U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-S-, LLC

DATE: APR. 19, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a global positioning service (GPS) device seller and service provider, seeks to continue the Beneficiary's employment as its president 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 Vermont Service Center denied the petition, concluding that the record did not establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner asserts that it has submitted sufficiently detailed duties and supporting documentation demonstrating that the Beneficiary would act 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 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 16, 2016, until July 30, 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

The sole issue to be addressed is whether the Petitioner has established that the Beneficiary would act in an executive capacity under the extended petition. The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

The statute defines an "executive capacity" 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 review 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 and indicate whether such duties are in an executive capacity. *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, its staffing levels, and its organizational structure.

A. Duties

In denying the petition, the Director concluded that the Petitioner did not appear to have a sufficient organizational complexity to support the Beneficiary in a qualifying executive capacity. The Director determined that the Beneficiary's duties reiterated the regulatory definition of an executive and stated that the Petitioner did not submit supporting documentation to substantiate his performance of executive level duties. On appeal, the Petitioner asserts that it has provided specific examples of the Beneficiary's executive duties and supporting documentation to corroborate them.

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.

1991) (unpublished table decision). Second, the Petitioner 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.

The Petitioner stated that it was established in 2016 "with the goal of bringing premium global positioning services and tracking devices to businesses and individual consumers in the United States." The Petitioner stated that as president the Beneficiary would be tasked with "formulating short- and long-term policies, goals, strategies, procedures and programs," noting his attendance at "business coaching classes," his engagement of a "personal business coach," and meetings "with potential investors and business men." The Petitioner also indicated that the Beneficiary would devote his time to "planning and directing the company's financial, governance, and commercial operations," noting his implementation of a "Rockefeller Habits managing methodology" and regular staff meetings. Further, the Petitioner explained that the Beneficiary would be responsible for "coordinating and setting accurate budgets...for administration and marketing," including reviewing financial statements prepared by an "accounting team." It also stated that the Beneficiary would spend his time "hiring and overseeing the company's management team and delegating supervision." It further emphasized the Beneficiary's decision to adopt a particular hiring philosophy based on "business relationships and referrals."

In addition, the Petitioner stated that the Beneficiary would devote his time to performing "annual evaluations and ensuring [the] highest level of customer/client service," including adopting and implementing employee evaluation forms used by the foreign employer. The Petitioner also indicated that the Beneficiary would be responsible for supervising "subordinate employees and subcontractors who perform the day-to-day work," "exploring and identifying the need for further investment," "coordinating international strategic planning," and participating in foreign employer monthly and quarterly meetings. It further explained that the Beneficiary would devote his time to "negotiating with banks and vendors and suppliers of GPS products and services," meeting with "potential vendors and service providers," "determining with shareholders updated marketing and promotion strategies," "working to develop a marketing strategy," "analyzing strategic alliances," and identifying new opportunities for the introduction of new services.

The Petitioner has not submitted a sufficiently detailed duty description that describes his day-to-day executive-level duties or that credibly establishes that he would devote his time primarily to qualifying tasks. The Beneficiary's duty description includes several general duties that could apply to any executive acting in any business or industry and they do not provide insight into the actual nature of his role. The Petitioner provided insufficient examples and little supporting documentation to demonstrate the Beneficiary's performance of qualifying duties, such as short-term and long-term goals, strategies, procedures, and programs he has set, commercial operations he manages, budgets he set for administration or marketing, further investment he sought to secure, international strategic planning he implemented, key issues or priorities he handled, vendors or service providers he met with, marketing or promotion strategies he updated or developed, or new services he introduced. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

To the extent that the Beneficiary submits specifics and documentation regarding the Beneficiary's daily executive duties we do not find that these credibly demonstrate that he is primarily focused on executive level tasks. For instance, the Petitioner references the Beneficiary's attendance at "business coaching classes," his discussions with a "business coach," his implementation of a "Rockefeller Habits managing philosophy," and the adoption of a hiring philosophy based upon "business relationships and referrals." Not only are the nature of these philosophies unclear, the Petitioner does not demonstrate or document how these activities translate into day-to-day executive level duties on the part of the Beneficiary.

