U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-I-S- CORP.

DATE: FEB. 6, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a distributor of cleaning and sealing products for marble, stone, and tile surfaces, seeks to continue the Beneficiary's temporary employment as its president 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 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 submits additional evidence and asserts that the Director's decision is not supported by the record or consistent with the intent of the L-1A visa classification. The Petitioner contends 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 September 1, 2016, until August 31, 2017. 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).

"Executive capacity" means 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.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

In the denial decision, the Director determined that the evidence did not support the Petitioner's claim that the Beneficiary would supervise subordinate managers or that the staff in place at the time of filing would be sufficient to relieve him from significant involvement in the day-to-day operational matters of the business.

On appeal, the Petitioner submits additional position descriptions for the Beneficiary and his subordinates in support of its claim that the Beneficiary will be employed in an executive capacity under the extended petition. The Petitioner emphasizes that the company has a structure in place that does not require the Beneficiary to spend significant portion of his time on non-qualifying activities, and he will instead primarily focus on dictating the company's direction. As the Petitioner does not claim that the Beneficiary will be employed in a managerial capacity, the scope of our analysis will focus on whether the Petitioner established that his role will be primarily executive in nature.

When examining the executive capacity of a given beneficiary, we will look to 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 Petitioner's business and its staffing levels.

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 is the North American distributor for an Italian brand of chemical products used to polish, clean, and seal marble, granite, stone, ceramic, metal, plastics, and hardwoods. In a letter submitted in support of the petition, the Petitioner stated that the Beneficiary holds a "hands on role" as president and provided a list of 25 duties he would perform under the extended petition.

In a request for evidence (RFE), the Director advised the Petitioner that the submitted job description lacked sufficient detail and did not indicate how much time the Beneficiary would spend on specific managerial or executive duties. In response to the RFE, the Petitioner submitted the same list of 25 duties, but organized them by areas of responsibility, adding the percentage of time the Beneficiary would allocate to each general area, as follows:

1) Strategic Decisions – Approximately 30%
2) Finance – Approximately 20%
3) Sales & Marketing – Approximately 20%
4) Personnel – Approximately 15%
5) Operations – Approximately 15%

While the description was fairly lengthy, the Petitioner did not describe the Beneficiary's specific tasks in sufficient detail, nor did it respond to the Director's request that the Petitioner indicate the amount of time he will spend on individual tasks. In fact, the individual duties under each heading were very general and could apply to any managerial or executive employee in any business. For example, the Petitioner vaguely stated that the Beneficiary would spend 30 percent of his time on "strategic decisions," including controlling the company's direction, driving its culture, identifying risks, making "day-to-day decisions," and developing company policies and procedures. However, the Petitioner did not identify the actual tasks he typically performs to control the company's direction and culture, nor did it provide examples of decisions he has made or company policies and procedures he developed. Without these details, we cannot evaluate whether these types of responsibilities would credibly require 30 percent of his time on a regular and ongoing basis.

The Beneficiary's finance-related duties were described in similarly ambiguous terms. The Petitioner states that the Beneficiary "drives profitability," "increases net profit," and "makes key decisions" related to the company's finances, but does not explain the specific actions he takes on a

day-to-day basis to support its claims that these activities are executive-level duties that reasonably require 20 percent of his time. The Petitioner further states that the Beneficiary's finance-related duties require him to oversee bookkeeping and cash flow, and to oversee "scheduling and cost monitoring of service calls." However, it is unclear what "service calls" the company makes as a wholesale product distributor, and, as discussed below, the Petitioner has not documented who is performing routine bookkeeping tasks.

Further, the Beneficiary's "operations" duties, requiring 15 percent of his time, do not indicate his executive-level authority or performance of qualifying executive tasks. The Petitioner states that he targets and initiates business partnerships with other companies, oversees purchasing, and ensures that products and activities are compliant with health and safety rules. The Petitioner has not clearly assigned purchasing tasks to any of this subordinates, or explained how initiating business partnerships is an executive-level tasks, rather than a sales task.

