U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6898175

Date: DEC. 4, 2019

Appeal of Texas Service Center Decision

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

The Petitioner is a manufacturer of knitted garments and an exporter of textile machinery. It seeks to temporarily employ the Beneficiary as its chief executive officer 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 Texas Service Center denied the petition concluding that the Petitioner did not establish, as required, that: (1) the Beneficiary would be employed in a managerial or executive capacity in the proposed position with the U.S. entity; and (2) the Beneficiary's assignment in the United States would only be for a temporary period. 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 finding regarding the Beneficiary's proposed employment in a managerial or executive capacity. Therefore, we will dismiss the appeal. Because of the dispositive effect of this finding, we will reserve the remaining issue.

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 claims that the Beneficiary's proposed U.S. employment will be in an executive capacity. As the Petitioner does not claim that the Beneficiary would be employed in a managerial

capacity, we will only address the Petitioner's claim and will not discuss whether the Beneficiary's U.S. employment will be in a managerial 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). The Petitioner must also 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 description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are 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 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 a managerial 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, the Petitioner claimed 34 employees and provided a supporting statement discussing the business operations of its three U.S. subsidiaries – two transportation/logistics companies and one restaurant – as well as the Petitioner's purchase of a facility and equipment for its textile manufacturing operation. The Petitioner claimed that each U.S. subsidiary would be under the supervision of a general manager and that the Beneficiary's role with respect to each subsidiary is to "direct the management . . . and establish[] the goals and policies." Although the Petitioner provided a staffing chart containing employee names, salaries/wages, and position titles, the chart is dated February 2018 and lists only 26 employees and therefore does not support the Petitioner's claim that it had 34 employees at the time of filing. In fact, the Petitioner did not provide evidence corroborating this claim and instead discussed its plans to staff its organization with at least 60 employees, including ten "top-level positions," once it becomes "fully up and running." The Petitioner described its own operation as "still at its early stages," claiming that [redacted] was charged with oversight of its daily functions, while [redacted]'s two subordinates – described as "experts in the textile industry" – would carry out those functions. The Petitioner did not provide corroborating

evidence showing that it employed either [redacted] or his two claimed subordinates and instead provided Forms 1099-MISC that [redacted] was issued in 2017 and 2018 by [redacted] one of the Petitioner's three subsidiaries.

Although the Petitioner also provided a block organizational chart outlining the management and staffing structures of its three subsidiaries, this chart did not include the Beneficiary's name anywhere in the hierarchy and provided little detail with respect to its own organizational structure, showing "Managing" at the top tier, followed by "Engineer Technologist Master's Degree in Textile." Further, despite claiming [redacted] as its general manager in its supporting statement, the organizational chart did not list [redacted] as the Petitioner's employee, nor did it name the two textile "experts" who were claimed to have been employed by the Petitioner at the time of filing. The chart also names [redacted] as the general manager of [redacted] – another of the Petitioner's U.S. subsidiaries. However, the record contains no evidence of wages paid to [redacted] either by the Petitioner or by any of its subsidiaries.[1] As the record does not show that [redacted] was employed by the Petitioner or its subsidiaries at the time of filing, it is unclear who, if not the Beneficiary, was available to oversee [redacted]'s daily operational functions at the time this petition was filed.

The record also shows that [redacted] issued Forms 1099-MISC in 2017 and 2018 to [redacted] who the Petitioner claimed as manager of [redacted] another of its three subsidiaries. Although [redacted] did issue two Forms 1099-MISC in 2017 and 2018, [redacted] was not the recipient of either of either wage document. As such, it is unclear what position [redacted] assumed with [redacted], the issuer of his wage declarations. More importantly, it is unclear who, if not the Beneficiary, was available to oversee [redacted]' daily operational functions at the time of filing, given that the individual who was supposed to be that entity's manager was paid wages by an entirely different, albeit related, entity. The Petitioner must resolve these discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Lastly, although the Petitioner provided six 2018 Forms 1099-MISC that were issued by [redacted], the restaurant that was the third of the Petitioner's subsidiaries, all six wage documents, including that of [redacted]'s general manager, showed wages that were consistent with part-time employment. Further, to the extent that the above described wage documents show wages that are consistent with part-time employment, these documents undermine the reliability of the Petitioner's staffing chart, which indicates that as of February 2018, all 26 of the named employees assumed full-time positions. The chart also lists the Beneficiary's rate of compensation as $45/hour, which is equivalent to approximately $93,000 annually and is therefore inconsistent with the Petitioner's claim that the Beneficiary's proffered wage is $50,000 annually.

