U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-[redacted]

DATE: DEC. 9, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, [redacted] seeks to employ the Beneficiary as its controller 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 business to transfer a qualifying foreign employee to the United States to temporarily work in a managerial or executive capacity.

The Director of the California Service Center denied the petition, concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity in the United States. On appeal, the Petitioner asserts that the Director ignored the details of the anticipated executive duties of the Beneficiary submitted by the Petitioner; that she failed to consider that the Beneficiary will serve as a function manager in the United States; and that she failed to consider the needs of the corporate international parent.

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 OR MANAGERIAL CAPACITY

The primary issue to be addressed is whether the Petitioner established that the Beneficiary will be employed in an executive or managerial capacity in the United States. On appeal, the Petitioner asserts that the Beneficiary will be employed in an executive capacity, and also as a function manager. We will address both assertions below.

A. Executive Capacity

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.

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). Based on the 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 at 1533.

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. 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.

1. Duties

The Petitioner sells [redacted] tools. The petition indicated that the Beneficiary will "assume all executive management, financial, and accounting control of [the Petitioner]. He will be responsible for all financial accounting functions, preparation of U.S. tax returns and payment of all necessary U.S. taxes, and report profit and loss and all other financial issues to the parent headquarters in Spain." In support of the petition, the Petitioner submitted a declaration from the President and Chief Executive Officer of [redacted] stating that the Beneficiary will "have managerial and executive responsibility for USA, including supervision of employees and responsibility for all financial, business management, and tax functions."

In the Director's request for evidence (RFE), the Director advised the Petitioner that the duty description lacked sufficient detail regarding what the Beneficiary would be doing on a day-to-day basis. In response, the Petitioner submitted a declaration of its Secretary stating the following proposed duties for the Beneficiary in the United States, and percentages of time to be devoted to those duties:

- Finance & Budget (30%) – includes budget, finance, accounts payable, commercial credit policies, and tax compliance;

- Marketing (45%) – includes market analysis, market strategy, hiring and supervising the marketing team, and branding;
- Personnel (5%) – responsible for all personnel decisions;
- Legal (5%) – work with outside legal counsel; and
- Other Executive Duties (15%) – includes collaborating with the foreign entity's senior management team and representing the company at industry and trade events.

In her decision, the Director determined that the position description was vague and did not provide sufficient insight into the Beneficiary's proposed daily activities. On appeal, the Petitioner states that the Director "ignored the specific detail of the executive work to be performed by the Beneficiary" and that the description of the duties provided was "quite detailed."

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 its broad goals and policies, 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 agree with the Director that the Petitioner did not establish that the Beneficiary would be employed in an executive capacity in the United States. The Petitioner initially provided broad statements that do not meaningfully describe what the Beneficiary will be doing on a daily basis. 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). 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.

In response to the RFE, the Petitioner changed the description of the Beneficiary's proposed job duties. Specifically, the revised duties focus primarily on marketing, but the Petitioner did not indicate that marketing would be the primary duty of the Beneficiary in its original submission. Instead, it initially stated that the Beneficiary's duties would be primarily financial. Thus, the substance of the Beneficiary's duties changed. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, a petitioner cannot offer a new position to a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. A petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. *See* 8 C.F.R. § 103.2(b)(1). If

significant changes are made to the initial request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Further, the Petitioner has not established that the newly introduced marketing duties are executive duties. The marketing duties include "analysis of the U.S. and North American market to develop strategic understanding of the market preferences and opportunities for [redacted] product sales;" approval of market strategy and "ensuring that it is being effectively implemented by the sales and marketing team;" and approving all branding initiatives. The Petitioner has not demonstrated how these activities represent primarily directing the management of the organization. Other duties assigned to the Beneficiary, such as reviewing financial reports and representing the company at industry and trade events, are not readily apparent executive duties. The Petitioner has not demonstrated how those activities represent primarily directing the management of the organization.

Additionally, many of the Beneficiary's assigned duties do not provide a meaningful understanding of how the Beneficiary will actually spend his time. For example, proposed duties contained in his finance and budget responsibilities include establishing policies for the payment of creditors; establishing commercial credit practices and policies; and ensuring that the Petitioner complies with all applicable tax laws. These duties are overly broad and do not indicate what the Beneficiary will actually be doing. 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. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Further, if the Petitioner has been operating in the United States since 1999 as claimed on the petition, it is not clear why it does not already have creditor payment policies and commercial credit practices in place.

The Beneficiary's duties also include supervising the senior marketing managers and approving financial projections and budgets prepared by the finance team. However, as further detailed below, the Petitioner's organizational chart does not include senior marketing managers or a finance team. In addition, the Petitioner initially indicated that the Beneficiary will be responsible for all financial accounting functions, preparation of U.S. tax returns, and payment of all necessary U.S. taxes. However, as further detailed below, its organizational chart indicates that it will engage an independent CPA. It is not clear whether the CPA will be performing the duties allocated to the Beneficiary. The Petitioner must resolve these inconsistencies 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).

