U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-C-B-M- LLC

DATE: DEC. 14, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an importer and wholesale distributor of home furnishings, seeks to temporarily employ the Beneficiary as the manager of its new office[1] under the L-1A nonimmigrant classification for intracompany transferees. *See* 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 Petitioner did not establish, as required, that the Beneficiary has been employed abroad in a managerial or executive capacity.

On appeal, the Petitioner submits additional evidence and asserts that it established that the Petitioner's parent company has employed the Beneficiary in an executive capacity since 2011.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification for a new office, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). 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. Section 101(a)(15)(L) of the Act. The petitioner must also establish that the beneficiary's prior education, training, and employment qualifies him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

[1] The term "new office" refers to an organization which has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation no more than one year within the date of approval of the petition to support an executive or managerial position.

The petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

The term "executive capacity" is defined as an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

II. EMPLOYMENT ABROAD IN AN EXECUTIVE CAPACITY

The Director determined that the Petitioner did not establish that the Petitioner's parent company has employed the Beneficiary in a managerial or executive capacity.[2] The Director found that the submitted position description was too vague to establish what the Beneficiary actual does on a day-to-day basis.

On appeal, the Petitioner objects to the Director's finding that the Beneficiary's duties are too general and asserts that the Beneficiary performs the same duties attributed to "Chief Executives" in the U.S. Department of Labor's O*Net Online occupational classification resource. The Petitioner further maintains that the Beneficiary has been responsible for executive oversight of its Chinese parent company as well as an affiliate Chinese entity, and performs primarily executive duties for both entities.

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 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, U.S. Citizenship and Immigration Services (USCIS) examines 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 foreign entity's business and its staffing levels.

[2] Although the Director referenced the definitions of both managerial and executive capacity, the Petitioner claims that the Beneficiary has been employed abroad in an executive capacity.

A. Duties

Based on the definitions of executive capacity, the Petitioner must first show that the Beneficiary has performed 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 has been *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the company's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

The Petitioner claims that its parent company, [redacted] has employed the Beneficiary as its president since 2011.[3] In a supporting letter, the foreign entity stated that the Beneficiary's duties include designing and implementing marketing plans, setting sales goals and reviewing results, reviewing and coordinating with affiliated manufacturing facilities regarding product quality and delivery, supervising vice presidents and department managers, reviewing reports, and evaluating staff performance.

In response to the Director's request for a more detailed description of the Beneficiary's duties, the Petitioner provided the following:

- Strategic planning for expanding the business by searching for suitable products, services, etc. to increase the revenue (65%)
- Set annual budget and profit goals for the company (10%)
- Meeting with department heads to review the performance results and take the corrective remedies to achieve the operational targets (20%)
- Meeting with department heads to review the personnel issues and make final decisions regarding hiring, firing, promotion and emotion (5%)

As noted, the Director found that this description did not provide sufficient insight into the nature of the Beneficiary's actual day-to-day duties to establish that he performs primarily executive tasks. We agree with that finding. The Petitioner indicates that the Beneficiary spends most of his time performing "strategic planning" but did not provide examples of his specific duties in support of its claim that this responsibility would reasonably occupy so much of his time. The Petitioner claims that the foreign entity markets and sells products manufactured by its affiliate so it is unclear what specific duties would be involved in searching for "suitable products, services, etc."

Rather than providing a more specific description on appeal, the Petitioner compares the previously submitted duties to the generic duties listed under the "Chief Executives" occupation on O*Net

[3] In a request for evidence (RFE), the Director advised the Petitioner that the Beneficiary identified a different foreign employer, [redacted] on his U.S. visa applications submitted to the Department of State between 2012 and 2015. The Petitioner explained that the Beneficiary owns and directs the management of this foreign company but is primarily employed by [redacted] Although the Petitioner has submitted evidence that the two foreign entities are affiliates, we will limit our analysis to the Beneficiary's role with [redacted] The Petitioner did not explain why it did not mention [redacted] in its initial filing and the record does not contain a detailed description of the Beneficiary's role with this company.

Online. The regulations require the Petitioner to provide a detailed description of the Beneficiary's actual duties within the context of the foreign entity's day-to-day operations. His duties should be reasonable in light of the nature, scope, and purpose of that organization. Accordingly, comparing his job description to a general listing of job duties within a broad occupational classification does not assist us in understanding what the Beneficiary actually does or whether his actual duties have been primarily executive in 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The fact that the Beneficiary manages or directs 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 the Beneficiary may exercise discretion over the foreign entity's day-to-day operations and with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that his actual duties have been primarily executive in nature.

