U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-T-USA, INC.

DATE: APR. 15, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a network technology services provider, seeks to continue the Beneficiary's temporary employment as its president under the L-1A nonimmigrant classification for intracompany transferees.[1] *See* Immigration and Nationality Act (the Act) § 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 Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner disputes the Director's findings, asserting that the Beneficiary will 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 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 Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period October 1, 2017, to September 30, 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.

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). This evidence must demonstrate that the beneficiary will be employed in a managerial or executive capacity, as defined at sections 101(a)(44)(A) and (B) of the Act, under the extended petition.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The primary issue to be addressed is whether the Petitioner established that the Beneficiary will be employed in an executive capacity. The Petitioner did not claim that the Beneficiary would be employed in a managerial capacity; therefore, our analysis will address only the Petitioner's claim that the Beneficiary's proposed position would be in an executive capacity.

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. *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

In a letter submitted in support of the petition, the Petitioner stated that the Beneficiary will occupy the executive position of president and will be responsible for the Petitioner's business operations. According to the Petitioner, the Beneficiary will be authorized to make important business decisions, including business directions, capital investment, major expenditures, and the hiring and firing of managerial employees, to name a few. The Beneficiary's duties are as follows:

> **[Overseeing] the establishment of [the Petitioner]:** [The Beneficiary] is responsible for leading the efforts in establishing [the Petitioner]. This includes spearheading and finalizing 5-year business plan for the company, reviewing and approving proposed office lease, leading and overseeing initial recruitment efforts

such as making a final hiring decision and deciding on the company's personnel needs, identifying CPAs and legal counsel and establishing relationships with such professionals, developing initial budget, etc. [The Beneficiary] was instrumental in making ultimate decisions in the company's initial hiring. [The Beneficiary] participates in the interview of her own assistant and then oversaw the recruitment efforts. [The Beneficiary] also reviewed and approved the design of the company logo. [The Beneficiary] worked closely with the company's corporate lawyer in developing HR strategies and hiring procedures, including the preparation of onboard documents and agreements. 30%

Overseeing the operations of [the Petitioner]: Subject to the approval of the Board and shareholders, [the Beneficiary] is the highest-level decision-maker within [the Petitioner]. She oversees the business operations by defining and adjusting the company's operative goals, delegating duties to subordinate employees, overseeing the execution of any operational activities, approving and signing any key documents or announcement on behalf of the company, monitoring the overall productivity and making any necessary key personnel and corporate structure adjustment, etc. 30%

Formulating business goals and plans: [The Beneficiary] is in charge of formulating [the Petitioner's] short-term, mid-term and long-term strategy and operational goals. Together with the executive management team of [the Petitioner's parent], [the Beneficiary] makes decisions on the general direction of business operations and makes any necessary adjustment based on actual performance of the company. Since her arrival, [the Beneficiary] has been working closing with the . . . parent company in adjusting and further refining the company's business focus and initial goals. 10%

Overseeing the finances of [the Petitioner], including budgeting and monitoring the financial performance of [the Petitioner]: [The Beneficiary] will have the ultimate authority of overseeing [the Petitioner's] finances and will be ultimately accountable for any major financial decisions made on behalf of the company. [The Beneficiary] will develop the overall budget with the Chairman of the Board. [The Beneficiary] monitors the cash flow to decide whether any budgetary adjustment needs to be made or whether any additional funding will be necessary. [The Beneficiary] also approves any internal accounting procedure as developed by the company's CPA or accountant. 10%

Directing the efforts in establishing U.S.-based business connections: [The Beneficiary] will direct any subordinate employees to develop any necessary marketing or promotional plans that could establish or further strengthen any business relationships between U.S. based vendors, business partners or customers. [The Beneficiary] will assign appropriate employees to attend any major business development events on behalf of the company. [The Beneficiary] will also review and approve any major business development plans and programs. 10%

