U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-V- CORP.

DATE: APR. 11, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an e-commerce vendor,[1] seeks to continue 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 California Service Center denied the petition, concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner disputes the denial and re-submits documents in support of its claim that the Beneficiary will be employed in a managerial and executive capacity.

Upon *de novo* review, we find that the petitioner has not overcome the basis for denial. Therefore, 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] Although the Petitioner indicates that it purchased [redacted] for the purpose of operating a food truck, the latter appears to be part of a separate business entity, which is not a party to this petition. Therefore, despite indicating that the Petitioner owns [redacted] this business relationship is not relevant in the instant matter, where only the Beneficiary's proposed employment with the petitioning entity will be addressed.

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

The only issue to be addressed is whether the Petitioner established that the Beneficiary will be employed in a managerial or executive capacity under the extended petition. The Petitioner initially claimed that the Beneficiary would be employed in a managerial capacity.[2] However, on appeal, the Petitioner claims that the Beneficiary's proposed employment fits the criteria of both managerial and executive capacity. Therefore, we will address both of these claims in the analysis below.

A. Managerial Capacity

First we will discuss whether the Petitioner has provided sufficient evidence to establish that the Beneficiary will be employed in a managerial capacity.

"Managerial capacity" means an assignment within an organization in which the 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, or a department or subdivision of the organization; has authority over 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.

Based on the definition of managerial 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 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.

The Petitioner must provide a job description that clearly describes the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial capacity. *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 the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the 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.

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[2] Although the Petitioner did not expressly identify the Beneficiary's employment as being in a "managerial capacity," it used language from the statutory definition of managerial capacity to describe the Beneficiary's proposed position, stating that the Beneficiary would have the authority to "control the work of other supervisory/professional employees," hire and fire employees and take "other personnel actions," and "exercise [] discretionary authority over day-to-day operations." Section 101(a)(44)(A)(2)-(4) of the Act.

1. Duties

First, we will discuss the duties to be performed by the Beneficiary. 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).

In a supporting cover letter, the Petitioner stated that since its inception in 2015 it has continued to develop and implement an e-commerce platform, which it used to build relationships with suppliers and clients for the purpose of selling products and services "through virtual and direct shopping." The Petitioner stated that as a result of the "managerial experience" gained during her course of employment with the foreign parent entity, the Beneficiary is an ideal candidate to oversee the Petitioner's e-commerce operation in the United States. The Petitioner did not, however, explain how the Beneficiary's former employment within the context of a medical laboratory – which focused on "assisting the treating physician and patient with reliable technical support in the evaluation, diagnosis, and prognosis during the process of a disease or its absence" – equipped her with the necessary knowledge and experience to start and lead an e-commerce operation.

The Petitioner provided a broadly stated job description that did not include a detailed list of the Beneficiary's daily activities within the Petitioner's business scheme. Rather, the Petitioner stated that the Beneficiary's position would include the following: conferring with staff and the board of directors, representing the company in all official business matters and ensuring adherence to local and state laws, engaging in contract negotiations with suppliers and contractors, coordinating budget and finances, formulating and implementing goals and policies and evaluating the staff's performance in successfully meeting those goals, reviewing the marketing strategy, coordinating departmental activities in terms of pricing, sales, and distribution logistics, reviewing inventory reports and restocking orders, overseeing the quality of goods, selecting "managers or other high-level staff," and ensuring proper operation of data systems and equipment.

In a request for evidence (RFE) the Director acknowledged the Petitioner's submission of the above list of duties, but determined that the list did not establish that the Beneficiary would primarily oversee supervisory or professional employees or describe how she would implement the policies of the organization. Accordingly, the Director asked for a more detailed job description delineating specific managerial job duties and the time she would allocate to each individual duty.

In response, the Petitioner provided a document titled "Functions of [the Beneficiary]," which indicated that the Beneficiary would oversee the following list of activities: "General Managing, Logistics, Marketing/Sales, Financial and Market Studies, Administration, Investigation and Developing, External Consulters (Accounting, Software, E-marketing, Hardware, Labor.)" The Petitioner discussed the Beneficiary's roles during its initial "Phase of Constitution," which preceded the current "Commercial Phase." The Petitioner stated that during this later phase the Beneficiary would allocate 75% of her time to "Corporative Leadership," which would involve five activities: (1) leading "the development and adjustments of the Vision and execution of the politics [*sic*] and procedures"; (2) reviewing and updating "the Business Model"; (3) creating strategies "around commercializing products and services"; (4) making "[h]igh level" policy and strategy decisions; (5) and "[r]eviewing and actualizing the politicies [*sic*] and strategies." The Petitioner also provided

a pie chart showing that 55%, rather than 75%, of the Beneficiary's time would be allocated to "Corporative Leadership" activities. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The pie chart indicates that 45% of the Beneficiary's time would be allocated to "Others," which is comprised of three categories – "Follow Up and Control of the Strategic Activities," "Strategic Human Capital Managing," and "Following and Control of the Functional Activities."

The Petitioner did not comply with the Director's RFE instructions, which asked that each managerial job duty be assigned its own percentage of time. Instead, the Petitioner grouped multiple activities into each of the four categories listed above and created a pie chart containing an inconsistent percentage breakdown. Alongside the pie chart, the Petitioner provided additional information stating that the Beneficiary's daily activities "are effectively aligning with our mission" and that "the company['s] president is actively engaged in revamping the approach to e[-]commerce between the U[.]S[.] and Latin American countries." The Petitioner did not list the duties that are involved in "revamping" the e-commerce approach or state which of the Beneficiary's daily actions further its "mission" within the scope of an e-commerce operation. The Petitioner also pointed to the Beneficiary's objective to "develop a new Business Model" to include "develop[ing] and commercializing of products of their own, unique, innovating oriented to strictly felt necessities"; it did not, however, explain the significance and application of this information with respect to the Beneficiary's role and duties within the petitioning organization. Similarly, the Petitioner's claim that the Beneficiary "is intensely working" on a strategy "to insert [the Petitioner] into the Amazon platform with conventional stores [sic] products" does not explain what actions the Beneficiary executes daily or weekly to meet this business goal.

