MATTER OF M-K-USA, LLC

DATE: FEB. 5, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a consulting firm, seeks to temporarily employ the Beneficiary as its "central executive officer" 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 Vermont Service Center denied the petition, concluding that the record did not establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer. The Director also determined that the Petitioner did not demonstrate that it is doing business as defined by the regulations. Finally, the Director concluded that the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner submits additional evidence and asserts that the Director's conclusions were in error.

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.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. QUALIFYING RELATIONSHIP

The first issue we will address is whether the Petitioner established that it has a qualifying relationship with the Beneficiary's foreign employer.

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").

The Petitioner states that it is an affiliate of the Beneficiary's foreign employer. The regulation at 8 C.F.R. § 214.2(l)(1)(ii) define the term affiliate as follows:

> (K) *Affiliate* means
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> *(1)* One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
>
> *(2)* One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. . . .

In concluding that the Petitioner did not demonstrate a qualifying relationship, the Director observed that, according to its federal tax returns, the Petitioner is an S-corporation. The Director stated that Internal Revenue Service (IRS) rules require that an S-corporation be owned by a U.S. citizen or resident. On appeal, the Petitioner asserts that the Director erred in concluding that it is an S-corporation.

Regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities. *See, e.g., Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (Comm'r 1988); *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). Ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

The Petitioner has not submitted sufficient evidence to demonstrate its actual ownership or that of the foreign employer. As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership,

and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting control of the entity. *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. at 365.

The Petitioner asserts on appeal that it and the foreign employer are commonly owned by the Beneficiary, thereby establishing a qualifying relationship. However, the Petitioner has submitted little of the documentation referenced above to demonstrate its actual ownership and control. For instance, the Petitioner does not submit membership certificates, documentation of monies, property, or other consideration furnished in exchange for membership, minutes of member meetings, or other such documentation to substantiate that it is wholly owned by the Beneficiary.

We acknowledge that the Petitioner provides what appears to be an operating agreement; however, this document lists the Beneficiary as "senior managing member" along with two other "US managing members." Although the articles indicate that the senior managing member has substantial power over the US managing members, this document does not definitively clarify the Petitioner's actual ownership. In fact, this document and the Petitioner's assertion that it is wholly owned by the Beneficiary contradict the information the Petitioner provided on the Form I-129, Petition for a Nonimmigrant Worker. In the petition, the Petitioner stated that it is owned 50% by "[redacted]" 25% by "[redacted] (Lebanon)," and 25% owned by itself. Indeed, it is not clear how the Petitioner could have a 25% ownership interest in itself. The Petitioner has not explained the discrepancies in its claimed ownership.

Further, as noted, the Director also concluded that the Petitioner appeared to be an S-corporation and therefore, could not be owned by a foreign entity or resident. On appeal, the Petitioner states that it is not an S-corporation. However, the Petitioner's assertion is questionable, as it has submitted two conflicting versions of its federal tax return for both 2014 and 2015. Specifically, it submitted IRS Forms 1120S U.S. Income Tax Return for an S Corporation, and IRS Forms 1065 U.S. Return of Partnership Income, for the same tax years. This discrepancy leaves only further question as to the corporate makeup and ownership of the Petitioner. The Petitioner must resolve this discrepancy 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). Given the aforementioned discrepancies and lack of probative supporting evidence, the Petitioner has not established its ownership.

In addition, the Petitioner has not sufficiently documented the foreign entity's ownership in support of its claim that both entities are commonly owned. For instance, the Petitioner submits the foreign entity's articles of association dated in February 2008 stating in Article 5 that the company issued

1000 shares. However, neither the articles, nor any of the other supporting evidence, indicate to whom these shares were issued. The articles were signed by three "founders," including the Beneficiary. Otherwise, the Petitioner submits little other supporting documentation to substantiate ownership in the foreign entity, such as share or membership certificates, minutes of foreign entity member meetings, evidence of capital contributions, or other such relevant evidence. As such, the Petitioner has not submitted sufficient evidence to establish the ownership in the foreign entity.

For the foregoing reasons, the evidence submitted does not sufficiently establish the ownership of either the Petitioner or the foreign entity, and does not support the Petitioner's claim that the two entities have an affiliate relationship. For this reason, the appeal will be dismissed.

III. U.S. ENTITY DOING BUSINESS

The next issue to analyze is whether the Petitioner has established that it is doing business.

The regulations define a qualifying organization as one doing business as an employer in the United States and at least one other country. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). "Doing business," is defined as the regular, systematic, and continuous provision of goods or services. 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.*

The Petitioner has not established that it is doing business. The Petitioner stated in the Form I-129, and submitted evidence, that it was established in 2009. However, the Petitioner's federal tax returns for 2015 and 2016 reflect that it did not earn any revenue or pay any wages to employees during these years. We acknowledge that the Petitioner provided agreements it has executed with potential clients. However, the Petitioner submits no supporting documentation to substantiate that it was regularly, systematically, and continuously providing services to these clients as of the date of the petition, such as evidence of services provided, invoices issued, payments made by clients, or other such relevant evidence.

Indeed, in a support letter on appeal, the Petitioner states that it suffered "major setbacks" in 2015, that it is "now finally to the point of our first product sale," and that it only "started closing sales in 2017 based on the successful trials results." We note that the petition was filed in August 2016. 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 Petitioner has not established that it was doing business as of the date of the petition. For this additional reason, the appeal will be dismissed.

IV. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The next issue to address is whether the Petitioner has established that the Beneficiary would be employed in a managerial or executive capacity in the United States.

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

The statute defines "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 a managerial or executive capacity, U.S. Citizenship and Immigration Services (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.

