U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-T- INC.

DATE: DEC. 18, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a company specializing in China in-bound trading relationships, software, and related services, seeks to continue the Beneficiary's temporary employment as its chief executive officer (CEO) under the L-1A nonimmigrant classification for intracompany transferees.[1] 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 the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner asserts that the Director's decision contains factual errors with respect to its staffing levels and that the Director failed to consider the Beneficiary's detailed position description and the position descriptions provided for the Beneficiary's subordinates. The Petitioner maintains that the evidence in its totality establishes that the Beneficiary will be employed in an executive capacity.

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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period April 5, 2017, until April 4, 2018. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary 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 one year within the date of approval of the petition to support an executive or managerial position.

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii). This evidence must demonstrate that the beneficiary will be employed in a managerial or executive capacity, as defined at sections 101(a)(44)(A) and (B) of the Act, under the extended petition.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner established that the Beneficiary will be employed in an executive capacity. The Petitioner did not claim that the Beneficiary would be employed in a managerial capacity; therefore, our analysis will address only the Petitioner's claim that the Beneficiary's proposed position would be in an 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). 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, its staffing levels, and its organizational structure.

A. Duties

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.

The Petitioner provided a description of the Beneficiary's duties as CEO which indicated that he would divide his time between the company's three departments as follows:

Financial & Business Administration Department
- Business and Operational Management (15%)
- Financial Management (5%)
- Fund Raising (5%)
- Human Resource Management (5%)

Technology Service Department
- Research, Analysis, and Planning (20%)
- Software Product & Engineering Management (20%)

Sales & Marketing Department
- Sales Development and Customer Acquisition (15%)
- Marketing, Promotion and Public Relationship Management (15%)

The description was nearly identical in content when compared to the description of the Beneficiary's role with the Petitioner's foreign parent company, which he held from 2008 until 2017. However, the foreign entity is a mature company with fully staffed departments, while the Petitioner, based on the supporting documentation in the record, had two employees (including the Beneficiary) at the time of filing in February 2018, and only began generating revenue in October 2017. Based on the facts presented, it was unclear how the Beneficiary's position would have remained unchanged upon his transfer to the Petitioner's new office, and the description did not appear to describe the Beneficiary's actual duties in context of the new office's operations as it approached the end of its initial year.

For example, the Petitioner stated that the Beneficiary's business and operational management functions include overseeing and managing "the execution of all strategies, programs, campaigns and corporate-level operations," creating and maintaining procedures for implementing departmental-level plans, and managing adherence with legal and regulatory requirements. While these duties confirm the Beneficiary's heightened degree of authority, they did not provide insight into what he would be doing on a day-to-day basis, and did not identify who would be executing the Beneficiary's plans and directives in the United States. The Beneficiary's other duties in this area include predicting trends that will impact the Petitioner's work in the United States and analyzing trends, threats and opportunities, but such duties are not clearly executive in nature, absent evidence that he would be delegating market research functions to other personnel.

The Petitioner indicated that the Beneficiary would allocate the largest portion of his time to overseeing the technology service department, but its organizational chart depicted him as the sole employee of the department. The Beneficiary's "research, analysis, and planning" duties were described in very general terms, as the Petitioner once again noted the Beneficiary's responsibility to develop and oversee strategies and collect and to collect and analyze information, without providing further explanation. The Petitioner noted that he would direct projects and programs for sourcing, compiling, and interpreting data regarding the industry, software market and customer requirements, but did not indicate who would actually carry out these projects and programs. In addition, the Petitioner stated that the Beneficiary would "supervise software development and product

engineering," establish the company's technical vision, supervise the "product engineering manager for the effective coordination and communication for production issue incident management and follow up problem management," "maximize engineering resource utilization/productivity," and "assist the engineering team in defining requirements." Again, the Petitioner does not employ a product engineering manager or a product engineering team. The foreign entity has a four-person technical services team that includes a CTO, product manager, user interface director, and test engineer, but there is insufficient evidence to support a claim that these are the employees referenced in the Beneficiary's U.S. job description.

Finally, the Beneficiary's duties related to sales and marketing were not described as clearly executive in nature. For example, the Petitioner states that the Beneficiary will be "building relationships for the purposes of securing customer sales," managing "inbound and outbound CRM and business development resources e.g. databases, campaigns, tactics" which "can result in the conversion of sales prospects into customers," and notes that he is responsible for promotions, public relations and directing marketing programs. Again, it is unclear who within the Petitioning company would be assisting the Beneficiary with U.S.-based marketing, sales, and promotion activities at the time of filing.

In response to a request for evidence (RFE) in which the Director requested a more detailed statement of the specific tasks the Beneficiary will perform under the extended petition, the Petitioner re-submitted the same description along with a discussion of some actions the Beneficiary has taken during the initial year of operations. While the information provided supports the Petitioner's claim that the Beneficiary occupies the senior position in the U.S. company, it did not provide additional insight into what he would primarily do on a day-to-day basis under an extended petition.

