U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-C-G-, INC.

DATE: AUG. 4, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a consulting company for marketing research firms, seeks to temporarily employ the Beneficiary as its chief executive officer (CEO) 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: (1) the Beneficiary will be employed in the United States in an executive capacity; and (2) the Beneficiary has been employed abroad in an executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by mischaracterizing record materials and disregarding corroborating evidence.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a managerial or executive capacity, or in a position involving specialized knowledge, for one continuous year within three years preceding the Beneficiary's application for admission into the United States. 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, executive, or specialized knowledge capacity. Section 101(a)(15)(L) of the Act.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, must include evidence that the petitioner will employ the beneficiary in an executive or managerial capacity, or a position involving specialized knowledge, including a detailed description of the services to be performed. The evidence must also show that the beneficiary has at least one continuous year of full-time employment abroad with a qualifying

organization, in an executive or managerial capacity or a position involving specialized knowledge, within the three years preceding the filing of the petition.

II. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be, and has been, employed in an executive capacity. The Petitioner does not claim that the Beneficiary will be or has been employed in a managerial capacity or a position involving specialized knowledge. Therefore, we restrict our analysis to whether the Beneficiary will be, and has been, employed in an executive capacity.

The Act defines the term "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.

A. U.S. Employment in an Executive Capacity

1. Duties

When examining the executive capacity of the Beneficiary, we will look first 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).

The definition of executive capacity has two parts. First, the Petitioner must 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's business plan stated that the Beneficiary is already managing the petitioning U.S. company as its CEO, although the Petitioner also indicated that the Beneficiary is not yet in the United States, and did not provide evidence that he was previously authorized to work in the United States. The business plan provided job descriptions for several positions, including ones that had not yet been filled. The Beneficiary's job description follows below. In later correspondence, the Petitioner estimated the percentage of time that the Beneficiary would devote to particular tasks. Where applicable, we have added those percentage figures:

Executive Functions

- Establishing, negotiating, and overseeing strategic partnerships to establish the company's presence in the US [no percentage figure cited]
- Liaising with 3rd party such as CPA, Law Firm and Independent consultants to formulate policies for organizational development [5%]
- Developing relationships with Private Equity, Investment Banking and Acquisition Candidate's key personnel to create a conducive environment for business furtherance [15%]
- Strategize, Create and oversee business plan to guide organizational objectives [15%]
- Attend industry events, seminars and conferences to present [the Petitioner's] thought leadership, experience and expertise in the industry [10%]
- Preparation and filing financial and business reports to comply with both internal and statutory requirements [5%]
- Negotiate and execute agreements wherever necessary for business operations, client and vendor relationships [15%]

Operations and Personnel Management

- Overseeing recruitment and training of administrative, consulting, and business development personnel to establish the US office [10%]
- Conducting periodic meetings and reviews to ensure that the US office is operating efficiently and effectively [10%]

Marketing Management

- Overseeing the company's brand presence, marketing processes and promotional activities in the US [5%]
- Developing Sales Strategies for sales personnel and partners [5%]
- Ensuring customer satisfaction and customer support in strategic new client acquisition efforts [5%]

As an example of the Beneficiary's activities for the company, the Petitioner stated:

> [The Beneficiary] recently negotiated and signed an agreement with a private equity firm. [The Petitioner's] role will be to help investors identify, validate and conclude investments in Marketing Research companies across North America. To [accomplish] this objective, [the Beneficiary] has been actively talking to marketing research companies that are considering capital infusion and/or buy-out.

The Petitioner added:

> [The Beneficiary] will focus on the following to grow [the company]:
> 1. New Client Acquisition for Management Consulting Services.
> 2. Identifying acquisition targets on behalf of PE investors.
> 3. Conducting promotion and public relationship [*sic*] activities in the industry.
>
> . . . .
>
> [The Beneficiary] will oversee [the Petitioner's] brand presence through the following methods:
> 1. Enrolling in industry specific associations.
> 2. Participating in industry events.
> 3. Obtaining coverage in industry media: print and online.
> 4. Promoting work experience, offerings and best practices to highly targeted industry contacts.

The Director denied the petition, stating that the "duties in and of themselves do not appear primarily executive in nature." The Director also found that the Petitioner had not shown "that the beneficiary is directing the management of the organization."

