U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-W-, INC.

DATE: AUG. 9, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, which engages in the sale and distribution of bottled water beverages, seeks to continue the Beneficiary's temporary employment as its chief executive officer (CEO) under the L-1A nonimmigrant classification for intracompany transferees. 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 Petitioner did not establish, as required, that: (1) the Beneficiary would be employed in an executive capacity under the extended petition; and (2) the Beneficiary was employed in an executive capacity abroad prior to his transfer to the United States.

On appeal, the Petitioner submits additional evidence in support of its claim that the Beneficiary was abroad, and will be employed in the United States, 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 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.*

The term "executive capacity" is defined 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.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The first issue to be addressed is whether the Petitioner established that it will employ the Beneficiary in an executive capacity under the extended petition. The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity.

When examining the executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees or staff 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.

B. Duties

The Petitioner's co-founder provided a description of the Beneficiary's duties as CEO at the time of filing. He stated that the Beneficiary:

- Is a co-founder of the company
- Is a member of the board of directors for [the Petitioner]
- Sets the company goals, policies, targets and budgets for the company
- Develops the strategy and direction of the company
- Directs the management of the product development and marketing of the group
- Performs high level decision making as a member of the board

The Petitioner's letter went on to state that the Beneficiary "has full executive responsibility for the sales, marketing and product development functions across the corporation," that he regularly makes "high level decisions" regarding the company's performance and direction, and that he "manages and cultivates relationships with funders to secure and expand recurring revenue streams." Finally, the Petitioner noted that the Beneficiary's responsibilities include "finances, operations and human resources."

In response to a request for evidence (RFE), the Petitioner submitted a new letter with the same job description.

We agree with the Director's determination that this broad description of the Beneficiary's duties does not convey what he would be doing on a day-to-day basis as the Petitioner's CEO. The Petitioner did not provide any concrete examples of policies, strategies, or goals the Beneficiary would develop or high-level decisions he would make in support of its claim that he would spend his time primarily focused on higher-level planning and decision-making responsibilities. In fact, many of the duties simply paraphrase the statutory definition of executive capacity and the Petitioner did not identify the

specific tasks that would occupy the Beneficiary's time. Reciting the 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. The Petitioner did not provide any detail or explanation of the Beneficiary's activities in the course of his daily routine. *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).

Although the Director's decision specifically addresses the deficiency of the submitted job description as a basis for denial, the Petitioner has not provided an expanded description or additional information regarding the nature of the Beneficiary's actual daily tasks on appeal. Instead, the appeal focuses on the Beneficiary's delegation of certain non-executive functions to external contractors. We will address the Petitioner's staffing claims below; however, we cannot make a determination regarding the Beneficiary's claimed executive capacity without a detailed description of his position. The record remains deficient with respect to this material evidence.

We acknowledge the Beneficiary's role as co-founder and member of the Petitioner's board of directors and the heightened level of responsibility this role involves. However, 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 the statutory definition. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Section 101(a)(44) of the Act. Here, we are unable to determine what the Beneficiary primarily does on a day-to-day basis and therefore the Petitioner has not met its burden to establish that his actual duties are primarily executive in nature.

C. Staffing and Organizational Structure

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

The Petitioner distributes its own brand of water beverages and had four employees at the time of filing, including the Beneficiary, the co-founder/COO, and two individuals whose job titles and duties were not identified prior to the denial of the petition. The Petitioner did not provide an organizational chart, nor did it mention or document its use of independent contractors. Because the Petitioner did not identify who performs the day-to-day, non-executive duties required for the operation of the business, the Director found that it did not meet its burden to establish that the Beneficiary directs the management of the company or that it has sufficient staff to relieve the Beneficiary from spending a significant portion of his time on non-qualifying tasks.

On appeal, the Petitioner asserts that the Director placed undue emphasis on the small size of the company. It maintains that the Beneficiary directs the management of the sales and marketing functions of the company, relying on a team of employees and external contractors who "do the actual work required" to market and sell the company's products.

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.

To meet its burden, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities consistent with the statutory definition of executive capacity. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). 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, e.g., Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

The Petitioner correctly asserts that both internal employees and external contractors can be considered in determining whether the Beneficiary has sufficient support to relieve him from significant involvement in non-executive duties. Here, the Petitioner states that the Beneficiary has a direct subordinate, a sales executive who is "responsible for sales in the New York area." This brief description of duties is insufficient to show how this employee relieves the Beneficiary from involvement in non-executive sales activities on a day-to-day basis, and the Petitioner has not identified the job title or job duties of its other payroll employee, who is not claimed to support the sales or marketing functions.

