U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-H-J-R-E-USA INC. DATE: DEC. 19, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a real estate development and investment company, seeks to continue the Beneficiary's temporary employment as its chief executive officer (CEO) under the L-1A nonimmigrant classification for intracompany transferees.[1] *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 approved the petition, but later revoked the approval following the issuance of a notice of intent to revoke (NOIR). The Director concluded that the record did not establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner submits additional evidence and asserts that the Director misinterpreted certain evidence that it previously submitted. The Petitioner contends that it has established that the Beneficiary will act in an executive capacity under the extended petition.

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 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

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period June 2, 2014, to June 1, 2015. 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.

or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.*

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).

Under U.S. Citizenship and Immigration Services (USCIS) regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, a director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue is whether the Petitioner demonstrated that the Beneficiary would be employed in an executive capacity under the extended petition.[2]

The statute defines an "executive capacity" 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.

If staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, USCIS takes 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 Director concluded that the evidence was insufficient to demonstrate that the Beneficiary primarily performs executive duties and revoked the approval of the petition.[3] The Director pointed to the insufficient staffing of the organization as of the date of the NOIR, noting that the Petitioner

[2] The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

[3] We note that the petition was originally filed on April 4, 2015, approved on May 18, 2015, but later revoked on May 25, 2017, following the issuance of the NOIR in July 2016. The NOIR was issued following a September 2015 site visit to the Petitioner's asserted office location in [redacted] California. The USCIS site visit revealed that no employees of the Petitioner were physically present at this claimed office location. The NOIR allowed the Petitioner an opportunity to address the site visit and to submit additional evidence in support of its claim that the Beneficiary would be employed in an executive capacity.

had only two employees, including the Beneficiary, at that time. The Director concluded that the Petitioner had insufficient staffing to support the Beneficiary as an executive and to relieve her from primarily performing non-qualifying operational tasks.

On appeal, the Petitioner asserts that it employs additional individuals not reflected in its previously submitted California quarterly wage tax documentation, and that it has sufficient operations and employees to support the Beneficiary in an executive capacity.

When examining the executive capacity of the 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 an executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, USCIS examines the claimed executive capacity of a beneficiary, including 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 business and its staffing levels.

A. Duties

Based on the definition of executive capacity, the Petitioner must t show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner stated that it was established in 2013 to explore real estate development opportunities in the United States, including "constructing and selling real estate properties" and providing "consultation services on [foreign students] in the US." The Petitioner provided supporting evidence that it had purchased eight acres of land in [redacted] California, in August 2014 and asserted that it planned on building single family homes on this land. In response to the NOIR, the Petitioner explained that this development plan had been abandoned and that the eight-acre lot was sold shortly after approval of the petition due to complications in the planned development. The Petitioner stated that it later purchased a commercial rental property in August 2015 and indicated that it rents and manages this property. The Petitioner asserted that it was still diligently exploring further land development opportunities.

In response to the NOIR, the Petitioner provided duty descriptions specific to the Beneficiary's tasks as of the date of the initial petition and her duties at the time of the NOIR response. These duty descriptions were largely identical. The Petitioner stated that the Beneficiary was responsible for "setting up the company's strategic goals, objectives, and policies and overseeing the[ir]

implementation," including reviewing annual reports finalized by the company's financial and administrative managers. The Petitioner indicated that the Beneficiary was tasked with supervising and monitoring "the daily operation of the company to assure profitability and growth," including supervising and overseeing subordinate managers "on the operation of the company." The Petitioner also explained that the Beneficiary was responsible for participating in "key clients' meetings and important social activities on behalf of the company," liaising with the parent company on a regular basis regarding the company's planning and business strategies, hiring, firing, and promoting employees of the company, and "planning and controlling the company's financial activities."

In addition, the Petitioner provided a "Work Summary & Three-Year Plan" which set forth a number of the Beneficiary's duties and accomplishments. For instance, this document indicated that the Beneficiary had supervised the completion of "staff manuals and management policies for each department," "enhanced company management regulation," made decisions on "thorny problems, and implementation on investments," and established a "recruiting plan."

As a preliminary matter, we note that the Petitioner has provided nearly identical duty descriptions for the Beneficiary at the time of the petition and later in response to the NOIR. This leaves question as to the credibility of the provided duty descriptions, considering the petition and NOIR response were over a year apart and the Petitioner asserts that the company had significantly modified its business plan during this time.