In a request for evidence (RFE), the Director found that the record lacked evidence showing how the Beneficiary would be relieved from having to primarily carry out non-qualifying job duties and

[1] The record contains several documents signed by [redacted] in 2015 and 2016 on behalf of [redacted] However, the Petitioner did not provide documents showing that [redacted] continued to act on behalf of [redacted] or that he assumed a role with respect to that entity at the time of filing or immediately prior to that time.

instructed the Petitioner to provide line and block organizational charts depicting its staffing and organizational structure and identifying the Beneficiary's subordinates and their job duties.

In response, the Petitioner resubmitted the organizational chart and wage documents and asserted that the Director overlooked this evidence. The Petitioner explained that it currently has only two employees and one manager because it "is still at its early stages." The Petitioner again named [redacted] as its manager, but did not provide evidence to support this claim, nor did it submit any wage evidence reflecting its staffing or the staffing of its U.S. subsidiaries at the time this petition was filed. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner also did not provide evidence resolving the discrepancy between its claimed employment of [redacted] and the submitted wage documents, which indicate that [redacted] was employed by [redacted] rather than the Petitioner itself. Aside from this discrepancy, we note that [redacted]'s Forms 1099-MISC show wages that are consistent with part-time employment. In any event, the record indicates that neither the Petitioner nor its three subsidiaries were adequately staffed so that that the Beneficiary would have been relieved from having to directly oversee the mundane functions of their daily operations at the time of filing.

Accordingly, despite finding that the Beneficiary assumes a high-ranking position within the Petitioner's organization, the Director determined that the Petitioner did not provide sufficient evidence showing that the Petitioner was able to relieve the Beneficiary from having to primarily perform non-executive job duties at the time of filing.

On appeal, the Petitioner claims that [redacted] was its consultant in 2018, explaining that "the [textile] business channel was redirected" based on its lack of profitability. The Petitioner does not, however, offer an explanation for not raising this claim in its April 2019 RFE response statement, where it maintained the claim that it has employed [redacted] as its manager. The Petitioner has not offered evidence to support either of these opposing claims, nor has it provided evidence resolving the inconsistency. *See Ho*, 19 I&N Dec. at 591-92. Moreover, the fact that the Petitioner did not disclose its changed circumstances until it filed this appeal indicates that the changes may not have taken place until after this petition was filed. We note that 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). As the Petitioner appears to have "redirected" its main business activity after having filed this petition, any details of its altered business circumstances would not be relevant for the purpose of establishing the Petitioner's eligibility as of the date this petition was filed.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organization or major component or function of the organization, and that person's authority to direct the organization, major component, or function. 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. Thus, to show that a beneficiary will "direct the management" of an organization or a major component or function of that organization, a petitioner must show how the organization, major component, or function is managed and demonstrate that the beneficiary primarily focuses on the broad goals and policies of the organization, major component, or function, rather than the day-to-day operations of such. An individual will not be deemed an executive under the statute

simply because they have an executive title or because they "direct" the organization, major component, or function 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.*

We find that the Petitioner has not provided sufficient evidence demonstrating its eligibility at the time of filing. As noted earlier, the record contains no evidence that the Petitioner paid wages to employees who could have supported the Beneficiary in a position that would entail primarily executive-level tasks. It is therefore unclear how or if the Beneficiary would have been relieved from having to primarily perform the non-executive job duties that were likely critical to the Petitioner's daily operation at the time of filing. Although the Petitioner claimed that the Beneficiary's spouse volunteers her services to manage the restaurant that is one of the Petitioner's three subsidiaries, the Forms 1099-MISC for 2017 and 2018 indicate that the Beneficiary's spouse received monetary compensation, thus contradicting the claim that she volunteered her services. Further, the record contains no evidence showing that [redacted] employed the Beneficiary's spouse as its restaurant manager at the time of filing. *See Chawathe*, 25 I&N Dec. at 376.

Likewise, the Petitioner has not provided sufficient evidence showing how it planned to relieve the Beneficiary from having to directly provide management services to its three U.S. subsidiaries. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988). Although the Petitioner has claimed that a general manager would be assigned to manage each U.S. subsidiary, the outdated wage declarations that the Petitioner offered as supporting evidence do not corroborate the management structure described in the initial supporting statements. This lack of evidence leads us to question who, if not the Beneficiary, would oversee the daily operations of each subsidiary. As previously noted, the Petitioner must support its assertions with relevant, probative, and credible evidence. *See id.* Further, if USCIS finds reason to believe that an assertion stated in the petition is not true, it may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Lastly, with regard to the Petitioner's references to its early stage of development and its expectation that additional staff would be hired as development progresses, we reiterate that eligibility must be established on the basis of facts and circumstances that existed at the time a petition is filed. The Petitioner in this instance has not provided sufficient evidence showing whom it employed at the time of filing, nor has it demonstrated that its U.S. subsidiaries were duly staffed with managers who could relieve the Beneficiary from having to oversee their daily operations. The Petitioner's early developmental phase does not relieve it from having to meet basic eligibility criteria, which states that the proposed position must primarily consist of executive job duties. *See* section 101(a)(44)(B) of the Act. The evidence provided in support of this petition does not lead us to conclude that the Petitioner

had the necessary staffing to relieve the Beneficiary from having to primarily perform its operational and administrative tasks.