For example, in discussing the Beneficiary's "Research, Analysis and Planning and Business Operational Management" duties, the Petitioner stated that his "executive functions" include increasing e-commerce turnover and profitability, reducing promotion and sales labor costs, improving customer service quality and shortening shipment times. The Petitioner also noted that the Beneficiary has identified key operating principles such as technology innovation, client dedication, financial independence, embracing change, and decentralized team collaboration. However, these are examples of the company's overall objectives, rather than examples of duties performed by the Beneficiary on a day-to-day basis.

The Petitioner did provide some examples of discretionary decisions the Beneficiary had made during the previous year, noting that he had updated the business model, signed a new lease, and proposed making the U.S. office the headquarters for the organization. However, the Petitioner's narrative description also included non-executive duties, noting that the Beneficiary "has been continually working closely with our US clients . . . to review the Company's product segments and core process applications for strategic fit and growth potential." The Petitioner mentioned the implementation of an internal tool that allows collaboration with overseas staff, but does not elaborate on how those staff support the activities of the U.S. office. The Petitioner again emphasized that the Beneficiary has been working closely with clients to improve their online sales,

improved the company's [redacted] software, further developed the product roadmap, and developed sales tools and client presentations to support the sales process. The Petitioner did not explain how these duties fall within the definition of "executive capacity."

With respect to the Beneficiary's "software product & engineering management" responsibilities, the Petitioner stated that he works with the parent company's China-based chief technology officer to "lead execution of the company's [redacted] e-commerce platform product strategy, system design and rapid development." The Petitioner indicates that he also set up a product support team with staff from both China and the United States but it is unclear who is on this team. The Petitioner had already stated that the Beneficiary himself has been performing technical aspects of developing and enhancing the [redacted] software, and also noted that he adapted the "Node.js and Nuxt.js software framework" to improved software development. The Petitioner further indicates that he is "personally involved" in the local software developer community, studies and evaluates technology trends in the U.S., and is developing relationships with engineers to prepare for the formation of a technology department. Absent evidence of the duties and contributions of the CTO and any other foreign-based technical staff, the record indicates that the Beneficiary is directly involved in the development of the Petitioner's software and services.

Finally, the Petitioner's letter in response to the RFE, discussed the Beneficiary's role in business development, marketing, and public relations management, noting that during the first year, he had composed sales procedures, a pricing strategy, a sales team handbook, commission plan, contracts and agreements. The Petitioner mentioned that it had been difficult to recruit business development staff, but noted that the Beneficiary had "engaged several new clients both from USA and internationally" and "successfully established yearly software subscription contract with 6 clients and several distribution re-selling partnerships." With respect to marketing and public relations, the Petitioner emphasizing the Beneficiary's decision to keep expenses low, noted that he had established a good relationship with the [redacted] small business division and purchased Facebook ads and Google AdWords, set up Facebook pages, and had designed and built the company website and the [redacted] solution website. The Petitioner did not explain how most of these duties fall within the statutory definition of executive capacity.

For these reasons, the additional information provided in response to the RFE did not support the Petitioner's claim that the Beneficiary's duties at the time of filing were primarily executive in nature. The new information did not sufficiently describe the nature of the Beneficiary's duties in the course of his daily routine, and, to the extent that it did include specific tasks, it suggested that he was directly involved in developing the company's technical products and services, as well as engaging in sales and marketing activities, at the end of the first year of operations. The Petitioner's description of the Beneficiary's job duties does not establish what proportion of the duties is executive in nature, and what proportion is none-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The fact that the Beneficiary will direct a business as its senior employee 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. Whether the Beneficiary is an executive employee

turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" executive. Even though the 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, a broad overview of his responsibilities is insufficient to establish that his actual duties would be primarily executive in nature as of the date of filing.

B. Staffing and Organizational Structure

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.

The Petitioner's business plans indicates that it offers consulting services, e-business solutions, social e-commerce solutions and social marketing services to small- and medium-sized enterprises, specifically targeting those seeking to enter the Chinese market. The Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it had four employees at the time of filing on February 1, 2018. In its supporting letter, the Petitioner stated that its employees included an executive assistant and account manager [redacted] a sales manager [redacted] and an administrative assistant [redacted] The Petitioner provided resumes for these three claimed employees and stated that it expected to hire 7 to 10 employees in 2018.

The Petitioner's initial submission included an organizational chart which identified the Beneficiary as CEO overseeing the marketing & sales, financial & administration, and technology services department. The chart indicates that the marketing & sales department was staffed by the sales manager and the financial and administration department was staffed by the "executive assistant for HR, operations and finance." The chart did not include the administrative assistant position mentioned in the Petitioner's letter or any employees in the technology services department.

The Petitioner provided a position description for the sales manager, but the stated duties were taken almost verbatim from the Beneficiary's own job description. Specifically, the duties closely mirror the Beneficiary's claimed "sales, business development and customer acquisition" responsibilities. The Petitioner indicated that the executive assistant screens telephone calls, maintains an updated calendar, maintains corporate records and files, drafts business reports/memos and minutes for meetings, may act as a special project manager, handles "corporate level operational and logistics items," handles "all corporate-level prospective customer/partner and existing customer/partner items," and manages "day-to-day corporate level operations of the business for the office of CEO."

