U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A- CORP.

DATE: APR. 17, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a wholesaler and retailer of custom shutters and cabinets, seeks to continue the Beneficiary's temporary employment as its "vice president/chief financial officer" under the L-1A nonimmigrant classification for intracompany transferees.[1] *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 contends that the Director disregarded previously submitted evidence and made factual and legal errors in denying the petition.

Upon *de novo* review, we find that the Petitioner did not overcome the Director's decision. 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 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 Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period August 1, 2016, until July 31, 2017. 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).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

In this matter, the Petitioner claims that the Beneficiary's proposed position will be in an executive capacity. The Petitioner did not claim that the Beneficiary would be employed in a managerial capacity. Therefore, our analysis will focus on the Petitioner's claim that the Beneficiary will be employed in an executive capacity under an extended petition.

"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.

Based on the statutory definition of executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). The Petitioner also must prove that the Beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

When examining the managerial or executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) examines 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 and its staffing levels.

A. Duties

In support of the petition, the Petitioner provided a cover letter stating that it has relied on "localized advertising," personal contacts, social media, and its newly launched website and mobile application to market its products and services. The Petitioner stated that under an extended petition the Beneficiary will: manage the company's finances and marketing by working with managerial employees to secure loans from vendors to maintain cash flow and by ensuring the foreign entity's continued financial support of the U.S. operation; continue to oversee the company's marketing by relying on managerial employees to develop a marketing strategy; exercise discretionary authority over personnel matters, such as hiring and firing managerial employees and recommending other personnel actions; and make decisions about daily operations by delegating daily functions to managerial employees.

In a request for evidence (RFE), the Director determined that the submitted job description was insufficient and questioned the Beneficiary's role with respect to the Petitioner's warehousing operation in light of a photograph that appeared to show the Beneficiary performing operational tasks.

In response, the Petitioner restated the Beneficiary's prior job description and provided a description of the job duties the Beneficiary performed during the Petitioner's first year of operation and would continue to perform under an extended petition. Those job duties include directing financial activities and coordinating such activities with the parent company, formulating financial and marketing strategies, and hiring, firing, and evaluating employees. The Petitioner also addressed the Director's concerns regarding the photograph of the Beneficiary in the warehouse, stating that the photograph depicts the Beneficiary demonstrating the use of new machinery that was ordered to carry out the Petitioner's daily functions.

In the denial decision, the Director determined that the Petitioner provided a deficient job description that did not adequately describe the Beneficiary's daily job duties or state how the Beneficiary would distribute his time among his assigned tasks. The Director also acknowledged the Petitioner's explanation regarding the Beneficiary's warehouse functions and noted that training employees is not an executive-level tasks.

On appeal, the Petitioner asserts that the Beneficiary "directs the management of the whole U.S. entity on finance" and contends that it is not required to provide a job description that necessarily breaks down the Beneficiary's job duties "on a daily basis." The Petitioner's interpretation of the express regulatory language is correct. We further note that the Director cannot make an adverse finding regarding the Petitioner's failure to submit specific evidence if such evidence is not expressly required by statute or regulation and was not requested by the Director. In any event, the Director has the discretionary authority to request evidence that is not expressly required by regulation,[2] including a job duty breakdown delineating a beneficiary's specific daily job duties. Here, however, the Director did not expressly request the Petitioner to provide a job description in

[2] *See* 8 C.F.R. § 103.2(b)(8)(iii).

that specific format and therefore no adverse finding should stem from the lack of such evidence. Nevertheless, in order to establish eligibility for the L-1A nonimmigrant visa classification, every petitioner must meet certain fundamental criteria, including providing "a detailed job description of the services to be performed" by the beneficiary. *See* 8 C.F.R. § 214.2(l)(3)(ii).