Regardless, the Petitioner has submitted vague duty descriptions for the Beneficiary that do not convey her actual day-to-day tasks or establish that she would devote her time primarily to executive duties. The Beneficiary's duty descriptions include several general duties that could apply to any executive acting in any business or industry and they do not provide insight into the actual nature of her role. For example, the Petitioner stated that the Beneficiary supervises and monitors "the daily operation of the company to assure profitability and growth," supervises and oversees subordinate managers "on the operation of the company," participates in "key clients' meetings and important social activities on behalf of the company," liaises with the parent company on a regular basis regarding the company's planning and business strategies, hires, fires, and promotes employees, plans and controls the company's financial activities, makes difficult decisions, and enhances company "management regulation."

The Petitioner provided few examples and little supporting documentation to demonstrate the Beneficiary's performance of executive level duties, such as the operations she supervises, key hiring decisions she has made, strategic goals and objectives she has implemented, financial decisions she has made, financial activities and operations she oversaw, or difficult decisions she made on a daily basis. Although we acknowledge that the Petitioner has submitted evidence indicating that the Petitioner likely sold its eight-acre parcel of land in [redacted] California, and purchased another commercial rental property, these transactions are not reflective of what executive-level tasks and decisions the Beneficiary makes on a daily basis. The Petitioner has not clearly articulated what qualifying duties the Beneficiary performs on a daily basis. Indeed, this lack of detail as to her executive-level duties is questionable given that the Beneficiary has been acting in

this capacity in the United States since June 2014. 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).

To the extent that the Petitioner does provide detail regarding the Beneficiary's duties, these specifics reflect her performance of non-qualifying operational tasks. For instance, the Petitioner submits several real estate purchase documents, title insurance letters and documents, and other related transactional documents, all which bear the Beneficiary's name and signature. The record includes few details and little documentation indicating the Beneficiary's delegation of non-qualifying tasks to subordinates. In contrast, the Petitioner states and provides supporting documentation and photographs reflecting the Beneficiary performing duties consistent with a sales representative or real estate agent, including visiting several potential real estate projects in the [redacted] area, attending real estate seminars, meeting with local government agents, and visiting several schools across the country. The record includes few examples of her delegating these operational tasks to subordinates, let alone her primarily delegating these tasks to a group of subordinate managers.

Whether the Beneficiary is an executive employee turns on whether the Petitioner has sustained its burden of proving that his or her duties are "primarily" executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the Petitioner does not document what proportion of the Beneficiary's duties would be executive functions and what proportion would be non-qualifying. The Petitioner lists the Beneficiary's duties as including both executive tasks and administrative or operational tasks, but does not quantify the time the Beneficiary spends on these different duties. This lack of documentation is important because several of the Beneficiary's daily tasks, as we have discussed, do not fall directly under executive duties as defined in the statute. For this reason, we cannot determine whether the Beneficiary is primarily performing the duties of an executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Even though the Beneficiary holds a senior position within the organization, the fact that she 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" managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. 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; however, the position descriptions alone are insufficient to establish that her actual duties would be primarily executive in nature.

B. Staffing and Operations

The Petitioner claimed to have five employees at the time of filing and provided an organizational chart reflecting that the Beneficiary oversaw a marketing and sales director, a financial department manager, an "admin department manager," and an architect. In turn, the chart indicated that the

marketing and sales director supervised a sales representative, the financial department manager oversaw an accountant, and the admin department manager supervised an "IT specialist and admin assistant." The chart also showed several positions "to be hired," including a marketing specialist, an engineer, and a legal support employee. A corresponding State of California quarterly wage report for the first quarter of 2015 reflected that the company had paid wages to five employees, including the Beneficiary, marketing and sales director, admin manager, IT specialist and admin assistant, and architect.

In the NOIR issued in July 2016, the Director requested that the Petitioner provide updated evidence of its staffing levels and organizational structure. In response, the Petitioner submitted an updated organizational chart which identified a total of seven employees by name. The chart indicated that the Beneficiary supervised a marketing and sales director and a financial manager, who in turn, supervised an accountant. This organizational chart also included several positions "to be hired," including a "planners specialist," an investment and development director and a subordinate market researcher, a "legal support" employee, a "property dep. Director," and an administrative assistant. The chart also indicated that the company employed an equipment maintenance employee, engineering technician, and a landscape and maintenance employee subordinate to the vacant property director position.

The Petitioner further submitted California quarterly wage reports for the first and second quarters of 2016 reflecting that it had paid wages only to the Beneficiary and the claimed marketing and sales director.

The submitted evidence indicates that the Petitioner was, and is, not sufficiently staffed to support the Beneficiary in an executive capacity. For instance, as of the date of the NOIR, the Petitioner asserted that it employed seven employees, including the Beneficiary. However, state quarterly tax returns from this same period indicate that the Petitioner only paid wages to two employees. On appeal, the Petitioner contends that the equipment maintenance employee, engineering technician, and landscape and maintenance employee are not reflected in the state quarterly wage reports for the first and second quarter of 2016 because "these three employees were paid by cash and were not listed on the payroll." However, the Petitioner does not substantiate its assertion with documentary evidence showing that it has been paying regular wages to these operational employees.

