U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-D- CORP.

DATE: AUG. 14, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a real estate investment and construction management company, seeks to temporarily employ the Beneficiary as its president 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 revoked the approval of the instant petition concluding that the Petitioner did not establish that the Beneficiary was employed in an executive capacity.

On appeal, the Petitioner asserts, contrary to the Director's conclusion, that it submitted a detailed description of the Beneficiary's duties and demonstrated that he oversaw professional subordinates who relieved him from primarily performing non-qualifying duties.

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 petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

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).[1]

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner has established that the Beneficiary was employed in an executive capacity as of the date of the Director's Notice of Intent to Revoke (NOIR). The Petitioner does not claim that the Beneficiary was employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary was 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 performed by the beneficiary and indicate whether such duties were in an executive capacity. *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 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 the 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

Based on the definition of executive capacity, the Petitioner must first show that the Beneficiary was performing 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 was *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.

[1] An L-1A nonimmigrant intracompany transferee petition filed on behalf of the Beneficiary was approved on April 7, 2015, for the period March 17, 2015, to March 16, 2017. The Director later revoked this approved petition on November 29, 2017, following the issuance of a notice of intent to revoke (NOIR) on September 14, 2015. The Director concluded that the Beneficiary was no longer eligible for the nonimmigrant classification. *See* 8 C.F.R § 214.2(l)(9)(iii)(2).

The Petitioner stated that its "primary business" was to "conduct real estate investment, development, and management." In support of the petition, the Petitioner indicated that the Beneficiary would be tasked with "monitoring and ensuring the financial and logistical viability" of the company, establishing its "financial objectives, policies and marketing strategy," securing "funding for investment projects," exercising control over capital funds, and reviewing and approving all investment proposals. The Petitioner explained that the Beneficiary would direct "ambitious investment expansion plans...representing a capital investment in [the United States] of over $5,000,000" by the foreign employer. It further stated that it had acquired a 50% interest in G-D-D- LLC "a company engaged in the investment and construction of residential real estate." The Petitioner indicated that G-D-D- LLC had been involved in the construction of two homes. It also explained that the Beneficiary had been "especially effective in identifying lucrative investment opportunities."

The Director later conducted a site visit at the Petitioner's office location following the approval of the petition. Following the site visit, the Director issued a NOIR stating that an asserted employee of the Petitioner provided details of the Beneficiary's duties during the site visit. The Director stated that the employee of the Petitioner explained that the Beneficiary's responsibilities included "having final approval of the selection of real estate investment projects, bids for construction projects, and hiring and firing of employees." The Director stated in the NOIR that based on the information collected at the site visit it did not appear that the Beneficiary was acting primarily in a managerial or executive capacity. As such, the Director requested that the Petitioner provide a description of the Beneficiary's typical managerial or executive duties and responsibilities along with percentages of time he devoted to them.

In response, the Petitioner provided additional details regarding its operations since the approval of the petition. The Petitioner stated that G-D-D- LLC, its affiliated company, had purchased three residential properties and further sold one of these properties, listed one for sale, and planned renovations and improvements to another. The Petitioner also indicated that it had submitted an offer to purchase another residential property and entered into contracts with contractors to perform "project development and supervision" related to three other residential properties.

In addition, the Petitioner stated that the Beneficiary was responsible for "leading and directing the business development and operations" of the company. The Petitioner indicated that the Beneficiary spent his time on some of the following tasks:

- 25-30% of the time the Beneficiary was tasked with:
  - Directing business activities and management at the highest level and setting overall goals,
  - Taking control of the Petitioner's business planning and operations,
  - Establishing policies including investment and financial policies, making strategic decisions, and directing business planning and financial planning,
  - Establishing and implementing short-term and long-term goals, objectives, and operating procedures,

- Providing leadership on capital resource requirements and implementations.

- 20-25% the Beneficiary spent his time on:
  - Reviewing and analyzing current management system, human resource system, and organizational framework, and making recommendations to the foreign employer for improving efficiency and increasing revenue, and
  - Providing leadership in achieving the Petitioner's business objectives and goals to be financially independent and generate revenues for the foreign employer.

- 30-35% the Beneficiary was responsible for:
  - Directing and overseeing the Petitioner's core business in real estate investment, development and management,
  - Directing market research and sales,
  - Meeting with staff members on regular basis to discuss issues and solutions,
  - Meeting with brokers/agents, architects, and contractors to resolve ongoing issues,
  - Formulating new ideas to acquire and develop real properties.

- 12-15% of the time the Beneficiary was tasked with:
  - Reviewing quarterly and yearly financial statements, and
  - Conferring with the foreign employer for continued financial support until the Petitioner becomes financially independent.

- 10-15% of the Beneficiary spent his time on:
  - Approving or rejecting potential real estate investment and development projects,
  - Conducting negotiations at the executive level with builders, contractors, architects, suppliers, etc.
  - Negotiating and executing real estate property contracts, and make final determination of pricing, terms, and payment methods.