In the present matter, the Petitioner provided a deficient job description that does not meet the above regulatory requirement because it does not include a detailed description of the services that the Beneficiary will perform under an extended petition. For instance, the job description indicates that the Beneficiary will direct the Petitioner's financial activities and "coordinate" those activities with its parent entity to ensure the foreign entity's continued financial commitment to the U.S. operation. The Petitioner did not, however, specify any actual services the Beneficiary will perform to explain how he will direct and coordinate the company's finances. The Petitioner was similarly vague in stating that the Beneficiary will supervise a "subordinate manager for marketing" and "rely on subordinate managers to produce the realistic marketing strategy" and "promote the company's goals." The Petitioner did not identify any specific job duties that would explain how the Beneficiary plans to supervise employees in creating and carrying out a marketing plan, nor is it clear that the Petitioner has employees that are specifically assigned marketing job duties.

Further, although the Petitioner claims that it will rely on its newly launched website and mobile application to market its products and services, it is unclear who created the website and mobile application and who will monitor and service these marketing tools going forward. The Petitioner also claimed that formulating the financial and marketing strategies will require the Beneficiary to "address[] the major business issues and operating problems"; it did not, however, identify any "major business issues" or "operating problems" or establish that addressing these issues and problems is beyond the types of operational concerns that can be delegated to non-executive subordinate employees. Stating that the Beneficiary will have discretionary authority in hiring, firing, and evaluating employees is not sufficient to convey an understanding of the underlying services the Beneficiary will perform, as these functions would only be performed intermittently as needed and would not be a routine part of the Beneficiary's proposed assignment.

On appeal, the Petitioner provides a supplemental job duty breakdown, which states that the Beneficiary will allocate his time in the following manner:

- 25% overseeing the company's finances and marketing by performing duties that include developing "financial management systems," making financial decisions regarding policies and objectives, developing financial procedures, making business forecasts, and managing the company's budget;
- 25% formulating a financial and marketing strategy, formulating responses to industry changes, preparing financial statements and reporting on company finances, assisting with contract negotiations and assessing prospective contracts, and overseeing cash and investments;
- 15% hiring, firing, and evaluating employees, creating performance incentives and delegating assignments, making financial recommendations and evaluating potential

investments and cost effectiveness of prospective services, drafting budgets, and reporting to the board of directors regarding financial and budgeting matters;

- 15% coordinating financial activities with the parent entity, ensuring the parent entity's continued financial commitment to the U.S. operation, developing and implementing accounting, billing, and auditing procedures, and overseeing fiscal reporting, purchasing and payroll, production of monthly reports, and accounts payable and receivable;
- 10% fund raising, managing costs and revenues, analyzing cash flow, costs controls, and investment proposals, coordinating financial audits, working with the CEO "to ensure programmatic success" and compliance with "contractual and programmatic requirements," and ensuring that "adequate controls" are in place to enable purchases to pass independent and government audits; and
- 10% overseeing budgets and financial management, supervising investments and fund raising, preparing financial analysis for contract negotiations and product investment decisions, training staff to raise awareness of "financial management matters," developing internal contracts to protect company assets, researching cost effective benefits plans, creating and implementing wage incentives, and overseeing business insurance and health plans.

Although this job description is lengthier than those previously provided and includes a percentage time allocation, it groups multiple duties together and therefore does establish how much time the Beneficiary would spend performing each individual task. Further, we find that the new job description does not add to our understanding of the Beneficiary's daily tasks, nor does it establish that the Beneficiary would allocate his time primarily to executive job duties. Despite maintaining the claim that the Beneficiary will oversee the company's finances, the Petitioner did not clarify any telling characteristics of the "financial management systems" that the Beneficiary will purportedly develop or specify any policies or objectives he has formulated and put in place. The Petitioner also provided no information about the types of financial and marketing strategies the Beneficiary will formulate, nor did it establish that preparing financial statements and assisting with contract negotiations are executive activities. Likewise, the Petitioner did not establish that drafting budgets, engaging in fund raising activities, or preparing financial analyses are executive job duties. As the Petitioner grouped multiple tasks together when assigning time allocations, it is unclear how much time the Beneficiary would spend carrying out these non-executive functions.