B. Staffing

At the time of filing, the Petitioner submitted an organizational chart for the foreign entity which listed the Beneficiary as president with a total of five subordinate staff. The chart shows a financial vice president and a vice president as his direct subordinates. In addition, it depicts a product manager [redacted] a sales manager [redacted] and a branch manager [redacted] all reporting to the vice president.

In response to the Director's request for additional information regarding the foreign entity's structure, the Petitioner submitted a revised organizational chart with a total of 11 employees. The newly added positions include an accountant who reports to the vice president, two employees reporting to the product manager, and two employees reporting to the sales manager. The three managers identified on the initial organizational chart were not named on the revised chart. Instead, the Petitioner identified [redacted] as product manager, [redacted] as sales manager, and [redacted] as purchasing manager. The revised chart did not include the "branch manager" position.

The Petitioner also provided the foreign entity's monthly "pay sheets" dating from January 2013 until May 2017. These documents were submitted in English with a "translation seal" but were not accompanied by the original Chinese language documents. Therefore, the probative value of these documents is limited.

The Petitioner did not explain the significant differences between the organizational chart submitted at the time of filing, and the one submitted in response to the RFE approximately three months later. The three managers identified on the initial chart do not appear in any of the monthly pay sheets and there is no corroborating evidence of their employment. In fact, the pay sheets appear to show that the staffing depicted in the second chart was actually in place well before the time the petition was

filed in January 2017. The Petitioner has not resolved 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). In light of these discrepancies in the organizational charts and the limited probative value of the incomplete translations provided, the Petitioner has not submitted sufficient evidence of the foreign entity's organizational structure.

The Petitioner was also asked to provide information regarding the foreign employees' job duties and the educational requirements for their positions. The Petitioner submitted a statement from the Beneficiary, who mentioned that the foreign entity has "4 employees with bachelor degree." The Petitioner did not provide position descriptions for the Beneficiary's claimed subordinates, or the educational requirements for specific positions.

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.*

Because of the deficiencies and inconsistencies in the record with respect to the foreign entity's staffing structure, the Petitioner has not established that the Beneficiary primarily directs the management of the foreign entity, or that the staff in place at the foreign entity has been able to relieve him from significant involvement in that entity's day-to-day operations. Without job descriptions for the Beneficiary's subordinates, we cannot determine what non-executive functions were assigned to those staff.

Further, the Petitioner must establish that the Beneficiary has been employed in a qualifying capacity abroad for at least one year in the three years preceding the filing of the petition in January 2017. 8 C.F.R. § 214.2(l)(3)(v)(B). The Beneficiary was physically present in the United States for most of 2016 and therefore, we will look at his employment abroad between January 2014 and January 2016.[4] During much of this period (January 2014 through March 2015), the foreign entity's pay sheets indicate that it employed only the Beneficiary, the "financial vice president" and an

[4] Brief trips to the United States for business or pleasure are not interruptive of the one year of continuous employment abroad, but such periods are not counted toward fulfillment of that requirement. *See* 8.C.F.R. § 214.2(l)(1)(ii)(A). The Beneficiary was in the United States as a visitor from January 14, 2016, until July 11, 2016, and from July 25, 2016, until October 28, 2016. He returned on December 6, 2016, and was in the United States when this petition was filed in January 2017.

accounting employee. The pay sheets list only four to five employees in May and June 2015, indicate that the claimed department managers were hired in July 2015, and show the other vice president was hired in 2016. The company was minimally staffed in 2014 and not fully staffed for at least half of 2015. Therefore, even if we accept the incomplete translations of the pay sheets as probative evidence of the foreign entity's actual staffing levels, this evidence shows that for much of the relevant two-year period, the Beneficiary was without subordinate staff to perform many of the day-to-day functions of the departments he was claimed to oversee.

We must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in denying a visa petition for classification as an L-1A manager or executive. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the foreign entity in conjunction with other relevant factors, such as the absence of employees who perform the non-managerial or non-executive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

The Petitioner has not shown that the reasonable needs of the foreign entity were plausibly met by the services of the Beneficiary as president, a financial vice president, and an accountant. Regardless, the reasonable needs of the Petitioner serve only as a factor in evaluating the Beneficiary's proposed position. The Petitioner must still establish that the Beneficiary was primarily employed in an executive capacity. *See* sections 101(a)(44)(B) of the Act.

The Petitioner has consistently stated that the Beneficiary occupied the senior position in the foreign entity, but has not submitted a job description or supporting evidence sufficient to demonstrate that he primarily performed executive duties.

III. CONCLUSION

The Petitioner has not established that the Beneficiary has been employed abroad in an executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of S-C-B-M- LLC*, ID# 739011 (AAO Dec. 14, 2017)