In response to the RFE, in which the Director requested evidence of wages paid to employees, the Petitioner revealed that the employee previously identified as the administrative assistant held the position of "executive assistant" from August to September 2017 but was not with the company at the time of filing. Further, the Petitioner stated that the individual previously identified as the sales manager, held the position of "new business development executive" from November 16, 2017 until November 30, 2017, and was also no longer with the company at the time of filing. The Petitioner

also provided a completely different job description for the "new business development executive" position that bore no resemblance to the "sales manager" position described previously.

Based on the evidence submitted in response to the RFE, the only subordinate employee the Beneficiary had at the time of filing was [redacted] Her duties as described at the time of filing are the same duties now attributed to an administration assistant hired in April 2018.[2] Meanwhile, the Petitioner indicated in response to the RFE that [redacted] is the company's "Account manager" and assigned a completely different set of responsibilities to her when compared to the "executive assistant" duties attributed to her previously.

The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Here, the Petitioner has provided no explanation for its statement on the Form I-129 that it had four employees at the time of filing when the evidence indicates that it had only two employees – the Beneficiary and [redacted] Further, the statements made in the initial supporting letter were misleading at best, as the Petitioner continued to imply that the three employees hired to date remained with the company. In addition, the Petitioner has provided two completely different position descriptions for the one subordinate worker who was employed by the company when the petition was filed.

The Petitioner asserts that the Director erred by not considering the duties performed by three employees hired after the date of filing. Specifically, the Petitioner points to an updated organizational chart it submitted in response to the RFE, which reflected three employees in the marketing and sales department [redacted] and two newly-hired business development employees), and a newly hired executive assistant in the finance and administration department, as well as vacancies for an IT manager and an application associate in the technology services department.

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). Therefore, while we acknowledge that the Petitioner was engaged in recruitment efforts when the petition was filed, we find that the Director properly considered the company's actual staffing levels at the time of filing when evaluating the Beneficiary's employment capacity. At the time of filing, the Petitioner employed the Beneficiary as CEO and [redacted] The Petitioner did not provide a job description with the initial submission that resembled the "account manager" description submitted in response to the RFE. Therefore, it appears more likely than not that [redacted] was employed as an administrative assistant (as indicated in her offer letter), or as an executive assistant (as indicated in the job description submitted at the time of filing), which the Petitioner initially identified as two distinct positions.

[2] The Petitioner also submitted a copy of [redacted] signed offer letter which indicates that she was hired for the position of "administration assistant."

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, 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.*

Here, although the Petitioner indicates that it has sufficient lower-level staff to allow the Beneficiary to primarily focus on the broad policies and goals of the organization, and to remove him from significant involvement in the day-to-day operations of the company, the record does not support that claim. The Beneficiary had one documented subordinate at the time of filing.

We have also considered the Petitioner's claim that the Beneficiary continues to direct the work of employees located abroad. While the Petitioner submitted evidence of the internal system that it uses for collaboration between offices, the information provided is insufficient to establish how the day-to-day non-executive functions of the U.S. company are primarily performed by the overseas employees. The Petitioner submitted an organizational chart for the foreign entity and brief descriptions of the foreign employees' duties, but those descriptions do not explain the scope or nature of the work they perform in support of the U.S. company. While the Beneficiary may continue to have general oversight of the foreign entity and the organization as a whole as a senior officer of both companies, the Petitioner has not sufficiently established that the foreign staff assist the Petitioner with its day-to-day operations or remove the Beneficiary from involvement in non-executive duties, such as the technical, sales and marketing functions stated in his job description.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, we must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, it is appropriate 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. *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.

Here, the Petitioner submitted inaccurate information regarding its actual staffing levels at the time of filing, has not explained how the Beneficiary was able to perform primarily executive duties with one subordinate employee, nor has it provided sufficient evidence of how the Petitioner was able to provide its multi-faceted services to customers with no subordinate operational staff based in the

United States. As a result, there are a number of non-executive functions which were not clearly delegated to subordinate staff when the petition was filed.

We acknowledge that the Petitioner was still in a preliminary stage of development and recorded its first revenues in October 2017, just four months prior to filing the petition. We have interpreted the statute to prohibit discrimination against small or medium-size businesses. However, we have also consistently interpreted that Act to require petitioners to establish that the beneficiary's position "primarily" consists of executive duties, and that it has sufficient personnel to relieve a beneficiary from performing operational and administrative tasks. The reasonable needs of a petitioner will not supersede the requirement that a beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008).

Based on the nature of the company and its documented staffing levels, the Petitioner has not shown that it requires the Beneficiary to primarily perform the higher-level planning, policy-making and business development duties attributed to him. Accordingly, the Petitioner has not established that he will be employed in an executive capacity.

III. CONCLUSION

The appeal will be dismissed because the Petitioner did not establish that it will employ the Beneficiary in an executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of A-T- Inc.*, ID# 1837911(AAO Dec. 18, 2018)