> **Serving as the Main Point of Contact between [the Petitioner] and [the Petitioner's parent]:** [The Beneficiary] will serve as the key contact person between [the Petitioner's parent] and the [the Petitioner]. [The Beneficiary] will also provide periodic report either orally or in writing to the Senior Management team of [the Petitioner's parent]. [The Beneficiary] will communicate with the Senior Management Team regarding any potential adjustments in the operational goals and directions of [the Petitioner]. 10%

In a request for evidence (RFE), the Director stated that the Petitioner had not sufficiently described the Beneficiary's duties. The Director asked the Petitioner to explain how the Beneficiary's position meets the requirements of executive capacity. In response, the Petitioner provided a statement from the treasurer and board of director that included a description of the Beneficiary's duties similar to that initially submitted.

The Director denied the petition, finding that the Beneficiary's duties are not primarily executive, and that the Beneficiary does not oversee lower-level managers within the company.[2]

On appeal, the Petitioner asserted that the Beneficiary performs a broad range of executive-level tasks to achieve complex business goals. The Petitioner included a description of the Beneficiary's duties and the percentage of time spent on each duty similar to that previously submitted.

The three job descriptions are similar to one another and each lack sufficient detail. For example, [the job descriptions stated: "[The Beneficiary] is in charge of formulating [the Petitioner's] short-term, mid-term and long-term strategy and operational goals" and "[the Beneficiary] will have the ultimate authority of overseeing [the Petitioner's] finances." The job descriptions are so general that they could describe virtually any executive of senior management position with any company. They provide only vague information that focuses on the Beneficiary's discretionary authority, but says little about the actual tasks she will perform.]. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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). Reciting a 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. *Id.* Here, the Petitioner has not provided the necessary details; neither version of the job description provides much information about the actual tasks that the Beneficiary will perform for the company.

Further, the Beneficiary's job descriptions indicated that she will "work[] closely with the company's corporate lawyer" and "approve[] any internal accounting procedure as developed by the company's CPA or accountant." None of those positions exist on the Petitioner's organizational chart. In fact, at the time of filing, the Beneficiary was one of only two employees at the petitioning company.

[2] We will further address staffing issues below.

The job descriptions resemble a general template. They stated, for instance, that the Beneficiary "[m]akes decisions on the general direction of business operations and makes any necessary adjustments based on the actual performance of the company." It also contains a number of references to "subordinate employees," which do not exist within the company. None of the three job descriptions provide substantive, verifiable details that can be reliably correlated to activities documented in the record.

The job descriptions also stated "Subject to the approval of the Board and shareholders, [the Beneficiary], is the highest-level decision-maker with [the Petitioner]" and "[the Beneficiary] will develop the overall budget with the Chairman of the Board." The Petitioner's consent in lieu of special meeting of the board of directors indicated that its board of directors consists of five members, with the Beneficiary and her "to be hired" subordinate, a part-time sales consultant (*Y.Z.*), both being members of the Petitioner's board of directors. It is unclear, however, how the Beneficiary will receive guidance and direction from the board that consists of herself and a "to be hired" employee she will supervise. According to section 101(a)(44)(B) of the Act, a beneficiary must "receive only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization." Here, it appears that the duties pertaining to the board of directors indicates the Beneficiary will receive direction from a lower-level employee, her subordinate.

The Petitioner has not established that the Beneficiary's duties are primarily executive in nature.

A. Staffing and Organizational Structure

The Petitioner's Form I-129 indicated that its current number of employees in the United States is three with an additional three to be hired. The Petitioner initially submitted an organization chart indicating that the Petitioner only had two employees (the Beneficiary and her assistant) and the Beneficiary would manage five subordinates:

- President, Bachelor's degree [the Beneficiary]
    - Assistant to the President, Master's degree (*W.W.*)
    - Systems Maintenance Engineer, Bachelor's degree (to be hired)
    - Sales Consultant, Part-time (to be hired)
    - Technical Customer Service Specialist, Bachelor's degree (to be hired)
    - Accounting Manager, Outside CPA (*J.Z.*)

The organizational chart indicated that the Beneficiary would have direct authority over two subordinates with managerial titles.