The Petitioner did not submit a sufficiently detailed duty description describing the Beneficiary's day-to-day executive-level duties to credibly establish that he devoted his time primarily to qualifying tasks. The Beneficiary's duty description includes several generic 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 supporting documentation to demonstrate the Beneficiary's performance of qualifying duties, such as investment or financial policies he established, strategic decisions he made, or objectives or operating procedures he implemented. The Petitioner also did not articulate or document recommendations he made to the foreign employer to improve efficiency or increase revenue, market research and sales he directed, issues or solutions he proposed to his staff, real estate proposals and development projects he approved or rejected, or negotiations he conducted with builders, contractors, or architects. This

lack of detail and documentation is particularly noteworthy since the Petitioner states that the Beneficiary acted in his role as president since March 2014, approximately nineteen months prior to the date of the NOIR. 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 details and documentation regarding the Beneficiary's daily duties, this evidence indicates his involvement in non-qualifying operational tasks. For instance, the Beneficiary's duties and the submitted evidence reflect that the Beneficiary met with brokers, agents, architects, and contractors to resolve issues and that he was engaged in investigating the purchase of residential properties. The Petitioner noted the Beneficiary's involvement with "all investment projects" and his effectiveness in identifying "investment opportunities," which based on the submitted evidence, was the acquisition of a handful of residential properties. Submitted bank records from August 2015, just prior to the NOIR, reflect the Beneficiary's involvement in day-to-day operational matters, including signing checks to pay contractors, reimburse employees, and pay insurance. Likewise, invoices and emails from October 2015 indicate the Beneficiary's involvement in paying an architect. In contrast, the record includes few examples and little documentation reflecting the Beneficiary's delegation of these non-qualifying operational tasks to his subordinates as of the date of the NOIR.

Whether a beneficiary is an executive employee turns on whether the petitioner has sustained its burden of proving that their duties are "primarily" executive. *See* section 101(a)(44)(B) of the Act. Here, the Petitioner does not document what proportion of the Beneficiary's duties were executive functions and what proportion would be non-qualifying. The Petitioner submits evidence indicating the Beneficiary's involvement in operational-level tasks that do not fall directly under executive duties as defined in the statute, but does not quantify the time he spent on these duties. For this reason, we cannot determine whether the Beneficiary was primarily performing the duties of an executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Even though the Beneficiary held a senior position within the organization, the fact that he managed or directed 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.* The Beneficiary may have exercised discretion over the Petitioner's day-to-day operations and possessed the requisite level of authority with respect to discretionary decision-making; however, the position descriptions alone are insufficient to establish that his actual duties were primarily executive in nature.

B. Staffing

If staffing levels are used as a factor in determining whether an individual was 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.

As noted above, the Petitioner asserts that the Beneficiary qualified 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.*

In response to the NOIR, the Petitioner provided an organizational chart reflecting that the Beneficiary supervised a vice president overseeing an administrative assistant, two real estate project managers, and a real estate associate/legal consultant. On appeal, the Petitioner emphasizes that the Beneficiary supervised professional subordinates who relieved him from primarily performing non-qualifying operational duties.

The regulatory definition of an executive does not provide that a beneficiary can qualify as an executive merely based on the supervision of professional subordinates, but based on his or her elevated position within a complex organizational hierarchy and a primary focus on directing the management and establishing the goals and policies of the organization. Therefore, the Petitioner's contention that the Beneficiary qualified as an executive merely based on his supervision of professional subordinates is not convincing.

The organizational chart submitted in response to the NOIR reflected that the Beneficiary only had one asserted subordinate manager, the vice president. However, the submitted evidence does not indicate that the claimed vice president acted in a managerial capacity overseeing real estate brokers and a real estate associate/legal consultant as asserted. For instance, on appeal, the Petitioner provides an affidavit from the vice president stating that she worked part-time for the company from December 2014 to December 2015, or at the time the NOIR was issued. The vice president also indicated that when she resumed fulltime status at the beginning of 2016, her title had been changed to office administrator. She also indicated that she was sent to the United States to "prepare for the [the Beneficiary's] arrival" and "to assist [the Beneficiary] in managing the real estate projects until he is fully adjusted to the American business system and environment." In addition, the record

includes evidence that the claimed vice president was responsible for performing a number of clerical tasks not consistent with a subordinate manager, such as paying invoices and buying a printer and furniture for the Petitioner's office. Further, the vice president's duties state that she was tasked with managing "office and general administrative duties," but the Petitioner's administrative assistant was no longer employed as of the date of the NOIR. In sum, the evidence suggests that the vice president was acting primarily in a clerical role and does not demonstrate that she was acting as a manager subordinate to the Beneficiary overseeing professionals as asserted.

