that the proffered position is executive in nature, and asserts that the Director erred by applying the statutory definition of managerial capacity to the evidence presented.[2]

The term "executive capacity" is defined 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.

When examining the executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties, which must clearly describe the offered position. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine 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 Petitioner's business, its staffing levels, and its organizational structure.

A. Duties

Based on the 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.

[2] We note that the Petitioner did not previously specify whether the offered position is in a managerial capacity or an executive capacity and, therefore, we disagree with the Petitioner's claim that the Director erroneously evaluated the position pursuant to the definition of "managerial capacity." As the Petitioner now clarifies that it considers the position to be executive in nature, we will limit our discussion to whether it has established that the Beneficiary's primary duties will be in an executive capacity.

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 at 1533.

At the time of filing, the Petitioner submitted a description of the Beneficiary's position which was divided into the following areas of responsibility:

- Leadership (15%)
- Operational Planning and Management (25%)
- Program Planning and Management (25%)
- Human Resources Planning and Management (15%)
- Financial Planning and Management (5%)
- Risk Management (15%)

The Petitioner further listed more than 30 duties under these six areas of responsibility. However, the description as a whole was lacking detail regarding the specific tasks that the Beneficiary would be performing on a day-to-day basis within the context of the Petitioner's business. For example, in elaborating on the Beneficiary's "leadership" responsibilities, the Petitioner noted that the Beneficiary would act as a professional advisor to the CEO, "foster effective team work" between management and staff, participate with the CEO in developing a strategic plan and vision for the business, and conduct official correspondence on behalf of the CEO. These responsibilities are ambiguous and do not provide meaningful insight into the "leadership" duties the Beneficiary would perform on a regular basis.

The Beneficiary's operational and program "planning and management" responsibilities account for the largest portion of his time, but were described in similarly broad language, much of which simply paraphrased the statutory definition of "executive capacity." The Petitioner noted that the Beneficiary will "develop an operational plan which incorporates goals and objectives"; oversee "the day-to-day operation of the organization"; draft policies for the CEO's approval and develop procedures to implement the policies; "oversee the planning, implementation, and evaluation of the organization's program and services"; monitor "day-to-day delivery of the programs and services," and ensure that the operations, programs and services contribute to the organization's mission. The Petitioner did not provide examples of plan, policies, goals or objectives the Beneficiary has developed or would develop in support of its claim that such responsibilities would require up to half of his time. Further, the initial job description was lacking any specific references to the Petitioner's specific business operations, which detracts from its probative value in establishing the actual nature of his day-to-day duties.

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 any detail or explanation of the Beneficiary's activities in the course of their daily routine. The actual duties themselves will 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).

In a request for evidence (RFE), the Director instructed the Petitioner to provide a more detailed description of the Beneficiary's duties and the amount of time he will spend on each specific task. In response, the Petitioner provided a list of "current duties" performed in 2017-18, broken down into daily, weekly, and quarterly work, as well as a short summary of his anticipated "future duties" for 2018-19.

The Petitioner did not assign a percentage of time to the listed tasks, as requested by the Director. On appeal, the Petitioner clarifies that the percentages assigned to the initial breakdown of the Beneficiary's duties (as stated above) remains accurate. However, Director expressly asked that the Petitioner provide a more detailed explanation of how the Beneficiary allocates his time after reviewing the initial job description. Further, many of the broadly-stated responsibilities from the initial description are repeated in the Petitioner's breakdown of the Beneficiary's "daily," "weekly" and "quarterly" work and the Petitioner did not elaborate upon the specific tasks involved, as requested.

In addition, the description provided in response to the RFE included non-qualifying tasks that were not mentioned previously and which suggest that the Beneficiary would be significantly involved in the Petitioner's day-to-day sales and service delivery tasks as of the date of filing. Specifically, the Petitioner listed the following new duties among the Beneficiary's "daily work":

- Speak with the canvassers daily. We discuss what areas to canvas next and strategies to get customers interested in the product.
- We identify interested clients and target markets.
- Research potential clients and oversee the development of sample promotional materials in concert with our CMO.
- Analyze developed marketing plans created by the CMO for potential clients and offer suggestions based on the content.
- Complete follow-up phone calls with current clients to check-in with overall customer satisfaction and with potential customers to discuss [the Petitioner's] overall process and to offer assurance of their performance.
- Once a new customer is obtained, I meet with internal staff to assign duties for each specific customer and create an overall strategy to ensure maximum customer satisfaction . . .

While the Petitioner indicates that the Beneficiary would rely on canvassers and "CMOs" to perform certain market and sales functions, it also suggests that he would be significantly involved in these functions as well as customer service functions. The Petitioner did not explain how duties such as researching potential clients, reviewing marketing plans, and daily phone calls with current and potential customers would rise to the level executive duties. Nevertheless, these duties appear to comprise a significant portion of the Beneficiary's "daily work."