The Beneficiary's claimed executive duties in the sales and marketing area include developing an action plan for the sales team, providing sales and marketing performance information to the team, and "creating a support and collaborative work environment." These duties do not support the Petitioner's claim that the Beneficiary supervises a "senior manager" in the sales and marketing area, as the Beneficiary himself appears to be responsible for supervising and motivating the non-professional sales team. It is also unclear who, other than the Beneficiary, is responsible for collecting the "sales and marketing performance information" that he provides to the team, or what specific tasks he typically performs to create a supportive work environment in this area.

Finally, the Beneficiary's responsibility for "personnel," requiring 15 percent of his time, focuses on "managing senior managers," recruiting, training and motivating staff, and "overseeing employment" to ensure the company is adequately staffed. The Petitioner's business plan did not indicate any fixed plans to hire additional staff in the near future, and, as discussed further below, the record does not support the Petitioner's claim that the Beneficiary's staff of four subordinates includes any "senior managers."

Overall, the Petitioner's breakdown of the Beneficiary's duties includes a combination of some qualifying tasks and some non-qualifying tasks, but was primarily composed of tasks that were too broadly stated to be categorized as 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). Accordingly, we are unable to determine whether the claimed executive duties constitute the majority of the Beneficiary's duties, or whether the Beneficiary primarily performs non-qualifying administrative or operational duties. Although the Director specifically requested the information, 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 non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

On appeal, the Petitioner offers an additional description of the Beneficiary's duties:

Directs and plans the management of the organization. Establishes the goals and policies of the organization.	20%
Supervises and controls the work of other supervisors, professional, or managerial employees, and independent contractors.	15%
Oversees and coordinates activities of Sales Supervisor concerning pricing, sales and distribution of products.	15%
Analyzes operations to evaluate performance of the company. Determines areas of potential cost reduction, program improvement, or policy change.	10%
Reviews reports submitted by staff members to recommend approval or to suggest changes.	10%
Negotiates or approves contracts and agreements with suppliers, distributors, federal and state agencies, and other organizational entities.	10%
Directs and coordinates the company's financial and budget activities to fund operations, maximize investments, and increase efficiency.	5%
Confers with Supervisors to discuss issues, coordinates activities, and resolve problems.	5%
Approves budgets including those for funding and implementation of programs.	5%
Creates monthly report to the Parent Company's CEO in Brazil.	5%

This description is even more general than the one provided in response to the RFE and includes duties which are taken directly from the statutory definitions of both executive capacity and managerial capacity. *See* sections 101(a)(44)(A) and (B) of the Act. It also includes duties, such as "reviewing reports submitted by staff members" that were not included in the previous description. The Petitioner has not provided any explanation for the revisions to the job description and we have given it limited weight in our determination, due to these unexplained ambiguities in the allocation of the Beneficiary's time and the extremely broad nature of the description. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The Petitioner has not provided any detail or explanation of the Beneficiary's activities in the course of their daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co.*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Finally, notwithstanding this new description, the Petitioner states in its brief that most of the Beneficiary's time under the extended petition will be dedicated to "planning marketing strategies, securing appropriate financing, importing and distribution," as well as investment of funds to "further the objective of acquiring a factory in American soil." The Petitioner references the Petitioner's need for 15 new employees, acquisition of real estate, and safety regulations associated with the new factory. However, the record does not support a claim that the company would be proceeding with the acquisition of a factory under the extended petition. The Petitioner provided a business plan at the time of filing which indicated no plans for an increase in staffing. While the

plan mentions the possibility of opening factories in the future, such plans were not accounted for in the company's five-year financial plan.

Therefore, the revised position description chart provided on appeal did not add additional clarity to the original job description, nor did it establish that the Beneficiary's duties, as of the date of filing, would be primarily executive when considered as part of the totality of the evidence in the record. 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's brief appears to include duties that the Beneficiary may perform in the future once the company has expanded significantly.

Even though the Beneficiary holds the senior position within the company, the fact that he 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)(B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. Section 101(A)(44)(B) of the Act.

B. Staffing

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it had five current employees at the time of filing in August 2017. The Petitioner's organizational chart identified those employees as the Beneficiary (president), a business assistant, a customer service and technical support employee, a sales coordinator, and a warehouse assistant. Based on the chart, these four employees report directly to the Beneficiary, and the chart shows that one subordinate, the sales coordinator, supervises two independent sales representatives. Finally, the chart shows that the Petitioner uses independent contractors for accounting and payroll, and for logistics, and that these contractors also report to the Beneficiary.