We further note that the Beneficiary's management of the 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. Sections 101(A)(44)(B) of the Act. Here, as further detailed below, the Beneficiary will be overseen by a President, but the President's duties are not listed. The Petitioner asserts that the Beneficiary will exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, but it does not indicate the President's role in oversight of the Petitioner's business. Even if the Beneficiary will 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 his actual duties would be primarily executive in nature. As such, a detailed job description is critical to a determination of whether the Beneficiary would be employed in an executive capacity. Here, at the time of filing, the record lacked a job description that delineated the Beneficiary's specific proposed tasks.

By statute, eligibility for this classification requires that the duties of a position be primarily executive or managerial in nature. Here, the job description does not establish that the Beneficiary's actual day-to-day duties would be executive in nature.

2. Staffing and Organizational Structure

The Petitioner claimed to have two employees at the time of filing the petition in March 2018. As noted by the Director in her decision, the Petitioner did not identify the two employees. Instead, it submitted copies of 2017 IRS Forms W-2, Wage and Tax Statements, for eight employees, and other tax and payroll documentation showing up to 13 employees.[1] The Petitioner also submitted employment agreements for six of the Form W-2 employees, which list their job titles and descriptions of their duties.[2] They include an office manager, an area sales manager, a sales technician, customer service, a sales assistant, and inside sales.

The record also contains two conflicting organizational charts for the U.S. entity. The first chart was submitted with the initial petition and shows the President overseeing the Beneficiary, and the Beneficiary overseeing an independent CPA, an office manager, and a national sales manager. The second chart, submitted in response to the RFE, lists the Beneficiary who is overseen by the President of the foreign entity. The chart shows the following individuals below the Beneficiary: an independent counsel; an independent CPA; an office manager; a national sales manager; and a product manager. Below the office manager is an "inside sales and customer service" position, and below the national sales manager are "Reps." The chart lists the salaries of all positions except the independent counsel; the independent CPA, and the Reps. On appeal, the Petitioner did not sufficiently explain the addition of several positions to the second chart. These inconsistencies raise doubt about the credibility of the organizational charts. *Matter of Ho*, 19 I&N Dec. at 591-92. Therefore, the actual staffing of the U.S. entity is not clear.

Also, as previously noted, some of the Beneficiary's duties are not supported by personnel in the organization. For example, although the Beneficiary's proposed duties include supervising the senior marketing managers and approving financial projections and budgets prepared by the finance team, the Petitioner's organizational chart does not include senior marketing managers or a finance team. Further, the Petitioner has not submitted evidence to corroborate its payments to the claimed independent CPA and counsel, nor documented how their work supports the Petitioner's operations

[1] On a 2019 E-2 nonimmigrant visa application submitted by the Beneficiary for employment with the Petitioner, the Petitioner listed four employees: an office manager and three inside sales managers. None of the employees listed on the application were previously named as employees of the Petitioner on its second organizational chart submitted in response to the RFE in this case.

[2] The record also contains employment agreements for four other employees who did not have Forms W-2 submitted to the record. The four employees' job titles include one sales assistant and four inside sales positions.

and relieves the Beneficiary from performing non-qualifying duties. With regard to the CPA, it appears that the duties may overlap with those of the Beneficiary.

Additionally, some of the individuals listed on the second organizational chart do not match the individuals listed on the Petitioner's Forms W-2 and in the employment agreements submitted. For example, [redacted] is listed as the national sales manager on the organizational chart, but there is no employment agreement or Form W-2 submitted on his behalf. [redacted] is listed on the organizational chart as inside sales and customer service, but there is no employment agreement or Form W-2 submitted on her behalf. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Thus, the record lacks evidence of the Petitioner's employment of workers who would perform daily operational, sales, financial, and marketing activities that the Beneficiary would allegedly oversee. Without evidence of sufficient lower-level employees, it is not clear who would be performing the day-to-day operational, sales, financial, and marketing duties or that the Beneficiary would be relieved from these duties.

The Director noted in her decision that the Petitioner's work force varied from quarter to quarter and that it did not appear based on the Petitioner's staffing that the Beneficiary would be employed primarily in a managerial or executive capacity. On appeal, the Petitioner asserts that the Beneficiary has served as controller abroad and that he was responsible for all of its parent company's Asian operations, including oversight of all of its Chinese sales. It states that the Beneficiary will work with the parent company in Spain and its Chinese subsidiaries to support the Petitioner's operations in North America. It cites *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), in support of its assertion that we must consider the Beneficiary's role within the wider qualifying international organization. In *Z-A-*, however, the petitioner submitted "substantial evidence relating to the support provided by the overseas staff," and "[t]he record amply substantiate[d] the existence of the foreign staff and the nature of and need for the services they provide to the Petitioner and the organization as a whole." *Id.* The Petitioner here has not documented the existence of its purported foreign staff or corroborated its assertion that these workers would support the Beneficiary's efforts in the United States.

The Petitioner has not established that the Beneficiary would be employed in an executive capacity. 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 sufficient employees to relieve the Beneficiary from performing operational duties and to allow the Beneficiary to 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.