The supporting evidence also included a copy of: (1) the Beneficiary's resume; (2) the Petitioner's five-year business plan dated October 1, 2017; (3) the Petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for second-quarter 2018;[3] and (4) the Petitioner's unaudited balance sheets as of June 30, 2018.

[3] The instant petition was filed on August 6, 2018.

In the RFE, the Director requested more information about the Beneficiary's subordinates. In response, the Petitioner provided the organizational chart and IRS Form 941 for second quarter 2018 that were previously submitted, and the Petitioner's employees' pay stubs for the months of April, May, June, and July 2018.

In denying the petition, the Director acknowledged the Petitioner's submission of an organizational chart, but found that the Petitioner did not provide evidence of the subordinates' qualifications and an explanation of how they relieve the Beneficiary from performing non-qualifying duties. The Director concluded that the Petitioner did not show that it currently employs individuals that would relieve the Beneficiary from non-qualifying duties.

On appeal, the Petitioner provided a copy of an offer of employment that was extended to *Y.Z.* just prior to filing the instant petition for the position of part-time sales consultant consisting of 5 to 25 hours per week. As mentioned above, the Petitioner claimed three U.S. employees on the Form I-129, however, the Petitioner's organizational chart identified only two current employees. Doubt cast on any aspect of a petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Although the Petitioner submitted a copy of an offer of employment for the position of a part-time sales consultant and paystubs for the Beneficiary and her assistant on appeal, it did not submit paystubs for the part-time sales consultant which may have corroborated the employment of a third employee at the time of filing the petition. In any event, the offer of employment stated that the beginning date of employment would be July 30, 2018 which was after the petition was filed. The record does not contain evidence indicating that *Y.Z.* in fact commenced employment with the Petitioner on July 30, 2018. For these reasons, we will not analyze whether the part-time sales consultant was able to relieve the Beneficiary from performing primarily executive duties.

The five-year business plan indicated that the position of accounting manager will be an outside CPA who works directly with the Beneficiary and the assistant to the President to manage and oversee the Petitioner's accounting affairs. Specifically, the five-year business plan stated: "this is a contract position." The organizational chart, however, indicated that the president (the Beneficiary) would have direct control over the accounting manager. Regardless of whether the accounting manager would be a direct employee or, as the Petitioner indicated, this is a contract position, it is critical to know when the Petitioner plans to fill this position and the duties it would encompass given the Petitioner's emphasis on finances as an element that is integral to its growth and development.

The five year business plan also indicated that the Petitioner projected payroll expenses of $170,000 for the first year of operations. Again, the Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period October 1, 2017, to September 30, 2018. USCIS electronic records indicate that the Beneficiary was initially admitted into the United States as an L-1 nonimmigrant at the [redacted] Washington, port-of-entry on December 26, 2017. The record, however, does not indicate that the Petitioner has allocated $170,000 for payroll expenses in the first year of operations. Specifically, the Petitioner's employees' most recent pay stubs, which were submitted on appeal, indicated that the president (the Beneficiary) and the assistant to the president year-to-date earnings for the month of July 2018 were $35,000.00 and $17,023.79, respectively, for the year-to-date period ending July 2018. The year-to-date remuneration of $52,023.79 that was

annotated on the Petitioner's employees' pay stubs for July 2018 is significantly below the prorated payroll expenses of $98,600[4] for the year-to-date period ending July 2018.

The Petitioner's IRS Form 941 for second-quarter 2018, which includes April, May, and June 2018 indicated that two employees received wages, tips, and other compensation of $23,207.99 for second-quarter 2018. The Petitioner's employees' pay stubs for April, May, and June 2018 indicated that the president (the Beneficiary) and the assistant to the president's earnings for these months were $24,999.99.[5] The record neither clarified nor explained this discrepancy.