In addition, the Petitioner also asserts that the financial manager and accountant are not reflected in state quarterly wage reports because they are independent contractors. However, again, the Petitioner did not provide sufficient documentary evidence to corroborate this assertion, such as evidence reflecting payment to these professionals. Without this evidence, the Petitioner has not properly supported its assertion that these independent contractors can be considered employees and subordinates of the Beneficiary.

Without sufficient subordinate employees, it is not clear who is relieving the Beneficiary from primarily performing non-qualifying operational duties. The Petitioner does not provide documentary evidence indicating that the Beneficiary delegates such duties to subordinates. As

noted, this lack of evidence is particularly questionable since the Beneficiary has been acting in her asserted capacity since June 2014, approximately three years prior to the current appeal. Further, the same lack of evidence is apparent with respect to the only other employee confirmed in the Petitioner's state quarterly tax returns as of the date of the NOIR, the marketing and sales director. Specifically, there is little documentary evidence of this employee's performance of duties for the Petitioner. The Petitioner states that the marketing and sales director is responsible for marketing and sales, marketing strategies, negotiations, and for "formulating standards for the sales staff." Not only are these duties overly vague, they are questionable since the Petitioner has not demonstrated that it has marketing or sales staff, and the Petitioner provides no detail or documentation as to this employee's actual day-to-day tasks. In fact, a document specific to a new commercial real estate project being explored by the Petitioner dated in April 2017 lists its claimed marketing and sales director as a representative of [redacted] As such, one of the few supporting documents relevant to the Beneficiary's only documented subordinate raises questions regarding the identity of that subordinate's actual employer.

Furthermore, the Petitioner also provided conflicting statements in support of the petition, indicating in its "Work Summary & Three-year Plan" document that it had hired "three skilled technicians (measured engineer, traffic engineer, and civil engineer) and three administrator [*sic*] (in sales department, operation department, and engineering technology department)." These employees are not reflected in any of the various organizational charts, nor is there any documentary evidence of their employment. The Petitioner must resolve this inconsistencies and 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).

The Petitioner has also not substantiated that it is sufficiently operational to support the Beneficiary in an executive capacity. As we have noted, the Petitioner's IRS Form 1120 reflects that the company only earned approximately $40,000 in revenue in 2015. Further, the Petitioner acknowledges that its only source of income is from renting one commercial property. The Petitioner does not provide documentary evidence of this income or any other evidence of revenue.[4] We acknowledge that the Petitioner has submitted evidence relevant to 2017, indicating that it is currently investigating a commercial real estate project. However, the Petitioner's current activities cannot demonstrate that it was sufficiently operational as of the date of the petition, and as of the date of the NOIR, to support the Beneficiary in an executive capacity.

The Petitioner's limited operations leave question as to its claimed staffing and staffing projections. We note that the Petitioner has existed since 2013 and that the Beneficiary has been acting in her capacity as CEO since 2014; however, the lack of operations and staffing indicate that the Petitioner has never become sufficiently operational after its one year as a new office as necessary to support

[4] We acknowledge that the Petitioner provided an agreement dated in March 2015 with a company called [redacted] indicating that the Petitioner would recruit foreign students on behalf of this organization. However, the Petitioner has not specified or documented any revenue it gained from this relationship. Further, the Petitioner has not detailed who provides, or would provide, the services outlined in the agreement.

the Beneficiary in an executive capacity. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the intended U.S. operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations allowing for an extension of this one-year period. If the business does not have the necessary staffing or operations after one year to sufficiently relieve the Beneficiary from performing operational and administrative tasks, the Petitioner is ineligible for an extension. Further, 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).

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.*

Here, even though the Beneficiary is a high level employee, the Petitioner has not established that, as of the date of filing, she was primarily concerned with the broad policies and goals of the organization, that the day-to-day management rested with a subordinate tier of management, or that she would be relieved from substantial involvement in the day-to-day operations of the business. As discussed, the Petitioner did not consistently or sufficiently describe the Beneficiary's duties and we cannot determine that her role would primarily involve executive-level tasks. Further, the Petitioner submits evidence indicating that the Beneficiary will be involved in all operational matters of the business and it has submitted little evidence to indicate that she will delegate operational tasks to subordinates. As such, the evidence does not demonstrate that the Beneficiary would be employed in a qualifying executive capacity.

III. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in an executive capacity under the extended petition, as claimed.

ORDER: The appeal is dismissed.

Cite as *Matter of T-H-J-R-E-USA Inc.*, ID# 771060 (AAO Dec. 19, 2017)