The Petitioner has not provided sufficient detail or supporting evidence to support a claim that he would direct the management of the organization and that he would primarily focus on the broad goals and policies of the organization, rather than on its day-to-day operations. Based on the discrepancies

in the staffing, the Petitioner has not demonstrated that the Beneficiary is relieved from performing the operational tasks of the business. It has not shown that it has the infrastructure to support the Beneficiary in an executive capacity.

Accordingly, the Petitioner has not met its burden to establish that it would employ the Beneficiary in a primarily executive capacity.

B. Function Manager

The Petitioner also asserts that the Beneficiary will be a function manager. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. On appeal, the Petitioner asserts that the Director erroneously reviewed the Beneficiary's duties in the context of a personnel manager, and that instead, she should have analyzed his duties as a function manager.

If, as here, a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017). The Petitioner asserts on appeal that, similar to the beneficiary in *Matter of G-*, the Beneficiary here will have executive responsibility for the finance and marketing functions of the Petitioner.

However, as previously noted, the Petitioner added marketing as a primary duty of the Beneficiary in response to the RFE. It appears that the primary duty was added to match the parameters of *Matter of G-*. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). The Petitioner has not sufficiently described the Beneficiary's duties, and its statement on appeal does not clarify the record regarding the Beneficiary's duties. Additionally, without an understanding of the Petitioner's staffing, it is not clear that the Beneficiary would act at a senior level within the organizational hierarchy or with respect to the function managed, or that he would exercise discretion over the function's day-to-day operations.

Accordingly, the Petitioner has not met its burden to establish that it would employ the Beneficiary as a function manager.

III. QUALIFYING RELATIONSHIP

Although not addressed in the Director's decision, we further find that the Petitioner has not submitted evidence of its qualifying relationship with the Beneficiary's foreign employer. As previously indicated, an L-1A petitioner must establish that, within the three years before a beneficiary's admission into the United States, he or she worked abroad for the petitioner or its parent, branch, subsidiary, or affiliate. 8 C.F.R. § 214.3(l)(3)(i).

To establish a "qualifying relationship," the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See* section 101(a)(15)(L) of the Act; *see also* 8 C.F.R. § 214.2(l)(1)(ii) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate"). On the petition, the Petitioner asserted that it is a subsidiary of [redacted] It further asserted that the Beneficiary was most recently employed in China by another purported subsidiary of [redacted]

The stock certificate for the Petitioner shows that it is owned solely by [redacted] The Petitioner submitted organizational minutes from a meeting in 2000 showing that 2500 initial shares of the Petitioner's stock were issued to [redacted] In response to the Director's RFE, the Petitioner asserted that [redacted] is the "successor-in-interest" to [redacted] It stated that "there was a split of [redacted], in November 2010 and [redacted] was one of two companies created and the one to which [the Petitioner] was distributed." In support of this claim, it submitted an English translation of the "Official Journal of the Commercial Register" which states that [redacted] "shall be terminated by means of dissolution without liquidation" and that "the entire equity of said company shall be transferred to the companies [redacted] and [redacted], which shall acquire all the rights and obligations inherent to said equity by universal succession, under the terms and conditions set out in the split-up project signed by the directors of the companies and filed in the Commercial Register of [redacted] province."

Any document in a foreign language must be accompanied by a full English language translation. 8 C.F.R. § 103.2(b)(3). The translator must certify that the English language translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.* Because the Petitioner did not submit the original foreign language document, we cannot meaningfully determine whether the translated material is accurate and thus supports the Petitioner's claims. Further, the translation does not state that the 2500 shares of the Petitioner owned by [redacted] would be transferred solely to [redacted], and the record does not contain stock certificates or stock transfer records showing that such a transfer ever occurred.

Instead, the Petitioner submitted an Informa and a report completed by [redacted] which state that the Petitioner is a wholly-owned subsidiary of [redacted] However, the Informa states that the writer "does not guarantee the absolute correctness of the information, and it is not responsible of its use for any specific purpose." Further, the report states that [redacted] does not guarantee the correctness or the effective delivery of the information and will not be held responsible for any errors therein or omissions therefrom." The Petitioner did not submit credible evidence of its ownership. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Further, the Petitioner stated that the Beneficiary was employed abroad by a Chinese subsidiary of the parent company, but no ownership information was submitted to the record regarding [redacted] The Petitioner must establish that it and the foreign employer share common ownership and control. Based on the evidence submitted, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer.[3] For this additional reason, the petition cannot be approved.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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* J-[redacted], ID# 6533650 (AAO Dec. 9, 2019)

[3] We also note that the Petitioner is located in Missouri, but the Missouri Secretary of State's online records do not indicate that it is authorized to do business in Missouri. Mo. Sec'y of State, https://bsd.sos.mo.gov/BusinessEntity/BESearch.aspx?SearchType=0 (last visited Nov. 11, 2019). Any future submissions, whether relating to this case or another filing, must account for this information and demonstrate that it has been resolved. We note this additional issue for informational purposes; even without considering the company's status, the other issues discussed above warrant dismissal of the appeal.