U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-C- LLC

DATE: APR. 5, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a coffee shop and wine and beer bar, seeks to temporarily employ the Beneficiary as the president of its new office[1] 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 record did not establish, as required, that (1) the Beneficiary had been employed in a managerial or executive capacity for the foreign entity; and (2) the new office would support a managerial or executive position within one year of approval of the petition.

On appeal, the Petitioner asserts that the Director ignored the evidence that corroborates its assertions and contends that it has submitted sufficient evidence to establish eligibility for this visa classification.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, 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 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 term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

The petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

II. EMPLOYMENT ABROAD IN AN EXECUTIVE CAPACITY

The Director denied the petition determining that the Petitioner's description of the Beneficiary's duties for the foreign entity was vague and thus insufficient to establish that she primarily performed duties in an executive capacity, as that term is defined in the statute.[2]

On appeal, the Petitioner asserts that the foreign entity's description of the Beneficiary's duties is not vague. The Petitioner contends that the Beneficiary's foreign duties correspond to the duties of an executive as that occupation is described in the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) and in the Occupational Information Network Online (O*NET) Summary Reports.

"Executive capacity" means 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 beneficiary, we review the 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 performed 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 was *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the organization'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.

The foreign entity, described in the record as a "privately owned electricity distribution company,"[3] provided a broad description of the Beneficiary's duties, stating that she "[s]upervis[ed] the staff of the administration and human resource department" and "[r]eview[ed] and ma[de] recommendations for improvement of company policies, procedures and practices on personnel matters." The

[2] The petitioner does not claim that the Beneficiary worked in a managerial capacity for the foreign entity. Therefore, we restrict our analysis to whether the Beneficiary worked in an executive capacity for the foreign entity.

[3] The foreign entity describes itself as a "privately owned electricity distribution company in Bangladesh providing a wide range of services including energy supply, pre-payment electricity metering system, automated/remote metering systems, [and] energy auditing and balancing." The foreign entity also says that it "supplies explosives, detonators and detonating cords, mining equipment, tools and materials for mining industries and exploration sector in Bangladesh."

Petitioner added that she maintained knowledge of industry trends, ensured compliance, and conducted recruitment efforts, as well as supervising career training, overseeing training, and participating in the annual review, preparation, and administration of company wage and salary programs. The Petitioner does not provide any detail or explanation of the Beneficiary's activities in the course of her daily routine at the foreign entity. 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 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).

The Petitioner also included the Beneficiary's resume and documentation showing that she had received promotions while employed at the foreign entity. The Beneficiary's resume includes a brief description of the Beneficiary's duties in the positions of "Director of Human Resources & Administration" from January 2015 to present, and "Administration Director" from January 2004 to December 2014. The Beneficiary's resume does not correspond to the promotion documents which show the Beneficiary was offered the position of "Administration Director" on January 15, 2011. The letters showing increases in the Beneficiary's salary for each year starting in December 2012, are addressed to the Beneficiary as the Administration Director, until December 2014, when the letter is addressed to the Beneficiary as "Director (Admin.&HRD)." The organizational chart submitted in response to the Director's request for evidence (RFE) shows the Beneficiary in the position of "Admin Director." The inconsistencies among the letters, the Beneficiary's resume, and the organizational chart raise questions regarding the Beneficiary's actual position within the family-owned business. The Petitioner must resolve these ambiguities regarding the Beneficiary's role in the foreign company with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In response to the Director's RFE, the foreign entity paraphrased the previously provided description and emphasized that the Beneficiary "has the authority to make executive decisions within her scope of responsibilities, holding full responsibility for her team and direct reports' performance." The foreign entity also allocated the Beneficiary's time amongst broad categories of duties. For example, the foreign entity noted that the Beneficiary spent 25 percent of her time managing the company's personnel according to existing policies that conform to federal and provincial laws and also assuring that the organization, and its mission, products, and services are consistently presented to relevant stakeholders. However, these responsibilities are also broadly-stated and do not provide insight into the Beneficiary's actual daily duties.

The foreign entity added that the Beneficiary spent another 25 percent of her time in the business development and marketing department. The foreign entity indicated that her duties included "[d]riv[ing] market strategy development and strategic business planning, monitor[ing] efficient implementation of all strategies, ensur[ing] delivery and quality of programs, products and services" as well as preparing for weekly and monthly meetings to report on business activities and "suggest[ing] recommendations to the Board of Directors." The Petitioner points out on appeal that these two duties correspond to executive responsibilities listed in the *Handbook* and the O*NET

Online Summary Report for top or chief executives. However, reciting responsibilities within a generic occupational title does not establish the specific duties the Beneficiary performed in relation to the foreign entity's particular business interests. The foreign entity in this matter has not detailed the actual work the Beneficiary performed. The descriptions do not include sufficient detail so that we may analyze and evaluate the Beneficiary's actual duties as they specifically related to the foreign entity's utility and mining supply business.

The fact that the Beneficiary managed or directed a business does not necessarily establish eligibility for classification as an intracompany transferee. While the Beneficiary may have exercised some discretion over the foreign entity's operations within her scope of responsibilities and possessed the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that her actual duties were primarily executive in nature.

We have reviewed the foreign entity's organizational chart and the list of its employees. However, the organizational chart is incomplete and shows the Beneficiary as the "Admin Director" subordinate to a managing director. Neither the organizational chart nor the list of employees describes the differences in duties, if any, between the managing director and the Beneficiary's position. The descriptions of duties for the foreign entity's employees, including a general manager who is shown subordinate to the Beneficiary on the organizational chart, do not correspond to the positions listed on the organizational chart. For example, the duty descriptions include three employees reporting to the AGM (Business Development) while the organizational chart shows four employees reporting to the AGM (Business Development). Nor do the descriptions provide sufficient detail to determine that the managerial employees listed primarily manage or supervise their subordinates rather than perform operational tasks.