Moreover, as discussed further below, the Petitioner did not claim to employ anyone in the position of "canvasser" at the time of filing, and the record does not contain a detailed description of the scope of the duties performed by the CMO staff or evidence of wages paid to these employees in support of

the Petitioner's claim that the Beneficiary delegates various non-executive sales and marketing tasks to subordinates. In addition, as we will discuss further below, the Petitioner does not explain who is actually providing the software and technical services outlined in its business plan and the Beneficiary appears to be the only one on staff with the technical background to provide such services.[3]

The job description submitted in response to the RFE, and the record as a whole, suggest that the Beneficiary more likely than not performs a combination of qualifying higher-level duties and non-qualifying operational tasks. Based on the current record, we are unable to determine whether the claimed executive duties constitute the Beneficiary's primary duties, or whether the Beneficiary primarily performs non-qualifying operational duties required for the Petitioner to provide its products and services. Although the Director specifically requested the information, the Petitioner's descriptions of the Beneficiary's job duties do not sufficiently establish what proportion of the duties is executive in nature, and what proportion is actually non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The fact that the Beneficiary will direct a business as a senior employee does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(44)(B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. While 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, a broad position description alone is insufficient to establish that his actual duties would be primarily executive in nature.

B. Business Activities, Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual will be acting in a managerial or executive capacity, we 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.

In support of the petition, the Petitioner provided a copy of its original business plan, which stated that the company anticipated that it would generate revenue through the sale of digital signage software and interactive mobile phone software (developed by and licensed from an Israeli company), and through the sale of creative content design services, maintenance and support services, and "miscellaneous" services. The Petitioner stated that it anticipated gross revenue of $516,750 in 2017.

[3] We note that the Beneficiary also held the position of "Chief Operations Officer" with the Petitioner's foreign parent company prior to his transfer to the United States. The Petitioner indicates that the U.S. and foreign companies operate with a similar structure and provide similar services. The record contains a description of the Beneficiary's duties abroad which indicates that he was responsible for: "fulfilling new customers' orders from all aspects: installation of equipment, handling the content and design materials, (outsourced)"; "strict time management the web software and content" [*sic*]; and "in charge of software installation and maintenance." The Petitioner does not state that he performs these duties in the United States, but has not established who, if anyone, performs these services for its U.S. customers.

The business plan also identified three departments to be staffed – a marketing sales and customer relations department; an operations department responsible for order fulfillment, delivery, and customer support; and an administration and finance department. The proposed organizational chart included in the business plan indicated that the CEO would directly supervise a chief marketing officer (CMO), a chief operating officer (COO), and a chief financial officer (CFO). It also depicted "customer relations" under the CMO position, "creative content" under the COO position, and "accounting" under the CFO position.

The Petitioner filed the petition in January 2018 and stated on the Form I-129, Petition for a Nonimmigrant Worker, that its gross annual income was $15,000. The Petitioner stated that it had five employees and identified them as follows:

- [redacted] – CEO: the owner and CEO of its parent company
- [Beneficiary] – COO: a senior manager in [the foreign entity] and is in charge of its location operations.
- [redacted] - CMO: A marketing specialist stationed in [redacted] MT to expand the brand.
- [redacted] – CMO, MN: Minnesota marketing assistant developing the brand, reports to [redacted] and [the Beneficiary].
- [redacted] – CFO: In charge of all financial decisions

The Petitioner stated that it anticipated hiring a marketing and sales manager, a "sales force," and an office manager. The Petitioner's organizational chart showed the CFO and [redacted] as the Beneficiary's direct subordinates. It also showed future positions for an accounting and office manager and a receptionist in the CFO's department, as well as a marketing and sales manager and sales staff in the CMO's department. This structure appeared to be a departure from the company's business plan, which indicated that the CMO, COO, and CFO would all report directly to the CEO. Further, the Petitioner's business plan identifies a need for operations staff to handle order fulfillment, delivery, and customer support, but the Petitioner did not hire staff to perform these functions.

In response to the RFE, the Petitioner submitted an updated organizational chart which depicted both CMO positions and the CFO reporting to the Beneficiary, and two new employees, both "canvassers" reporting to [redacted] The revised chart shows that [redacted] would be responsible for customers in Missouri and North Dakota, while [redacted] would have geographic responsibility for Minnesota and Wisconsin.

In the denial decision, the Director discussed the structure depicted in the initial organizational chart and found that the Petitioner did not establish that the company had a sufficient structure to support the Beneficiary in a qualifying managerial or executive position. On appeal, the Petitioner asserts that the Director erred by failing to consider the updated chart submitted in response to the RFE, which shows that the Beneficiary had three direct subordinates as well as a subordinate manager who oversees lower level employees.

The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). The Petitioner does not claim that it had already filled the "canvasser" positions at the time of filing. As such, the Director did not err by relying on the initial organizational chart. The Petitioner claimed to employ five employees at the time of filing and the Director properly relied on the chart which identified five employees by name, rather than the updated chart which identified seven employees.