B. Duties

In addition to the above staffing analysis, we also examine the Beneficiary's proposed job duties. 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 statement, the Petitioner claimed that the Beneficiary is responsible for directing the management of and setting the goals and policies for its three U.S. subsidiaries. The Petitioner also provided a general job duty breakdown claiming that the Beneficiary's time would be spent as follows: 10% "coordinating the operations" of the three subsidiaries, 10% "controlling and commanding" their operations, 20% "delegating tasks to the Management Team" of the subsidiaries, 20% organizing their goals and policies, and 40% planning their operations. The Petitioner further stated that the Beneficiary intends to "work towards the creation of new business" and "continue establishing new jobs" without performing the daily tasks of each subsidiary.

In response to the RFE, the Petitioner explained that in an effort to compensate for its textile business's "slow start" it decided to expand its operations by setting up three U.S. subsidiaries whose operations the Petitioner would oversee by hiring a general manager to run the operations at the location of each subsidiary. The Petitioner asked the Director to consider the Beneficiary's role and duties "as they relate to each company," not just his role and duties with respect to its existing textile operation. The Petitioner claimed that the Beneficiary attributes "minimal attention to day-to-day tasks" of each subsidiary operation and reiterated the original claim that the Beneficiary focuses on directing the management and setting the goals and policies of each subsidiary. The Petitioner also discussed how each subsidiary functions and described the role of each subsidiary's manager, emphasizing the Beneficiary's role at the top of a chain of command overseeing the managers of the three subsidiaries. Although the Petitioner stressed the Beneficiary's leadership position and his discretionary authority over the Petitioner's plans to establish more businesses, it did not provide more detailed information about the Beneficiary's daily job duties within the context of a business operation, which at the time of filing included an underdeveloped textile business and three understaffed subsidiaries.

On appeal, the Petitioner focuses on the Beneficiary's "direction and control" of the entity and his continued contribution towards "the development of business in the United States." The Petitioner explains that it used the foreign entity's funds to purchase commercial property and obtain necessary permits for its use and claims that the property will house a "branch" of the restaurant business operated by one of its subsidiaries. The Petitioner also mentions a piece of proprietary equipment it seeks to patent and discusses a new business venture involving the processing of meat and dairy products, stating that this will lead to job creation and hiring more staff. The Petitioner asserts that the Beneficiary's ideas, experience, and direction are critical to the organization's ability to meet its business goals.

We find that the arguments on appeal focus primarily on the Beneficiary's discretionary authority and leadership role within the organization, but they do not further our understanding of the Beneficiary's prospective job duties or establish that the Beneficiary's time would be primarily spent performing

tasks of an executive nature. 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. at 1108.

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) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. Sections 101(A)(44)(B) of the Act. While a 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 not sufficient to establish that the actual duties to be performed would be primarily executive in nature.

Here, the Petitioner was informed in the RFE that the job description it originally provided was insufficient and lacked adequate detail about the Beneficiary's daily job duties. However, the Petitioner has not provided a more comprehensive job duty breakdown nor imparted a meaningful understanding of the actual tasks the Beneficiary would perform in the normal course of the Petitioner's daily business operation. Although we acknowledge the Beneficiary's heightened degree of discretionary authority and top placement within the Petitioner's hierarchy, the record indicates that the Petitioner ultimately abandoned its original business endeavor of operating a textile manufacturing business, which, by the Petitioner's own admission, was in a nascent phase of operation at the time this petition was filed and thus does not appear to have had the capability to support the Beneficiary in a primarily executive capacity. In fact, at the time of filing, the Petitioner focused primarily on the business activities of its three U.S. subsidiaries whose staffing is unknown as the supporting evidence largely consists of outdated wage documents that do not establish whom the subsidiaries employed at the time of filing or demonstrate that the subsidiaries had designated managers to run their respective operations, as the Petitioner claims.

In sum, the Petitioner has not provided sufficient information about the Beneficiary's day-to-day job duties within the scope of its organization at the time of filing. Therefore, the Petitioner has not established that at the time of filing it was able to employ the Beneficiary in a position that would primarily entail the performance of executive-level job duties.

ORDER: The appeal will be dismissed.