The Petitioner also refers to the Beneficiary's negotiations with banks, vendors, and suppliers. However, the Petitioner submits documentation indicating that these negotiations have been limited. For instance, evidence of these asserted negotiations includes a one-time non-binding memorandum of understanding with a potential GPS device provider. In addition, the Petitioner submitted boilerplate contracts with a bank, an accounting service, and a payroll service provider for the transfer of funds, to complete the company's annual IRS filings, and to service the company's payroll for $200 per quarter. This supporting documentation does not demonstrate that the Beneficiary is continually performing executive level negotiations with other vendors, suppliers, and subcontractors as asserted. Likewise, the Petitioner provides an asserted "manual of conduct, general policies and human resources policies" it asserts was formulated by the Beneficiary. We find this evidence similarly non-probative in demonstrating the Beneficiary's regular performance of executive level duties. The claimed policy makes no reference to the Petitioner's specific business and sets forth only general principles that could apply to any employee in any industry such as being "truthful, transparent, accurate, and complete" or maintaining "harmony with...superiors and co-workers." In sum, the Petitioner has not sufficiently documented that the Beneficiary was primarily devoted to executive level duties as of the date of the petition.

Even though the Beneficiary holds a senior position within the organization, the fact that he will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. Sections 101(A)(44)(B) of the Act. 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; however, the position descriptions alone are insufficient to establish that his actual duties would be primarily executive in nature.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or 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.

In support of the petition in June 2017, the Petitioner stated that it employed four individuals, including the Beneficiary. A submitted organizational chart reflected that the Beneficiary oversaw an operations manager, who in turn supervised an administrative assistant and a "technical specialist #1." The Petitioner indicated that by the end of 2017 it planned on hiring six additional employees, including an installer, a system specialist, a sales representative, an operations assistant, a customer service representative, and a receptionist. The Petitioner explained that the sale of the company's products was handled by the technical specialist, with oversight by the operations manager.

The Petitioner further stated that the operations manager handled "sales to executives of the company's larger clients" and that he was responsible for hiring and firing the company's lower level employees, meeting with the company's sales and customer service representatives, establishing and maintaining a training program, providing guidance to subordinate managers, leading a team of installers, and overseeing a marketing and promotion strategy. The Petitioner noted that "its staff fully relieves [the Beneficiary] of performing non-qualifying duties." However, later in a submitted business plan, the Petitioner stated that "the [Beneficiary] will be relieved from performing non-qualifying duties by the end of the 2017."

In response to the request for evidence (RFE) in September 2017, the Petitioner submitted an entirely new organizational chart reflecting that the company consisted of five departments supervised by the Beneficiary including operations, marketing, administrative, accounting, and innovation and technology departments. The chart indicated that the operations manager supervised an "outsourced contractor" responsible for installations and vacant operations assistant, sales representative, and customer service representative positions. The Petitioner further explained that the marketing department was overseen by a foreign employer manager and that the administrative department was directed by another foreign employee, the human resources director.' It also stated that the human resources director supervised an executive assistant, also a foreign employee, and an administrative assistant. In addition, the Petitioner indicated that the innovation and technology department was made up of a new employee, the IT manager, and a technical specialist. Lastly, the chart specified that the accounting department consisted of a foreign accounting and budget manager and a contractor handling accounting matters.

On appeal, the Petitioner states that the Beneficiary oversees five departments, including subordinate managers and professionals. The Petitioner also emphasizes four foreign employees and asserts that they support its operations in the United States relieving the Beneficiary from performing non-qualifying operational duties. It contends that the Director did not consider the totality of the evidence and the reasonable needs of the Petitioner.

As a preliminary matter, the Petitioner has presented two materially different organizational structures, only approximately three months apart, leaving question as to its actual organizational structure. In support of the petition, the Petitioner did not reference the engagement of foreign

employees within the Petitioner's organizational structure; however in response to the RFE, it includes five foreign employees in its organizational chart, equaling the number of U.S. based employees. The Petitioner also submits no evidence substantiating that it regularly engages foreign employees as a part of its operations or that these employees can be considered a part of its organizational chart as of the date of the petition. In sum, this leaves substantial question as to the credibility of the Petitioner's asserted organizational chart submitted in response to the RFE. The Petitioner's apparent material modification of the record indicates that its staffing was not sufficient to support the Beneficiary in an executive capacity as of the date of the petition. The Petitioner must resolve discrepancies 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 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). As such, the relevant organizational chart to analyze is that existing as of the date of the petition. The evidence indicates that the staffing of the Petitioner was not sufficient to support the Beneficiary in an executive capacity as of the date of the petition. As stated, the Petitioner indicated that it only employed three subordinates, beyond the Beneficiary, as of the date of the petition; namely, an operations manager supervising a technical specialist and an administrative assistant. However, the Petitioner's support letters and business plan reveal numerous non-qualifying operational duties, including handling "numerous installations," sales activities, service of GPS devices, delivery of orders, deployment of devices, generation of sales leads, marketing campaigns, handling customer inquiries, "24x7, 365" technical support, software support and updates, amongst other operational level duties. It appears unlikely that an operations manager and two other operational level employees would be sufficient to perform this extensive list of operational functions.