On appeal, the Petitioner asserts that the Director interpreted the regulations too narrowly, because the definition of "executive capacity" includes the requirement that a beneficiary "[d]irects the management of the organization or a major component or function of the organization"; the beneficiary need not direct "the management of the organization."

The Petitioner states:

> [T]he petitioner submitted a letter [describing the Beneficiary's intended position]. Per the language of the [U.S. Citizenship and Immigration Service (USCIS)] denial notice itself, the Vermont Service Center acknowledged the letter "describes the beneficiary's duties as being executive in nature." While admitting the duties are executive in nature on one hand, the USCIS denial notice nevertheless proceeds to state the position is not executive in nature.

The Petitioner has selectively read the denial notice. The phrase in question derives from this passage: "although the letter . . . describes the beneficiary's duties as being executive in nature, the evidence of record does not support the assertion." When read in context, it is clear that, in the quoted passage, the Director neither "acknowledged" nor "admit[ed]" that "the duties are executive in nature." Rather, the Director acknowledged only that the Petitioner had *claimed* the duties were those of an executive.

In several instances, the Petitioner has listed responsibilities rather than specific tasks that the Beneficiary would perform. For example, the Petitioner did not explain exactly what the Beneficiary

would do to develop relationships with outside entities, oversee the company's brand presence, and ensure customer satisfaction.

Preparing reports, meeting with accountants and attorneys, and conducting promotional activities are not self-evidently executive functions. Without further details and information, we cannot find that the Beneficiary's involvement in these activities show that he will be an executive.

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). The actual duties themselves reveal the true nature of the employment. *Id.* Therefore, 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.

Other duties presume the existence of subordinate staff, such as the Beneficiary's oversight over training and his authority to call meetings. As we shall discuss below, the Petitioner had no such staff at the time of filing. These duties represent, at most, the Petitioner's expectations about what the Beneficiary's duties will be at some future time when the vacant positions are filled.

We note that the Petitioner submitted promotional materials which cast doubt on the accuracy of the submitted job description. A brochure called [redacted] includes "Leadership Profiles" for several officials of the organization. The Beneficiary's profile states that "[h]e consults for our clients in both practice areas of organic and inorganic business development." This indicates that, in promotional materials aimed at prospective clients, the Petitioner presents the Beneficiary as an active consultant for the organization. The provided job description did not mention the Beneficiary's active involvement in client consultation, which is very different from executive-level oversight over subordinate consultants. Therefore, the Petitioner's evidence is inconsistent and the job description is insufficient to establish that the nature of the Beneficiary's duties would be primarily executive.

2. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed executive capacity of a beneficiary, including 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.

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. 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.

Inherent to the definition, a beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise.

When the Petitioner filed the petition in October 2016, the petition form indicated that the company had one U.S. employee, who is apparently the individual who co-founded the company with the Beneficiary. The Petitioner's business plan stated that the company "will employ a team of consultants," but not that it already does. The same document indicated that the company "has done multiple consulting projects for US based clients with an US based contractor and some support from the Indian entity." The Petitioner did not provide documentary evidence to support this claim or to specify the number of outsourced workers and the nature of the work they performed.

The business plan also stated that the company "plans to hire" two consultants, an office manager, a business development director, and a business development manager by the fourth quarter of 2017. Organizational charts showed the company's projected structure in the fourth quarters of 2017 and 2019, but these projections did not establish the company's personnel as of the petition's filing date. The Petitioner must establish eligibility as of the petition's filing date. *See* 8 C.F.R. § 103.2(b)(1). We will only consider intended future hires in the context of a petition filed for a new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(*3*). The Petitioner does not claim to meet the criteria of a new office. Therefore, we need not discuss particulars of the planned, but unfilled, positions.

Even then, neither of the projected organizational charts indicated that the company would employ "sales personnel" as shown in the job description for the CEO (and that of the yet-to-be-hired business development director, who would "[w]ork . . . with the CEO to define the direction of the sales team.")