Further, we note that, when seeking to extend a petition which involved the opening of a "new office," it is a petitioner's burden to provide a statement describing the staffing of the new operation, including the number of employees and types of positions held, accompanied by evidence of wages paid to employees. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). Here, the Petitioner provided extremely limited descriptions of the type of work performed by its two "chief marketing officers" and initially described their roles as that of a "marketing specialist" and "marketing assistant" despite the CMO job titles given to them. The record is also lacking a description of the actual duties performed by the CFO.

In addition, the Petitioner has not provided any evidence of wages paid to the CFO and two CMOs and as such we cannot determine whether they were hired as full- or part-time employees, whether they are employees or contractors, or whether they even worked for the Petitioner at the time of filing. We acknowledge that the Petitioner provided secondary evidence of their employment, including resumes, internal correspondence, and written records of their initial interviews with the Beneficiary. However, the evidence is insufficient to allow us to determine to what extent these employees would be available to relieve the Beneficiary from involvement in the non-executive, day-to-day operations of the company. The supporting evidence indicates that [redacted] has been canvassing local businesses in different regions of Montana in an effort to sell the Petitioner's products and services and acting as a sales representative rather than a "chief marketing officer."

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 beneficiary 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. Although the Petitioner asserts that the Beneficiary's position is executive in nature, the submitted job descriptions are too vague to establish that he would be primarily focused on the company's broad policies and goals, and the evidence as a whole does not adequately establish how the staff would relieve him from significant involvement in operational tasks required to operate the company.

On appeal, the Petitioner asserts that the Director placed undue emphasis on the size of the company and the number of employees to be supervised by the Beneficiary. The Petitioner correctly observes that a company's size alone may not be the determining factor in denying a visa petition for classification as a multinational manager or executive without taking into account the reasonable needs of the organization. S*ee* section 101(a)(44)(C) of the Act. However, it is appropriate 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. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Further, as noted, the evidentiary requirements for the extension of a "new office" petition and require us to examine the organizational structure and staffing levels of the Petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. If a business does not have the necessary staffing after one year to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

As noted, the Petitioner's business plan indicates that the company derives its revenue from the sale of licensed software products, and through the provision of creative content services, maintenance and support services, and other miscellaneous services. The Petitioner claims to have two marketing employees who target potential new customers and a CFO whose duties have not been defined. It does not claim to have any staff who actually provide its services, and, as noted, the evidence suggests that the Beneficiary is the only employee of the company who has the requisite technical background to do so. The Petitioner also provided receipts and invoices as evidence of "purchases made for customers largely consisting of electronics and supporting equipment as well as raw materials to build design displays." The Petitioner does not claim to have employees engaged in purchasing activities or anyone to build the referenced design displays for customers. Finally, as noted, the Petitioner has not sufficiently documented its staffing levels at the time of filing because it did not provide evidence of wages paid to its employees.

Based on the evidence as a whole, the Petitioner has not shown that that the subordinate staff in place at the time of filing were sufficient to support the Beneficiary in a position in which he was required to perform primarily executive duties. In a cover letter submitted with its initial submission, the Petitioner emphasized that the Beneficiary was not able to enter the United States until March 2017, noting that he "immediately went to work on creating business contacts and providing marketing audits for local businesses." The Petitioner emphasizes that it is not a shell business and stated that while it "does recognize that there are weaknesses in the case, it simply asks for one more renewal."

We acknowledge that the Petitioner does not appear to be a shell company, and acknowledge the Beneficiary's efforts to develop the business upon his arrival to the United States. However, the reasonable needs of the Petitioner will not supersede the requirement that the Beneficiary must be "primarily" employed in an executive capacity as required by the statute, or in turn, qualify a Beneficiary who spends a significant portion of his or her time on non-qualifying duties at the end of the initial year of operations. *See* section 101(a)(44)(B) of the Act. Here, the Petitioner did not show that the Beneficiary would be sufficiently relieved from involvement in the day-to-day operations of providing the company's products and services as of the date of filing. Therefore, the Petitioner did not meet its burden to establish that his actual duties would be primarily executive in nature.

III. ADDITIONAL ISSUE

While we are not denying the petition for any additional reason, we have identified a potential ground of ineligibility that the Petitioner may need to address in future proceedings.

A search of the Minnesota Secretary of State's business entity records indicates that the Petitioner's business status is "inactive" and that it was subject to "administrative termination" in 2018. *See* https://mblsportal.sos.state.mn.us/(accessed on Apr. 3, 2019). If the Petitioner is no longer an active business, this fact would be material to its eligibility for the requested visa. Specifically, the Petitioner's inactive status would raise questions about whether it continues to exist as an importing employer, whether it maintains a qualifying relationship with the Beneficiary's foreign employer, and whether it is authorized to conduct business in a regular and systematic manner. *See* section 214(c)(1) of the Act; *see also* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (l)(3).

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of C- LLC*, ID# 2667212 (AAO Apr. 4, 2019)