U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-C-, LLC

DATE: AUG. 27, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which sells cabinets and furniture components manufactured by its foreign affiliate, seeks to continue the Beneficiary's temporary employment as its chief executive officer 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 California Service Center denied the petition, concluding that the record did not establish, as required, that: (1) the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity; and (2) the Beneficiary has been employed abroad in a capacity that is managerial, executive, or involved specialized knowledge.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred by relying too heavily on the absence of subordinate personnel.

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.*

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Petitioner contends that the Beneficiary's employment has been and will be in an executive capacity. The Director found that the Beneficiary had not established that the Beneficiary's employment in the United States or abroad has been primarily in an executive capacity.

"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). 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.

When examining the claimed 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, 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 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 and Staffing

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 implies an understanding that an organization must have some kind of management for a beneficiary to direct and 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.*

As the majority shareholder in a company with no board of directors, the Beneficiary's discretionary authority and control over the petitioning entity is not in dispute. The question in this proceeding is

whether the Beneficiary's duties are, and will be, *primarily* those of an executive. A beneficiary does not qualify as an executive simply by virtue of owning or controlling a company.

The Petitioner described the Beneficiary's duties in the United States:

> [H]is duties for the U.S. company included: overseeing the company's operations and finances and creating budgets to manage costs and increase profits; managing employees as the company grows, including hiring for new positions, conducting performance reviews, and terminating employment when necessary; managing inventory; conducting marketing activities to seek out potential clients and arranging meetings with them to promote the company's products and drive sales; and continually sourcing new products, domestically and abroad.

The above description is vague and some of the tasks described, such as marketing activities, might be non-qualifying depending on the nature of those activities. The description does not contain enough detail to establish that the Beneficiary's duties are, and will be, primarily executive in nature.

Photographs of the Petitioner's store depict a retail showroom and an adjacent storage area. The Petitioner's "[c]urrent organizational chart" showed the Beneficiary, his spouse (identified as an owner but with no job title), a sales manager, and five departments:

- Marketing
- Management
- Planning
- Administration
- Accounting

The Petitioner did not show that those departments were staffed, with either employees or contractors. Instead, the Petitioner acknowledged that the sales manager was the only worker other than the Beneficiary. The Petitioner added that the Beneficiary "continues to make contacts and create interest in his business to require the services of additional employees, including professionals in marketing and sales, assembly and quality control, packaging and shipping, and banking and finance." The Petitioner's plans for future hiring cannot establish that the Petitioner met eligibility requirements at the time of filing as required by 8 C.F.R. § 103.2(b)(1).

The Petitioner engaged the sales manager as an independent contractor. The contract is dated April 2017, and the Petitioner submitted copies of monthly paychecks from May through August 2017. The contract itself did not describe the services to be performed. The contract referred to "the services described in Exhibit A," but the Petitioner did not submit a copy of Exhibit A.

In a request for evidence (RFE), the Director advised that the Petitioner had not established that the Beneficiary's duties are primarily executive in nature. In response, the Petitioner stated that the Beneficiary "works 40 hours per week and devotes his time as follows":

- 50% of time spent developing and establishing the overall sales and business policies, creating budgets, reviewing and adjusting strategies for the company and overseeing the company's operations and finances;
- 20% of time of overseeing and managing employees; recruiting, hiring and terminating employees; and conducting performance reviews.
- 20% of time on conducting marketing activities, meeting with clients, and sourcing new products; and
- 10% on all other duties.

In the RFE, the Director noted the absence of evidence that the Petitioner had any subordinates before April 2017 and after August 2017. In response, the Petitioner acknowledged that the individual identified as the sales manager left the company on August 31, 2017, more than three months before the Petitioner filed the petition in December 2017. Nevertheless, in that filing, the Petitioner attested under penalty of perjury that the sales manager was still working there and included his name on a "[c]urrent organizational chart." The Petitioner did not explain this serious discrepancy.

The Petitioner also indicated that two new contractors began working for the company as cabinet installers in July 2018, several weeks after the Director issued the RFE. But the Beneficiary had no subordinates – either as employees or contractors – at the time of filing in December 2017.

The Director denied the petition, noting that "the U.S. entity had no employees at the time of filing," and concluding: "The beneficiary appears to have been primarily performing all routine operational tasks associated with the day-to-day services of the business."

On appeal, the Petitioner observes that the Beneficiary need not spend *all* of his time on executive tasks. The Petitioner acknowledges that "it is true that the Beneficiary was the sole employee of his company at the time of filing the L-1A extension on December 11, 2017," but contends that the Beneficiary nevertheless "spends a *majority* of his time on duties related to policy." The only cited source for this claim is the letter containing the percentage breakdown discussed above.