In general, the fact that the Beneficiary will direct the management of a business does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. As such, a detailed job description is critical in determining the nature of the employment; reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient and would not meet the regulations, which require a detailed description of the Beneficiary's daily job duties. We further note that exercising discretion over the Petitioner's day-to-day operations and possessing the requisite level of authority with respect to discretionary decision-making does not mean that the Beneficiary would devote his time primarily to executive-level tasks, as claimed. In

order to make this determination, the Petitioner must identify the specific tasks the Beneficiary will perform or the services he will provide. 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 job descriptions that the Petitioner has provided do not sufficiently delineate the Beneficiary's actual job duties and thus they do not establish that he would be employed in an executive capacity.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, USCIS takes 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.

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.*

In the present matter, the Petitioner provided an organizational chart showing a chief executive officer at the top of the hierarchy with the Beneficiary immediately subordinate to that position. The chart shows three U.S. positions – a sales manager, an office manager, and a production manager – and a China-based head of the "international division" as the Beneficiary's direct subordinates. The chart also shows a third tier of employees consisting of two sales people subordinate to the sales manager, one warehouse employee subordinate to the office manager, two production technicians subordinate to the production manager, and two China-based trading department employees subordinate to the head of the "international division." The Petitioner provided brief job descriptions for the Beneficiary's direct and indirect subordinates in the United States. It did not, however, provide a job description for its CEO or the claimed China-based employees.

In the RFE, the Director questioned the Petitioner's representation of China-based employees as part of its U.S. staffing structure, pointing out that all three employees are part of the parent company's organizational chart, which does not depict those employees as the Beneficiary's subordinates.

The Petitioner's response includes a new organizational chart, which depicts the same basic staffing structure as in the original chart, but omits the foreign-based employees. The chart also shows that [redacted] whom the Petitioner previously identified as one of its two production technicians, now occupies the position of sales manager, thereby decreasing the number of production technicians from two to one. The Petitioner did not explain these staffing changes or discuss how they might affect its daily operations and the time the Beneficiary would devote to the Petitioner's non-executive operational functions.

We further note that while the Petitioner did not provide a job description for its CEO, whom it depicted at the top of its organizational hierarchy, nor did it explain how the CEO and Beneficiary direct the management of a nine-person organization and its components. Without this information, we cannot assess the Beneficiary's position or gauge his level of discretionary authority within the scope of an organization where approximately 20% of the staff is claimed to be employed in an executive capacity. We also find that the job descriptions that the Petitioner provided for its support personnel are overly vague and do not adequately establish which duties the subordinate staff would perform. For instance, despite the heavy focus on financial management in the Beneficiary's own job description, none of the supporting employees have been tasked with routine finance functions. It is therefore unclear who, if not the Beneficiary, would carry out the underlying daily tasks associated with financial management. Without sufficient information about the tasks performed by the Beneficiary's support staff we are unable to determine the extent to which they would effectively relieve the Beneficiary from having to engage daily in the performance of operational job duties.

The Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in denying a visa petition for classification as a multinational manager or executive. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS 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 or a company that does not conduct business in a regular and continuous manner. *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. As discussed above, the record does not establish that the Petitioner had a sufficient staff to relieve the Beneficiary from having to allocate his time to primarily non-executive job duties.

Finally, the Petitioner contends that the Director did not consider the congressional intent in creating the L-1 visa category and also points to the current U.S. policy to "Buy American Hire American." We note, however, that an immigration benefit cannot be granted to a petitioner that has not established that it meets the eligibility requirements for the benefit being sought. As discussed earlier, the Petitioner did not adequately describe the Beneficiary's proposed job duties or demonstrate that at the time of filing it had the organizational complexity to support the Beneficiary in an executive capacity.

III. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary will be employed in an executive capacity under an extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of A- Corp.*, ID# 1130757 (AAO Apr. 17, 2018)