The Director found that the Petitioner did not have sufficient staff at the time of filing to relieve the Beneficiary from performing the non-executive tasks necessary to run the business from day to day. The Director also found that the company did not yet have a management structure for the Beneficiary to direct on an executive level. The Director added that, because the Petitioner must establish eligibility at the time of filing, the Petitioner could not overcome this finding by explaining its plans to hire more subordinate employees in the future.

Directing the management of an organization, or of a major component or function, is inherent in the definition of "executive capacity." The Petitioner states that the Beneficiary directs "a major function of the organization," specifically "developing relationships, entering consulting agreements, overseeing brand presence, and ensuring customer satisfaction." The Petitioner has not shown that existing in-house or outsourced workers would carry out the non-executive, day-to-day activities associated with these functions, as of the date of filing. If the Beneficiary has no lower-level staff to whom he can delegate a particular function, then the Beneficiary would be performing that function rather than directing it. The record does not establish that the Beneficiary's duties associated with any of these "major functions" would be primarily executive in nature.

The Director, in the denial notice, stated that the Petitioner had not addressed a request "to provide corroborating evidence . . . that the beneficiary has been insulated from the day-to-day non qualifying duties." On appeal, the Petitioner protests that the Director made no such request. We reviewed the request for evidence (RFE). While the Director did not use those actual words in the RFE, the Director did request additional evidence to show that the Beneficiary's position meets the definition of an executive capacity, which includes the requirement that the Beneficiary's duties are primarily those of an executive rather than lower-level operational or administrative tasks. If the Beneficiary is not to perform those lower-level tasks himself, then there must be others to perform them instead.

On appeal, the Petitioner states that it relies on "an extensive support staff" at its foreign affiliate, but the Petitioner does not elaborate on this point or provide any evidence to corroborate or clarify the nature and extent of the work that the Petitioner has outsourced overseas.

The Petitioner documents an office service agreement with a third-party provider of office space and clerical and services, and a marketing agreement with a company that solicits potential clients. These agreements address certain administrative and support functions but do not cover the core operational business tasks that are the source of the Petitioner's income. The Petitioner is a consulting firm with no consultants on staff. In this context, it is significant that the Petitioner has told prospective clients that the Beneficiary himself actively "consults for our clients in both our practice areas."

The incomplete and sometimes conflicting evidence of record is not sufficient to show that the Beneficiary will primarily perform in an executive capacity.

B. Foreign Employment in an Executive Capacity

The Director, in the denial notice, concluded that the Petitioner had not established that the Beneficiary's position abroad qualified as an executive capacity, but the denial notice contained little discussion to explain or elaborate upon this finding.

The Beneficiary serves as the foreign entity's managing director and has a subordinate staff comprised of 42 employees, including five department heads, each with their own subordinate staff. The Petitioner submitted payroll records to support the staffing levels depicted in the foreign entity's organizational chart. The Director did not explain why the evidence does not show that the Beneficiary oversaw layers of management which, in turn, controlled the foreign company's various operational and administrative functions.

The Petitioner has submitted essentially the same job description for the Beneficiary's positions in the United States and India. The difference is that the company in India is sufficiently staffed to relieve the Beneficiary from having to perform the company's business functions. Accordingly, the record supports the Petitioner's claim that he performs primarily executive duties in his role as the foreign entity's managing director.

We withdraw the Director's finding that the Petitioner did not meet this eligibility requirement.

III. TEMPORARY EMPLOYMENT

Beyond the Director's decision, the Beneficiary's ownership of the petitioning entity and its foreign affiliate raises an additional issue. If a beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and evidence that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

The Petitioner acknowledges that the Beneficiary owns 85% of the foreign entity and 90% of the petitioning U.S. employer. Therefore, the above provision applies to this proceeding. The Petitioner has not established that it intends for the Beneficiary's employment to be temporary and that it will transfer the Beneficiary abroad after his temporary assignment in the United States. For this additional reason, the Petitioner has not established eligibility for the classification sought.

IV. CONCLUSION

The Petitioner has not established that it will employ the Beneficiary primarily in an executive capacity. The Petitioner has also not established that the Beneficiary will be transferred abroad upon completion of his temporary services in the United States.

ORDER: The appeal is dismissed.

Cite as *Matter of A-C-G-, Inc.*, ID# 519705 (AAO Aug. 4, 2017)