That breakdown raises several questions. The Petitioner has not shown how the operation of its business would require the Beneficiary to spend half his working time devising policies and strategies. Marketing activities can be non-qualifying, depending on their nature. And because the Petitioner's own affiliate manufactures the same kinds of products that the Petitioner sells, it is not evident that the Beneficiary would need to spend a significant percentage of his time sourcing new products.

Furthermore, the Petitioner did not explain how the Beneficiary could have devoted 20% of his time to personnel issues at a time when the company had no personnel other than the Beneficiary himself. Even with the later addition of two contractors, the 20% figure does not appear to be realistic. The Petitioner has engaged in minimal hiring and firing activity, and any time that the Beneficiary spent directly supervising two front-line installation workers would constitute the work of a supervisor rather than an executive.

Although the Petitioner claimed a sales executive at the time of filing, the Petitioner later retracted that claim and acknowledged that the Beneficiary had no subordinate staff to relieve him from

performing sales, administrative, and installation duties at the time of filing. The Petitioner cannot overcome this finding simply by claiming that the Beneficiary spent half of his time making unspecified and uncorroborated policy and strategy decisions.

The Petitioner asserts that the Director "is improperly placing excessive weight on the fact that [the Petitioner] had no other employees at the time of filing except for the beneficiary." A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa petition for classification as a multinational manager or executive. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for us 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-managerial or non-executive operations of the company. *See, e.g., Family Inc.,* 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when discrepancies in the record raise doubts as to whether the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15. In this instance, the Petitioner claimed that a sales manager still worked for the company in December 2017, months after that person left the company.

The Petitioner has not established that the Beneficiary's duties were, are, or will be primarily those of an executive. Even the presence of two contracted installers does not relieve the Beneficiary from non-installation tasks such as sales and administrative responsibilities.

B. Finances

The Director also found that the Petitioner was not in a financial position to support an executive position. For 2016, the last full calendar year before the December 2017 filing date, the Petitioner reported the following figures to the Internal Revenue Service:

Gross receipts or sales	$45,132
Cost of goods sold	25,626
Total income	19,506
Salaries and wages	0
Total deductions	70,705
Ordinary income or loss	-51,199

The Petitioner reported significant losses when it had no employees or contractors; bringing on additional workers would place additional demands on the Petitioner's finances.

In the RFE, the Director noted the Petitioner's financial situation and concluded that the company could not support a managerial or executive position. In response, the Petitioner asserted that, despite reported losses, "the company maintains more than adequate assets on hand to support the executive position and additional employees." The Petitioner stated that the Beneficiary "has received distributions in the amounts of . . . $40,000 for 2016, and $59,614 in 2017." These amounts are less than the Beneficiary's stated annual salary of $60,000.

The Petitioner indicated that the company's income has increased over the years, but the Petitioner did not show that it could support the five-department structure shown in the organizational chart. Furthermore, a balance sheet and tax documents showed that, despite an increase in sales, the Petitioner had fewer assets in December 2017 than it did a year before:

	2016	2017
Gross profit	$23,740	$35,671
Current assets	86,715	69,217
Total assets	144,801	92,668
Ordinary loss	51,199	38,450

The Director observed that the Beneficiary has received less than the stated rate of compensation and that the Petitioner "has been running at a net loss every year and appears to have exhausted its capital reserves at the end of 2017."

On appeal, the Petitioner asserts that the company "maintained more than adequate assets on hand to support the beneficiary and additional employees," and that "the company's net losses have consistently decreased and sales have increased steadily over the past three years."

The Petitioner did report nearly $200,000 in sales during the first six months of 2018, but as the Beneficiary was the only person working at the company during that entire period, the evidence is consistent with the conclusion that the Beneficiary had to devote considerable time to sales duties. Furthermore, a decreased net loss is still a net loss, and the Petitioner has been drawing down its assets to cover that loss. The Petitioner has not shown that the company would be able to support the personnel structure depicted in the organizational chart or employ a staff of sufficient size and organizational complexity to support a primarily executive position.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it would employ the Beneficiary in an executive capacity under the extended petition.

III. EMPLOYMENT ABROAD IN AN EXECUTIVE CAPACITY

A qualifying organization must have employed the beneficiary outside the United States "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.

The Petitioner specified that the Beneficiary's experience abroad was in an executive capacity. The Director found that the Petitioner had not shown that experience to have been primarily executive. Because our conclusion regarding the Beneficiary's U.S. employment, by itself, warrants denial of the petition and dismissal of the appeal, we need not reach the separate issue regarding the Beneficiary's foreign employment and therefore reserve it.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of M-C-, LLC*, ID# 5145596 (AAO Aug. 27, 2019)