In fact, the vice president's non-clerical duties largely overlap with those of the Beneficiary, including managing real estate projects, assisting the Beneficiary in "direction and policies," hiring and firing, analyzing financial documents and policies, and recommending solutions in order to establish new directions or strategic plans. First, it does not appear credible that at the time of the NOIR the Petitioner required two managerial-level employees, the Beneficiary and vice president, to oversee three subordinates and the sales and renovation of three residential properties. As of the date of the NOIR, the Petitioner stated that it had only sold one of these properties for revenue and indicated in the Beneficiary's duties that it was still seeking financial self-sufficiency, leaving question that both he and the vice president were overseeing financial matters and policies. We acknowledge that the record includes evidence that the asserted vice president signed real estate documents on behalf of the Petitioner; however, the fact that she signed these documents does not demonstrate that she acted as a manager subordinate to the Beneficiary. In fact, this evidence suggests that the vice president was acting much like a real estate agent, similar to the company's other asserted employees, searching out real estate opportunities and buying and selling properties. There is no evidence on the record to substantiate that the vice president had supervisory authority over other employees. Indeed, the record includes evidence that the vice president signed one of the Petitioner's real estate purchase contracts as an agent on behalf of a separate legal entity.

Therefore, the Petitioner has not demonstrated that the Beneficiary was overseeing a subordinate level of managers as necessary for him to primarily focus on the broad goals and policies of the organization rather than its day-to-day operations.

Furthermore, discrepancies in the record leave question as to whether the Petitioner had sufficient subordinates to relieve the Beneficiary from performing non-qualifying operational duties. We acknowledge that the Petitioner submitted an IRS Form 941 from the third quarter of 2015 reflecting that it had six employees. However, the Petitioner also stated that the administrative assistant had been terminated prior to the issuance of the NOIR. In addition, submitted evidence indicates that one of the claimed real estate project managers is an equal partner in G-D-D- LLC (through his ownership in another company), the Petitioner's affiliated company that purchased the discussed three residential properties that form the basis of its operations. Further, this real estate project manager signed real estate purchase documentation on behalf of G-D-D- LLC as its member and president. This evidence leaves substantial question as whether this asserted real estate project manager works directly for the Petitioner and as a subordinate to the vice president and Beneficiary as claimed.

Likewise, the provided evidence indicates that the other claimed real estate manager also signed real estate documentation on behalf of other legal entities opposite the Petitioner. Further, the claimed real estate associate/legal consultant is the Beneficiary's former counsel who filed the petition at issue here and there is no documentary evidence that she performs real estate duties for the Petitioner. In fact, there is little documentation on the record reflecting the Beneficiary's delegation of responsibilities and tasks to his claimed subordinates. In total, these discrepancies and deficiencies leave uncertainty as to whether the Petitioner had sufficient employees as of the date of the NOIR to relieve the Beneficiary from primarily performing non-qualifying operational duties, such as its real estate investment identification and renovation plans. Given the evidence submitted, it appears more likely that the Beneficiary is devoting a majority of his time to these non-qualifying operational matters rather than dictating general goals and policies to subordinate managers.

The Petitioner has also not demonstrated that it had developed sufficiently to support the Beneficiary in an executive capacity as of the date of the NOIR. The Petitioner stated in the Beneficiary's duties that he was tasked with conferring with the foreign employer "for continued financial support until the Company becomes financially independent." The Petitioner also submitted a 2014 IRS Form 1120 U.S. Corporation Income Tax Return reflecting that it earned $107,350 during that year. The Petitioner further provided evidence indicating that it had sold only one purchased and renovated residential property as of the date of the NOIR. It is not clear how these operations are sufficient to sustain the Beneficiary in his executive role and the asserted quarterly wages of $51,983.89 set forth in its IRS Form 941 from the third quarter of 2015. In addition, the Petitioner provides little indication as to the Petitioner's financial status or revenues as of the date of the NOIR. The Beneficiary was originally approved for an L-1A visa as a new office beginning in March 2014; however, it is not clear that it developed sufficiently as of the date of the NOIR in September 2015 (approximately 19 months later) to support its claimed organizational structure and the Beneficiary in an executive capacity. Indeed, the Petitioner appears to acknowledge this on the record by stating that it will continue to require the foreign employer's support to operate.[2]

The Petitioner has not substantiated that it had sufficient managers subordinate to the Beneficiary as of the date of the NOIR to allow the Beneficiary to primarily focus on the broad goals and policies of the organization rather than its day-to-day operations. Submitted documentation indicates that the Beneficiary was likely engaged in non-qualifying operational duties and the Petitioner has not documented that he was primarily relieved of these tasks at the time of the NOIR. For these reasons, the Petitioner has not established that the Beneficiary acted in an executive capacity.

[2] The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive position. There is no provision in the regulations that allows for an extension of this one-year period. If a business does not have the necessary staffing to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible for an extension.

III. CONCLUSION

The Petitioner has not established that the Beneficiary was employed in an executive capacity; therefore, the revocation of the approved petition will not be disturbed.

ORDER: The appeal is dismissed.

Cite as *Matter of G-D- Corp.*, ID# 1548291 (AAO Aug. 14, 2018)