U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7871422

Date: APR. 30, 2020

Appeal of California Service Center Decision

PETITION: Form I-129, Petition for L-1A Manager or Executive

The Petitioner is a manufacturer and seller of communication cables. It seeks to continue to employ the Beneficiary temporarily as its president under the L-1A nonimmigrant classification for intracompany transferees who are coming to be employed in the United States in a managerial or executive capacity. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the California Service Center revoked approval of the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in the United States in a managerial or executive capacity. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. 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 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*.

Under U.S. Citizenship and Immigration Services regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, a director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Petitioner refers to the proposed position as that of "an executive over the company's employees," thereby indicating that the Beneficiary will be employed in an executive capacity.[1]

"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 managerial capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. Section 101(a)(44)(A) of the Act. The Petitioner must also 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).

The description of the job duties must clearly describe the duties performed by the Beneficiary and indicate whether such duties are in a managerial or an executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the employing 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 and its staffing levels.

A. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, we take 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 the petition form the Petitioner stated that it was established in 2012 and claimed seven employees in April 2018, when this petition was filed. In a supporting cover letter, the Petitioner reiterated that claim and stated that it "is expecting to hire more employees" in addition to the seven it claimed to employ at the time of filing The Petitioner stated that two vice presidents and a "VP General Manager" will directly report to the Beneficiary and that a sales manager, an internal sales coordinator, and an operation manager will report to the "VP General Manager." The Petitioner provided an organizational chart, which illustrates this staffing hierarchy and provides names for six of the listed positions. As the chart did not name a sales manager, it appears that this position was vacant at the time of filing. In response to a request for evidence (RFE), the Petitioner provided a new

[1] The Petitioner does not claim that the Beneficiary would be employed in a managerial capacity.

organizational chart depicting a different organizational structure, which included six, rather than seven, employees as depicted in the original organizational chart. Although both charts depicted the Beneficiary at the top of the hierarchy, the chart that was provided in response to the RFE did not include either a sales manager or a "VP General Manager," as in the original chart, and it showed the Beneficiary overseeing an operation manager and three vice president positions – a "VP/Board Member," "VP/Board Member," and "VP of Sales/Board Member," who in the original chart was listed in the position of "VP General Manager" overseeing a sales coordinator, whom the original chart depicted as "internal sales coordinator." The Petitioner also provided its California and Kansas state quarterly wage reports. The California wage report for the first quarter of 2018 shows that in the three months leading up to the filing of the petition, the Petitioner paid wages to only one employee in January 2018 and paid no wages at all in February or March 2018. The Kansas wage reports only accounted for 2017 wages and show that the Petitioner paid wages to only one employee during each of the four quarters. The Petitioner did not provide evidence showing whom it employed in April 2018, when this petition was filed.

Despite initially approving the petition, upon subsequent review of the record, the Director determined that the Petitioner did not demonstrate eligibility and therefore issued a notice of intent to revoke (NOIR), pointing to the inconsistency between the number of employees the Petitioner initially claimed and the information gathered in the course of a USCIS site visit, which indicated that the Petitioner had only two employees for whom there was no wage evidence. The NOIR determined that the discrepancy over the number of employees was indicative of willful misrepresentation.

In response, the Petitioner denied having made a willful misrepresentation, explaining that one of the employees listed as the Beneficiary's subordinate terminated his employment with the Petitioner approximately five months after the petition was filed. The Petitioner admitted to having inadvertently listed someone whose employment was terminated in 2017, but claimed that a new employee – [redacted] – was hired as a replacement and maintained that it "currently" has seven employees. In support of this claim, the Petitioner provided an email exchange from April 2019 indicating that [redacted]s employment with the Petitioner[2] commenced in May 2019, more than one year after this petition was filed. Likewise, although the same email exchange indicates that the Petitioner hired [redacted], this employment also did not commence until May 2019 and thus is not relevant to the issue of whom the Petitioner employed at the time this petition was filed. In a separate statement, [redacted] – one of the Petitioner's vice presidents – claimed that [redacted] and one other employee "perform dual roles" for the Petitioner and its U.S. affiliate. However, no explanation was provided to clarify how these "dual roles" serve the Petitioner's business goals or how, if at all, these employees could have supported the Beneficiary at the time this petition was filed given that neither actually worked for the Petitioner at that time. 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).

The Petitioner also argued that in determining whether the Beneficiary would be employed as an executive, USCIS must consider "all persons that work on behalf of" its organization, including individuals working at its headquarters, outside sales people and "producers," and six employees who

[2] The email indicates that prior to May 2019, [redacted] worked for [redacted], the Petitioner's U.S. affiliate, which is majority owned by the Beneficiary.

work for the Petitioner's Chinese affiliate and who are claimed to support its U.S.-based organization. In support of this argument, the Petitioner cited *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), and provided the foreign entity's partial organizational chart, which lists the Beneficiary's position title as "Chairman & General Manager" and highlights five positions from the foreign entity as the Beneficiary's subordinates. This chart also contains the foreign entity's name at the heading and does not include the U.S. support staff, nor does it provide job descriptions for the foreign employees explaining how they would support the Petitioner's U.S. operation. Further, rather than providing a comprehensive organizational chart incorporating all of the positions that are claimed to support the U.S. operation, the Petitioner offered separate charts individually depicting the U.S. and foreign entities' respective hierarchies, neither of which included each other's personnel or outside contractors, thus detracting from the new claims offered in response to the NOIR response. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Further, although the Petitioner claimed that the NOIR response included evidence "showing the compensation of these employees," it did not provide such evidence. Instead, the Petitioner provided email exchanges that either referenced two of the foreign employees or showed that those employees were the originators or recipients of the emails.