Further, although the discussion of "Corporative Leadership" segued into a discussion of the Petitioner's involvement in a food trucking operation, this information pertains to the activities of a separate entity and is therefore not relevant for the purpose of establishing the Beneficiary's prospective employment in a managerial capacity with respect to the petitioning entity. As such, any job duties the Beneficiary has or would perform in furthering the business goals of the food trucking operation, or any business endeavor that is not directly part of the petitioning organization, are outside the scope of this petition and will not be considered.

In the denial decision, the Director noted that the original job description, which was submitted initially in support of the petition, is different from the job description that was submitted later in response to the RFE. The Director also determined that the Petitioner did not establish that the Beneficiary would primarily oversee supervisory or professional employees or provide sufficient supporting evidence of the Beneficiary's policy-making role.

On appeal, the Petitioner argues that the Director failed to consider previously submitted evidence and contends that it provided a detailed description of the Beneficiary's proposed job duties. The Petitioner points to the Beneficiary's hiring and firing authority describing instances where she exercised that authority based on knowledge she gained from reviewing quality control reports. The Petitioner also emphasizes the Beneficiary's senior position within its organizational hierarchy noting that such placement gives her discretionary authority over the company's finances and contract negotiations and

allows her to evaluate whether "the company is taking the correct path" and to make changes accordingly.

We find, however, that the Petitioner offered vague job descriptions that did not adequately convey what the Beneficiary would be doing on a daily basis within the context of an e-commerce business. Despite the inconsistency in the percentage breakdown concerning "Corporative Leadership" category, the Petitioner seemingly indicated that the Beneficiary would allocate the majority of her time to activities within this category. The Petitioner did not, however, provide a detailed description of the actions the Beneficiary would carry out with respect to "Corporative Leadership." Instead, the Petitioner listed five broadly stated and somewhat overlapping job responsibilities that convey a strong sense of the Beneficiary's high level of discretionary authority, but do clarify her actual role in the e-commerce business or specify the activities she executes on a daily or weekly basis to meet the organization's business goals. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The fact that the Beneficiary will manage a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section 101(a)(44)(A) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. Section 101(A)(44)(A) of the Act. 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, the broadly stated position descriptions that the Petitioner provided are insufficient to establish that the Beneficiary's actual duties would be primarily managerial in nature.

In light of the deficiencies discussed above, we find that the Petitioner has not adequately described the Beneficiary's proposed job duties and therefore has not established that the Beneficiary would spend her time primarily performing duties of a managerial nature.

2. Staffing

Next, we will address the Petitioner's staffing and organizational hierarchy and the Beneficiary's position within that hierarchy. If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we take into account the reasonable needs of the organization, in light of its overall purpose and stage of development. *See* section 101(a)(44)(C) of the Act.

In the petition form, the Petitioner claimed six employees at the time of filing. Although the Petitioner provided payroll registers and state quarterly wage reports for 2017, showing that it had five employees

in December 2017, it did not provide an organizational chart illustrating the organization's staffing hierarchy.

In the RFE, the Director instructed the Petitioner to provide an organizational chart describing its staffing levels and the Beneficiary's position with respect to her subordinates, as well as evidence of educational levels and employee wages.

In response, the Petitioner provided an organizational chart depicting the Beneficiary as the "president/general manager" of the organization, subject to a three-person board of directors where the Beneficiary is one of the board members. The chart shows that in her capacity as "president/general manager," the Beneficiary oversees the company's four "external consultants" – an accountant, a software developer, an e-marketing company, and "quality developers" – along with five direct company employees, including an administrative assistant, a "logistic" employee, a "logistic assistant," a marketing and sales employee, and the director of research and development.

Although the Petitioner provided brief job descriptions and listed monthly salaries for the positions in the chart, it did not provide supporting evidence showing that the employees and "external consultants" named in the chart actually worked for, or provided services to, the Petitioner at the time this petition was filed. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Without such evidence we are unable to determine that at the time of filing the Petitioner's e-commerce business was adequately staffed to support the Beneficiary in a managerial capacity and to relieve her from having to allocate her time to primarily non-managerial job duties.

B. Executive Capacity

On appeal, the Petitioner claims that the Beneficiary's proposed employment also fits the definition of executive capacity.

"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.

Although the Petitioner claims that the Beneficiary has been assigned managerial and executive job duties "since the beginning," it did not originally claim that the Beneficiary would be employed in an executive capacity and only made this claim recently, on appeal. In support of this claim, the Petitioner again focuses on the Beneficiary's discretionary authority in making business decisions and points to the previously submitted job description; as noted here, however, the earlier job description focused on the claim that the Beneficiary would be employed in a managerial capacity and did not indicate that the same employment meets the statutory elements of executive capacity. Regardless, in light of the previous discussion, which addressed the Beneficiary's deficient job descriptions and lack of sufficient supporting evidence showing whom the Petitioner employed at the time of filing, we find

that the Petitioner has not established that at the time of filing it was able to employ the Beneficiary in an executive capacity where she would primarily direct the management of the organization and focus on its goals and policies.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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 M-V- Corp.*, ID# 2688039 (AAO Apr. 11, 2019)