The Petitioner also identifies an external sales contracting company focused on key sales accounts in the northeastern United States, and an external brokering company responsible for handling key national sales accounts. The Petitioner has provided a sample invoice from both sales contractors and a few sample emails as evidence of the Beneficiary's interactions with them. The Petitioner explains that the Beneficiary provides the sales team with goals and objectives to execute but does not further elaborate on the nature of the Beneficiary's role, the specific responsibilities of the sales employee and contractors, or the frequency of the sales contractors' work for the company. Overall, the new evidence does not provide sufficient insight into the nature of the Beneficiary's duties with respect to the sales function or show that he performs primarily executive-level duties with respect to this function.

With respect to the marketing function, the Petitioner has identified: an external company that develops product design and marketing elements; a consultant who develops brand positioning communication elements; a social media marketing contractor; a contractor who develops creative elements for brand marketing; and a former marketing intern who executed "marketing and event management activities." As with the sales staff, the Petitioner has provided some sample invoices and email communications, but only brief descriptions of the services these individuals and entities

provide with respect to product marketing. The Beneficiary appears to work collaboratively with the contractors on activities such as product messaging and label design and there is insufficient evidence to establish that he primarily directs the management of the marketing function.

Therefore, while the Petitioner has now identified one employee and various contractors who assist with carrying the duties necessary for the sales and marketing functions, it still has not clearly described the actual day-to-day duties the Beneficiary will perform in directing these functions. Further, the record does not sufficiently establish that all of its sales and marketing activities are contracted out, such that the Beneficiary is removed from involvement in non-executive sales and marketing tasks. The newly submitted evidence assists us in determining some of the functions that the Beneficiary does not perform, but is not provide sufficient insight into what he primarily does on a daily basis.

Finally, the Petitioner has stated that the Beneficiary's responsibilities extend beyond sales and marketing to "finances, operations, and human resources." However, it has not identified the duties he performs in these areas, what types of activities are involved in "operations," how much of his time he allocates to these responsibilities, or any subordinates or contractors who assist him with these activities.

For these reasons, the new evidence submitted on appeal is insufficient to overcome the lack of a detailed job description for the Beneficiary. Notwithstanding the Beneficiary's position title, the record does not adequately support the Petitioner's claim that he will be employed in an executive capacity as defined at section 101(a)(44)(B) of the Act.

III. EMPLOYMENT ABROAD IN AN EXECUTIVE CAPACITY

The remaining issue in this case is whether the Petitioner established that its foreign subsidiary employed the Beneficiary in an executive capacity prior to his transfer to the United States.

In the denial decision, the Director emphasized that the Petitioner did not describe the Beneficiary's duties with the foreign entity beyond stating that he "had executive duties that include[d] sales for US, Europe along with marketing responsibilities for the group." The Director also emphasized that neither the initial evidence nor the response to the RFE included an organizational chart or list of subordinates the Beneficiary directed while employed by the Petitioner's subsidiary.

On appeal, the Petitioner states that the Beneficiary's duties abroad were the same as those he performs in the United States and that he was responsible for the sales and marketing functions of the business. It does not further elaborate on the nature of the Beneficiary's duties abroad. We agree with the Director that the Petitioner's claim that the Beneficiary "had executive duties" related to sales and marketing does not meet its burden to show that he was employed in an executive capacity as defined at section 101(a)(44)(B) of the Act. We discussed the deficiencies of these broad statements above and find that the same analysis applies here. Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *Fedin Bros.*, 724 F. Supp. at 1108,

aff'd, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

On appeal, the Petitioner has not identified any direct subordinates the Beneficiary managed while employed abroad, but provides evidence related to four external contractors who provided services to the foreign entity. These contractors included a PR agency, a sales executive responsible for "sales execution in ," a brand communications company that executed "brand activations and marketing events," and a product development agency that developed packaging and product design.

While we do not doubt that contractors relieved the Beneficiary from involvement in certain sales and marketing functions, the minimal information and evidence provided does not establish how these four contractors performed most of the non-executive tasks associated with the foreign entity's sales and marketing activities. For example, the Petitioner stated that the Beneficiary was responsible for sales in the United States and Europe while employed abroad, but the sole contracted sales executive was responsible for sales in Australia. It is not clear who, if anyone, assisted the Beneficiary with sales outside of Australia. The Petitioner has not provided an organizational chart for the foreign entity or explained who performed the company's other daily operational and administrative functions during the Beneficiary's period of employment abroad.

Without a description of the Beneficiary's specific job duties or a complete picture of the company's structure and staffing levels, we cannot determine that the Beneficiary performed primarily executive duties abroad or that the foreign entity was able to support an executive position. Again, the fact that the Beneficiary directed the business or a component of the business does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of the statutory definition. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive nature. Section 101(a)(44)(B) of the Act.

The evidence submitted on appeal does not overcome the Director's findings with respect to this issue.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner did not establish that it will employ the Beneficiary in an executive capacity under the extended petition, or that the Beneficiary was employed abroad in an executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of B-W-, Inc.*, ID# 1305982 (AAO Aug. 9, 2018)