The Petitioner's unaudited balance sheet as of June 30, 2018, identified payroll liabilities of $5,705.69 for the period as of June 2018. This document does not identify any additional labor costs. Accordingly, this document does not reflect the Petitioner's employees' year-to-date earnings of $43,690.46 for the year-to-date period ending June 2018.

Further, it is unclear how the Beneficiary will receive guidance and direction from the board that includes herself and a "to be hired" employee she will supervise. Further, the Petitioner has submitted insufficient evidence that her assistant alone would be able to relieve her from performing non-qualifying duties. 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, 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, although the Petitioner claims that it has sufficient lower-level staff to allow the Beneficiary to primarily focus on the broad policies and goals of the organization, and to remove her from significant involvement in the day-to-day operations of the company, the record does not support that claim. The Beneficiary had one documented subordinate at the time of filing. Further, the Petitioner's claim that the Beneficiary's oversight over an outside CPA will relieve her from primarily performing non-qualifying duties is not corroborated by documentary evidence.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, we must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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

[4] From January 1, 2018, to July 31, 2018 = 212 days. 212/365 = 0.58. 0.58 x $170,000 (projected payroll expenses) = $98,600.

[5] The Beneficiary's pay stubs for April, May, and June 2018 identified earnings of $5,000.00 per month, for a cumulative total of $15,000.00 for this period. The assistant to the president pay stubs for April, May, and June 2018 identified earnings of $3,333.33 per month, for a cumulative total of $9,999.99 for this period.

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). The size of a company may be especially relevant when USCIS notes discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15. Here, the Petitioner submitted inconsistent information regarding its actual staffing levels at the time of filing and has not adequately explained how the Beneficiary would be able to perform primarily executive duties with one subordinate employee, her assistant.

For these reasons, we find that the Petitioner did not establish it will employ the Beneficiary in an executive capacity.

III. NEW OFFICE EXTENSION

Although not addressed in the Director's decision, we further find that the Petitioner has not submitted evidence that it has been doing business for the previous year.

A new office extension petition must include evidence that the petitioner has been doing business for the previous year. 8 C.F.R. § 214.2(l)(14)(ii)(B). "Doing business" means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad. 8 C.F.R. § 214.2(l)(1)(ii)(H).

The Petitioner projected revenue from operating income of $1,000,000 for the first year of operations on its five-year business plan. The Petitioner has not documented receiving this projected revenue or shown what services it provided in exchange for it. The Petitioner claimed that it "intends to host and operate data centers in the U.S. to meet clients' demands for heightened network security protection and infrastructure support," but the Petitioner did not document this claimed activity. Although the Petitioner claimed that it provides network technology services, the Petitioner did not submit documentation supporting this claim.

Neither the Petitioner's business checking and investment account statements, nor its unaudited balance sheet as of June 30, 2018, identify receipt of funds beyond in-coming wire transfers remitted by the Petitioner's foreign parent. The accuracy of the Petitioner's unaudited balance sheet as of June 30, 2018, is in question. For instance, this document identified payroll liabilities of $5,705.69, but the quarterly report and employees' pay stub documents in the record show $23,207.99 and $43,690.46, respectively, in wages for second-quarter 2018 and year-to-date earnings as of the period ending June 2018. The unaudited balance sheet does not indicate that an allocation was made for wages payable. This very significant discrepancy casts doubt on the reliability of the unaudited balance sheet. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of the Petitioner's evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Also, other key claims by the Petitioner lack documentary support.

Given the Petitioner's inconsistent and uncorroborated assertions regarding the nature and extent of its business activity, we find that the Petitioner has not met its burden of proof to show regular, systematic, and continuous provision of services at the time of filing. The Petitioner has not

established that it was doing business, as the regulations define that term, at the time of filing and during the previous year.

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-T-USA, Inc.*, ID# 2988926 (AAO Apr. 15, 2019)