Further, the Petitioner does not specify who was performing these tasks as of the date of the petition. The stated duties of the operations manager include few operational-level tasks, leaving less clarity as to who was performing these duties as of the date of the petition. In fact, the operations manager's duties reflect that he would be tasked with overseeing sales and customer support representatives, establishing and maintaining a training program, providing guidance to subordinate managers, and leading a team of installers. However, as of the date of the petition, the submitted organizational chart does not indicate that the Beneficiary's sole subordinate, the operations manager, has subordinate managers or multiple sale representatives, or that the Petitioner employs "a team of installers."

The Petitioner also asserted that it engages independent contractors that perform non-qualifying operational tasks for the business, including a vendor handling installations and another engaged in accounting matters. However, the Petitioner submits little supporting evidence to substantiate this assertion. For instance, there is little indication on the record that the Petitioner was regularly engaging an installation contractor as of the date of the petition; in fact, there was no mention of this contractor in support of the petition. In addition, although the Petitioner did submit evidence that it signed a contract with an accounting contractor to complete its Form IRS, U.S. Return of Partnership Income and a Form 1040 NR, U.S. Nonresident Alien Income Tax Return, this contract reflects that

these services would amount to less than $2,250 during 2017. This evidence does not indicate that this contractor was regularly hired as an accounting resource or that it could be considered part of an "accounting department" within the company as asserted. In short, the Petitioner has provided little evidence to indicate that it employed independent contractors to relieve the Beneficiary and his few subordinates from non-qualifying operational tasks.

Therefore, without clarification and sufficient supporting evidence as to which employees were performing the numerous non-qualifying operational duties of the business, it appears that the Beneficiary was substantially engaged in these duties as of the date of the petition. Indeed, the Petitioner stated in a provided business plan that the Beneficiary would not be relieved of these tasks until the end of 2017, several months after the date of the petition. The evidence does not indicate that, as of the date of the petition, the Beneficiary was removed from performing non-qualifying operational tasks and that he primarily spent his time focusing on executive level duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in an executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

On appeal, the Petitioner also emphasizes the applicability of an adopted decision to the current matter asserting that it supports the Beneficiary's eligibility. *See* Matter of Z-A-, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016). However, we do not find the Petitioner's reference to this matter persuasive. We note that *Matter of Z-A-* involved an L-1A function manager with no subordinates in the United States. Also, that case involved a manager, not an executive, as the Petitioner asserts in this matter. Regardless, we acknowledge that *Matter of Z-A-* took into account the beneficiary's foreign subordinates in assessing whether he qualified as a manager. However, the petitioner in *Matter of Z-A-* submitted "substantial evidence relating to the support provided by overseas staff." Here, the Petitioner submits little to no evidence of its engagement of foreign employees in support of its operations. In fact, this asserted foreign employee support was not mentioned as of the date of the petition, but suddenly emphasized it in response to the RFE and on appeal without supporting evidence. . In addition, in *Matter of Z-A-* we also pointed to evidence of foreign subordinates performing "production planning, technical support, research and development, sales, logistics, and distribution for the U.S. market." In contrast, the Petitioner provides no supporting evidence of its foreign employees performing these types of operational level tasks.

As noted, the Petitioner asserts that the Beneficiary qualifies as an executive. 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.*

However, as we have discussed, the Petitioner has not sufficiently demonstrated that the Beneficiary had a subordinate level of managerial employees to direct as necessary to allow him to primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. The evidence indicates that the Petitioner was engaged in a wide range of operational activities for which it appears to not have sufficient employees. Likewise, the Petitioner does not clearly and credibly describe and document the Beneficiary's day-to-day executive duties. For these reasons, the Petitioner has not established that the Beneficiary would act in an executive capacity as of the date of the petition's filing. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the intended U.S. operation one year within the date of approval of the petition to support an executive position. There is no provision in USCIS regulations allowing for an extension of this one-year period. If the 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 for an extension. For these reasons, the appeal must be dismissed.

III. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in an executive capacity under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of T-S-, LLC*, ID# 1176109 (AAO Apr. 19, 2018)