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 brief descriptions for the foreign entity's managerial employees are insufficient to establish that they primarily manage their departments.

We cannot ascertain the Beneficiary's actual role within the foreign entity from the general descriptions provided, the incomplete organizational chart, and the brief descriptions of the duties of the foreign entity's employees. Although the Beneficiary may own a portion of the foreign entity, her role in providing direction to the management of the foreign entity has not been established. The

record does not contain sufficient evidence of her involvement in the foreign business, other than as an owner/investor. The record is insufficient to corroborate the Petitioner's claim that the Beneficiary performed duties in a primarily executive capacity for the foreign entity.

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

The Petitioner was organized in 2015 to manage and run a coffee, wine, and beer shop in New Jersey. The Director determined that the record did not contain sufficient information to demonstrate that the "new office" will support an executive or managerial position in one year. On appeal, the Petitioner asserts that it has provided its business plan that included information on the number and salaries of the individuals it planned to employ. The Petitioner also contends that the Beneficiary's proposed duties are not vague and that the record shows she will occupy the top level of the company's hierarchy.

The Petitioner provides the August and October 2015, and January 2016 minutes of meetings of the Beneficiary's foreign employer. The August minutes indicate that the Beneficiary and her spouse have been appointed to travel to the United States to explore establishing a business in the United States. The October minutes approve an investment in a joint venture with a coffee shop in the United States. The January 2017 minutes appoint the Beneficiary to manage the United States operation and an investment up to $500,000 in the venture.

The record includes a copy of a five-year lease agreement for the coffee shop/wine bar entered into on March 1, 2016. The record includes numerous emails between the lessors and the Petitioner's brand director and chief operating officer. The email exchanges do not mention the Beneficiary or show her as responsible for or involved in the lease negotiations. The business plan submitted states that the position of president, the Beneficiary's proposed position, will provide strategic leadership, ensure and maximize operational success and financial profitability, as well as plan, introduce new programs/strategies, and provide counsel and direction in all coffee shop operating matters. Other than the Beneficiary's appointment by the foreign entity in January 2016, the record does not include any evidence that the Beneficiary participated in or discussed the proposed business. The record does not include evidence that the Beneficiary has been or will direct the operations of the new business.

Although the business plan also includes a proposed organizational chart showing the Beneficiary at the top of the Petitioner's hierarchy, artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive position. The Beneficiary's position of president is depicted over the brand director, who in turn supervises a general manager and an advertising/marketing assistant. The general manager and advertising/marketing assistant supervise yet another layer of employees identified as a store manager and kitchen supervisor who then supervise the wait and kitchen staff. The duties for the managerial positions are general and do not include sufficient information to determine that their positions are primarily supervisory or managerial in nature. There is insufficient information in the business plan regarding the proposed management positions to distinguish their responsibilities and

duties in operating the business. The business plan submitted is general and does not include sufficient detail to present a credible and realistic picture of the Beneficiary's role in the operations.

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the evidence, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of a petitioner's business, the employment and remuneration of employees, and any other evidence contributing to a complete understanding of a beneficiary's actual role in a business. Here, other than the foreign entity's claimed investment and the Beneficiary's appointment to manage the United States operation and the investment venture, the Petitioner has not substantiated the Beneficiary's proposed role.

IV. ADDITIONAL ISSUES

We also observe that the record does not include sufficient probative evidence establishing the Petitioner's qualifying relationship with the Beneficiary's foreign employer or that it has sufficient physical premises to commence operations. These issues must be addressed in any future proceedings.

A. Qualifying Relationship

To establish a "qualifying relationship," the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See* section 101(a)(15)(L) of the Act; *see also* 8 C.F.R. § 214.2(l)(1)(ii) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate").

As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership, and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting control of the entity. *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986). Here, the record does not include minutes of membership and management meetings or voting agreements. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

We have also looked at the method of the Petitioner's capitalization in order to assess the relationship(s) that may have been generated by the capitalization. The Petitioner provides a number of documentary excerpts that depict transfers from an account in to the Petitioner in the United States. The Petitioner also submitted copies of bank statements from several of the foreign entity's bank accounts as well as the foreign entity's managing director's bank account in However, the foreign entity and the managing director's bank account numbers do not match the account number transferring funds to the Petitioner in the United States. Thus, the record does not appear to corroborate the Petitioner's claim that the foreign entity in this matter provided its capitalization and it is not possible to conclude that the Beneficiary's foreign employer provided the actual investment to start up the Petitioner's operations so that it could commence doing business. *This issue must be addressed in any future proceedings.*

B. Physical Premises

The record includes a copy of a lease the Petitioner claims it entered into in March 2016. The Petitioner, however, has not submitted any evidence that it has made any rental payments to maintain the lease. The record includes the Petitioner's bank statements only for January and February 2016. Thus, there is no evidence corroborating the Petitioner's continued interest in the property. 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). This issue must also be addressed in any future proceedings.

V. CONCLUSION

The Petitioner has not established a qualifying relationship with the Beneficiary's foreign employer, and has not established that a qualifying foreign entity employed the Beneficiary in an executive capacity. The Petitioner also has not established that it will employ the Beneficiary in a managerial or executive capacity within one year of approval of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of K-C- LLC*, ID# 632919 (AAO Apr. 5, 2018)