In the revocation decision, the Director reiterated the information gathered during the USCIS site visit, finding that the Beneficiary was not overseeing seven employees at the time of filing. The Director noted that only two people were encountered at the Petitioner's place of business during the USCIS site visit and no evidence was provided to show that the Petitioner paid wages to those individuals.

On appeal, the Petitioner claims that the inconsistencies regarding its number of employees at the time of filing were the result of "employees leaving and an incorrect starting number," rather than willful misrepresentation. We note that despite using the phrase "willful misrepresentation" in the NOIR, the Director did not ultimately make a finding of willful misrepresentation in the revocation notice and therefore the Petitioner's argument disputing such a finding is considered moot.

The Petitioner also contends that the Director disregarded the findings in *Matter of Z-A-* by failing to consider the Beneficiary's role "within the wider qualifying international organization." Adopted Decision 2016-02. We disagree with the Petitioner's comparison of its own facts and evidence with the circumstances in the cited decision, where the petitioner offered "substantial evidence" showing that in addition to its U.S.-based employees, it relied on eight staff members of its parent entity in Japan to "exclusively support the [b]eneficiary's work" in managing a function that is essential to the organization. *Id.* Here, the Petitioner does not claim or provide evidence to show that the Beneficiary would manage an essential function; rather, it claims that the Beneficiary would be employed in an executive capacity where he would set the goals and policies of the organization.

Furthermore, the Petitioner does not offer sufficient reliable evidence to show that it had seven employees in the United States at the time this petition was filed or that there were designated employees at its foreign affiliate who were assigned job duties in support of its U.S. manufacturing and sales operation. Although the Petitioner claims on appeal that it listed employees "according to its broader definition," which included employees who "work at the company's headquarters, outside sales and producers in the United States," it did not define what is meant by "the company's

headquarters" or "producers in the United States," nor did it specify which of its claimed staff were part of either the "headquarters" or U.S. "producers." The Petitioner also did not provide evidence to support the claim that it contracted outside sales representatives to assist with the sales of its products. As previously stated, the Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376.

Lastly, we disagree with the Petitioner's contention that the size of its support staff "is a non-factor according to the law." Although a company's size alone may not be the only factor in denying a visa petition for this classification, 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-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 initially discussed in the Director's decision, the Petitioner in the present matter has not provided sufficient reliable evidence showing whom it employed at the time this petition was filed. Without this critical information, we are unable to conclude that the Petitioner was able to relieve the Beneficiary from having to primarily perform non-executive job duties at the time of filing.

B. Job Duties

Next, 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 the initial supporting cover letter, the Petitioner stated that in his U.S. position the Beneficiary will formulate policies, provide "overall direction" to the company, "set up the mid[-] and long[-]term business strategies," direct and coordinate "operational activities as [*sic*] the highest level of management," direct and oversee the "overall operations" and subordinate managers and employees who carry out the company's operational duties, and set and adjust profit goals. In response to an RFE, the Petitioner focused on the Beneficiary's level of discretionary authority, stating that the Beneficiary "is responsible for the success" of the organization and that he "provides leadership and strategic planning" and "manages the senior executive team." The Petitioner also provided the following job duty breakdown with the following time allocations:

- 20% to establishing "long-range goals, strategies, plans and policies";
- 20% to developing "plans and programs as a strategic partner";
- 20% to evaluating and advising board members and managers on matters regarding planning, new programs, strategies, and "regulatory action";
- 20% to improving "overall operation and effectiveness";
- 10% to acting as financial adviser on various contracts; and
- 10% to traveling as needed and meeting with investors, partners, and customers.

The Petitioner did not offer further insight about the Beneficiary's actual job duties in its response to the NOIR. Instead, the Petitioner restated, verbatim, the information that was included in the initial

supporting statement about the Beneficiary's role and discretionary authority with respect to business goals and strategies, "operational activities," and subordinate employees, adding that the Beneficiary recently participated in a trade expo where he "established contacts with ninety clients" in an effort to expand the Petitioner's business. The Petitioner did not state how much time the Beneficiary would devote to this non-executive sales and marketing function. 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.*, section 101(a)(44)(B) of the Act (requiring that one "primarily" perform the enumerated executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The fact that the Beneficiary 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)(B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. *Id.* 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, these elements alone are insufficient to establish that his actual duties would be primarily executive in nature. As such, we rely on specific information about the Beneficiary's actual daily tasks as 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. at 1108.

Here, the Petitioner provided a vague job description focusing on the Beneficiary's level of discretionary authority over policies and business strategies. However, the Petitioner listed no goals, strategies, or policies that the Beneficiary established, it did not specify any plans or programs he developed as a "strategic partner," nor did it point to any "new programs" or "regulatory actions" of which the Beneficiary advised the board members and managers. In other words, the Petitioner provided a list of duties that was so broad that it could be applied to any executive, regardless of the nature or size of a given business. However, these broad claims fail to disclose the specific actions the Beneficiary would take on a daily or weekly basis within the specific context of the Petitioner's operation, which was comprised of a limited staff potentially containing as little as two employees at the time this petition was filed.

In light of the deficient evidence of the Petitioner's staffing and job duties, we are unable to gauge the extent to which the Petitioner was able to relieve the Beneficiary from having to spend his time primarily performing non-executive tasks at the time this petition was filed. Therefore, we cannot conclude that the Beneficiary would be employed in an executive capacity under an approved petition.

ORDER: The appeal will be dismissed.