In denying the petition on this ground, the Petitioner pointed to the company's operating agreement and noted that the agreement states that the Beneficiary, the senior managing member, and its two other "US managing members" held equal power in the organization thereby indicating that the Beneficiary does not direct the management of the organization. On appeal, the Petitioner submits an expanded list of duties for the Beneficiary and asserts that he "will be in charge of leading all aspects of the business and delegating tasks to subordinates."

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

A. Duties

Based on the definitions of managerial and 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 managerial or 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 has not clearly articulated the nature of its business in the United States. From the submitted evidence, it appears that the Petitioner will act as a liaison to sell U.S. agricultural products to companies in the Middle East. The Petitioner explained that the Beneficiary would handle all operational aspects of the business. The Petitioner further stated that the Beneficiary would be tasked with "managing the existing sales leads and generating more sales" and "opening more markets in the Middle East." The Petitioner indicated that the Beneficiary would be responsible for "establishing a US-based sales team to assist him" and training them "on Middle Eastern sales trends and behaviors and developing the best tools to promote US brands into such markets." The Petitioner also explained that the Beneficiary would be tasked with "designing new branding strategies," "creating the right marketing channels and messages," "coordinating projects and referrals," "handling sub-distributors," and "handling all aspects of management" such as finance and administration.

This description indicates that the Beneficiary would devote a substantial amount of his time to non-qualifying operational duties. For instance, the Petitioner states that the Beneficiary would be responsible for following up and generating sales leads, designing branding strategies, creating marketing messages, conducting site visits, coordinating projects and referrals, and handling sub-distributors. As we have discussed, the Petitioner states that it did not generate its first sale until 2017. A submitted email and invoice from May 2017 reflect that the Beneficiary likely handled all operational aspects of this sale, as he provided the invoice to the client and communicated wire transfer instructions for payment. The evidence does not indicate that that the Beneficiary would be relieved from primarily performing non-qualifying operational tasks or that that he would spend most of his time focusing on the broad goals and policies of the organization or managing supervisory and professional employees. In fact, the Petitioner acknowledges on appeal that it has no other employees and there is no evidence to demonstrate that it has hired any members of the "sales team" referenced in the Beneficiary's duty description.

An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In addition, to the extent that the Petitioner references qualifying managerial or executive level tasks in the Beneficiary's duty description, such as his management of a sales team and "handling all aspects of management," these duties are vague and offer little insight into the actual nature of these activities. The Petitioner provides few examples and little supporting documentation to demonstrate the Beneficiary's performance of managerial or executive level duties. 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).

Even though the Beneficiary holds a senior position within the organization, the fact that he will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in an managerial or 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 or executive 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 his actual duties would be primarily managerial or executive in nature.

B. Staffing and operations

In the Form I-129, the Petitioner indicated that it had two employees. However, on appeal, the Petitioner acknowledges that it has no employees stating that "there are no hired employees as of yet," that "there are no salaries to be paid until the company starts to generate profits." Although the Petitioner's operating agreement identifies two U.S. managing members, the Petitioner explains that these individuals "have to work in another business to ensure their own income until such time as [the Petitioner] can afford to pay them a salary." Further, as we have noted, the Petitioner's tax documentation from 2015 and 2016 reflects that it has paid no salaries or wages and that it has generated no income.

Therefore, the Petitioner has not established as of the date of the petition that it has sufficient operational employees to relieve the Beneficiary from performing all non-executive and non-managerial aspects of the business. The Petitioner has not demonstrated as of the date of the petition that the Beneficiary would supervise and control the work of supervisory, professional, or managerial employees, or manage an essential function within the organization, or a department or subdivision of the organization or that he directs the management of the organization. Indeed, the Petitioner indicates that one of the Beneficiary's major responsibilities will be to hire, train, and direct a sales team, suggesting that he would require a team of operational employees to relieve him from these tasks. However, the Petitioner acknowledges that no such team exists. The Petitioner has not demonstrated that it has sufficient staff to relieve the Beneficiary from performing non-qualifying operational tasks prominently emphasized in his duty description. Again, 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 evidence indicates that the Beneficiary will be involved in nearly all of the operational matters of the business and it has submitted little evidence to indicate that he will delegate operational tasks to subordinates. It has also not sufficiently clarified or documented his managerial or executive level

tasks. In addition, the Petitioner has not demonstrated that the Beneficiary primarily oversees managerial or professional subordinates as of the date of the petition. As such, the evidence does not demonstrate that the Beneficiary would act in a qualifying managerial or executive capacity. For these reasons, the appeal will be dismissed.

V. FOREIGN EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

In addition, beyond the Director's decision, the Petitioner has not established that the foreign entity has employed the Beneficiary in a managerial or executive capacity as required. First, we note that the Petitioner has not provided a detailed description of the Beneficiary's duties abroad. The Petitioner states that the Beneficiary "personally handled all product test trials for the past three years in Qatar." Otherwise, the Petitioner sets forth no qualifying managerial or executive level tasks the Beneficiary performs for the foreign employer.

Likewise, the Petitioner does not describe the foreign entity's staffing levels or even indicate whether the Beneficiary has any subordinates in his capacity abroad. The Petitioner does not submit an organizational chart, position descriptions, evidence of wages or salaries paid to foreign employees, or other such evidence of its claimed affiliate's operations. The foreign entity's financial statements do not indicate whether the foreign entity pays any wages or salaries. Therefore, absence any supporting evidence as to the Beneficiary's duties and capacity abroad, we cannot conclude that he has been employed in a managerial or executive capacity. For this additional reason, the appeal will be dismissed.

VI. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer, that it is doing business as required by the regulations, or that the Beneficiary is employed abroad and will be employed in the United States in a managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of M-K-USA, LLC*, ID# 858027 (AAO Feb. 5, 2018)