The Petitioner provided a copy of its Florida quarterly wage report for the second quarter of 2017, as well as payroll summaries showing that it paid all direct employees named on the organizational chart as of June 2017. The Petitioner did not submit comparable evidence of any fees or commissions paid to the independent sales representatives, accounting firm, or logistics company, nor did it provide copies of contracts or agreements documenting the nature and scope of the services they provided. Therefore, the Petitioner has not established that the contracted staff performs the day-to-day sales, bookkeeping, and logistics duties of the business on a regular and ongoing basis.

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 he "directs" 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.*

As the Petitioner indicates that the Beneficiary's role is primarily executive, the Director looked at the roles subordinate to him to determine if he would be directing managerial employees, consistent with the definition of "executive capacity." The Petitioner provided position descriptions for the business assistant, customer service & technical support employee, sales coordinator, and warehouse assistant at the time of filing and re-submitted those descriptions in response to the RFE.

The Petitioner did not indicate that its business assistant, warehouse assistant, or customer service and technical support employees would be performing managerial duties. The Petitioner stated that the customer service employee is responsible for assisting the sales department with training customers' sales representatives about the use of the company's products. The business assistant performs administrative and clerical office functions, and the warehouse assistant processes transactions, tracks open receipts and sales order transactions, and audits and reconciles inventory against monthly recurring inventory charges. The Petitioner did state that the sales coordinator "supports the success of an assigned team of sales people" and provides coaching and professional development to her team members. However, as noted, the Petitioner did not provide supporting evidence documenting its independent sales representatives. Moreover, all other duties assigned to the sales coordinator are those typical of a sales representative and that appears to be her primary role within the business.

On appeal, the Petitioner submits, without explanation, a revised organizational chart along with revised position descriptions for the Beneficiary's subordinate staff. The new chart identifies the same individual in the technical and customer service support role, but adds "supervisor" to his job title. The organizational chart now shows that this employee directly supervises the business assistant and a "warehouse operations" employee, positions which were previously identified as the Beneficiary's direct subordinates. Moreover, the Petitioner now identifies the sales coordinator as "sales supervisor." The Petitioner also added some new duties to these two employees' position descriptions, noting that the technical and customer service supervisor "coordinates customer service activities and policies." However, the duties newly attributed to him are not supervisory or managerial despite the revised job title. With regard to the sales coordinator/supervisor, the new job description puts more focus on her supervision of sales representatives and less emphasis on her performance of routine sales functions.

It is unclear whether the Petitioner underwent organizational changes subsequent to submitting its response to the RFE, or if the Petitioner simply made changes to its organizational chart to add an additional tier of management between the Beneficiary and the "assistant" level employees. Regardless, the newly submitted evidence does not support the Petitioner's claim that the Beneficiary will be supervising managerial employees. The Petitioner has documented an assistant to the Beneficiary and three departments, each staffed by a sole employee. Those employees may

have some discretion over the day-to-day operations of their individual departments, but they are also performing the customer service, sales, and warehouse activities of the company and cannot be considered managerial employees.

On appeal, the Petitioner asserts that the Director failed to take into account the Petitioner's reasonable needs and still early stage of development. The Petitioner emphasizes that the company is well-capitalized with over $350,000 in its bank account, and notes that the Beneficiary has authority to invest those funds. 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, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

As a new office, the Petitioner was given one year to grow to the point where it can employ the Beneficiary in an executive capacity. Without a meaningful description of the actual duties performed by the Beneficiary within the context of the Petitioner's operations at the time of filing, we cannot determine that the Petitioner had a reasonable need for the Beneficiary to perform primarily executive duties at the time it requested this extension. As noted, a number of duties in his position description were not clearly defined and it appears that he continues "hands on" involvement in the day-to-day operations of the business and has not delegated certain non-executive tasks to his four subordinates. The Petitioner did not document its use of contractors and has not established that his subordinates are managers or that they sufficiently remove him from the company's day-to-day operations and allow him to primarily focus on the broad policies and goals of the company.

Therefore, for all of the reasons discussed, the Petitioner has not established that it will employ the Beneficiary in an executive capacity.

III. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of B-I-S- Corp.*, ID# 959604 (AAO Feb. 6, 2018)