U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-, LLC

DATE: APR. 26, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a fish farm, seeks to extend the Beneficiary's temporary employment[1] as its general manager under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the Vermont Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner will employ the Beneficiary in the United States in an executive capacity. The Director based this finding on discussion of the Beneficiary's duties and the petitioning company's staffing a year after the approval of the new office petition.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by not considering the company's growth. The Petitioner adds that the record, as a whole, establishes the breadth of the Beneficiary's executive authority.

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, approved for the period March 18, 2015, until March 17, 2016. 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 Director found that the Petitioner did not establish that it will employ the Beneficiary in an executive capacity. The Petitioner does not claim that it seeks to employ the Beneficiary 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. The Petitioner asserts that it has established the Beneficiary's high level of discretionary authority, and that the Beneficiary's duties are primarily those of an executive. We disagree with the latter assertion, as explained below.

"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 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 and indicate whether such duties are in a managerial or 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 and its staffing levels.

A. Duties

The Petitioner stated that the Beneficiary is "responsible for the entire company's business management," with authority over the company's operations, finances, production, personnel, marketing, and other aspects of the business. The Petitioner stated:

> Beneficiary will continue to direct the US fish farm business operations, ensure compliance with all regulatory agencies and market the products for sale in the local US market. He will oversee ponds and all staff, including managers; oversee marketing via internet/media to attract additional wholesale buyers; supervise the investment of [the foreign parent company]; report directly to the Board of Directors all findings, including requests for additional monetary support for improvements to the property and equipment.

Asked for more details, the Petitioner provided a 19-item list of responsibilities, and stated that the position fulfills all four elements of an executive capacity. Some of the listed duties are consistent with a high level of authority, such as supervising the administrative manager and developing policies. But others indicate lower-level, non-executive activity, such as training "all staff" and "[p]romot[ing] the business through advertising and marketing."

Furthermore, the more detailed list of the Beneficiary's responsibilities dates from nine months after the filing date, when the Petitioner had hired several additional employees who were able to assume functions that, apparently, the Beneficiary himself had previously performed. Of particular significance is the assertion that the Beneficiary directs the management of the organization by supervising the administrative manager. At the time of filing, the Petitioner did not employ an administrative manager.[2]

The Director denied the petition, stating that the job description "is broad in scope and limited in detail" and includes several non-qualifying tasks. The Director concluded that the Petitioner had not shown that the Beneficiary's duties were primarily those of an executive at the time of filing.

On appeal, the Petitioner maintains that it had previously established that the Beneficiary "primarily performs [high-level] responsibilities and does not spend a majority of his time of day-to-day functions." The earlier submissions, however, did not specify how much time the Beneficiary spent on any given task.

The Petitioner states that the Director "relies too much on the letter from the Petitioner, this letter does not stand alone in the assertion that the beneficiary has an executive role and performs executive duties." The Petitioner observes that "the Beneficiary is the 50% owner of the U.S. Company," "has sole authority to sign checks and obligate the Company to pay substantial amounts to its vendors and suppliers," and "continues to be the decision-maker for all new contracts."

[2] We will further address the Petitioner's staffing below.

Although the above information relates to the level of the Beneficiary's discretionary authority, it does not tell us that the Beneficiary *primarily* exercised that authority at the time of filing. The Petitioner has not provided enough information about the Beneficiary's duties, and the proportion of time he devoted to each of those duties at the time of filing.

The Petitioner has not shown that the Beneficiary's duties, at the time of filing, were primarily those of an executive.

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. The definition presumes a management structure, separate from the beneficiary, for the beneficiary to direct. A beneficiary 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 an 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.*.

At the time of filing, the Beneficiary was one of three employees at the petitioning entity. The Petitioner stated that it would soon recruit and hire "an experienced fish farming expert" followed by "3 or 4 more employees." In a supplement to the initial filing, ten months later, the Petitioner identified seven subordinate employees, most of them hired late in 2016.

In the denial notice, the Director stated that the Petitioner had not shown "how two employees would be able to support the [B]eneficiary's role, handle all of the daily operations of the entity, and therefore relieve the [B]eneficiary from performing non-qualifying duties." The Director stated that employees hired after the filing date could not establish eligibility at the time of filing.

On appeal, the Petitioner states that the Director "is not accounting for the needs of a growing organization":

> Here, when the initial filing was submitted, the newly-minted company was just a few years old and only staffed three employees. Therefore, based on the reasonable need of the fledgling company, the Beneficiary was spending more of his time, albeit not

> the majority, on such things as human resources, operations, and training. . . . Now, the company employs many more employees . . . . Therefore, the Beneficiary is able to devote even more of his time to his executive tasks.

The Petitioner also states that the Director "fails to recognize that businesses grow as time passes." The issue is not the growth of the company, but the timing of that growth. The Petitioner's initial new office petition could permissibly take into account planned growth over the following year. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(*1*). But this provision does not apply to petitions to extend the Beneficiary's status past that initial year. The Petitioner must meet all eligibility requirements at the time of filing. *See* 8 C.F.R. § 103.2(b)(1). Subsequent hires cannot establish eligibility at the time of filing. A visa petition may not be approved at a future date after a petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

Judging from pay records, the Petitioner appears to have hired several employees after the Director issued a request for evidence in October 2017. (The administrative manager, for instance, earned less than $923 during 2016, consistent with a mid-December hiring.) In the request for evidence, the Director specifically stated:

> [Y]ou are required to demonstrate your organizational structure can support the beneficiary's proposed role at the time of filing. Hiring new employees after you have filed does not demonstrate the beneficiary was in a manager[ial] or executive capacity at the time of filing.

The Petitioner maintains that, even at the time of filing, the company had enough employees "to support the beneficiary's role in an executive capacity." The Petitioner does not explain or support this critical assertion. The Beneficiary's two subordinates were not managers, such that the Beneficiary could direct the management of the company through them.

The Beneficiary's two subordinates at the time of filing were a farm assistant and a laborer, who cared for the fish and operated and maintained farm machinery. Supervision at this level is not inherently executive-level work. Later hires performed tasks such as sales, marketing, and driving delivery vehicles. The Petitioner does not explain who performed those tasks before the Petitioner filled the respective positions. Invoices from 2015 show that sales and deliveries took place before the Petitioner hired sales and delivery personnel. Even if the farm assistant or laborer performed those tasks, this would not have made the Beneficiary an executive; it would have made him the first-line supervisor of two multi-tasking employees.

The Petitioner has not provided enough information to show that, even with only two non-managerial subordinates, the Beneficiary's duties were primarily those of an executive at the time of filing. The Petitioner cites the Beneficiary's hiring authority, but hiring authority is managerial rather than executive. See section 101(a)(44)(A)(iii) of the Act. An executive directs the management of a company, rather than manages it personally. Even then, the Petitioner did not hire

or fire any employees for more than a year before the filing date, and therefore those responsibilities made no demonstrable demands on the Beneficiary's time on the filing date and during the period leading up to it.

We acknowledge the Beneficiary's authority to handle contractual and financial matters on the Petitioner's behalf, as well as handle other matters such as applying for permits. But the Petitioner has not shown that the Beneficiary spent significant time on these duties.

Based on the deficiencies discussed above, the Petitioner has not established that it seeks to employ the Beneficiary in a primarily executive capacity under the extended petition.

III. CONCLUSION

The Petitioner did not show that the Beneficiary served in an executive capacity at the time of filing. Therefore, the Petitioner did not establish eligibility for extension of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of H-, LLC*, ID# 1201513 (AAO Apr. 26, 2018)