U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-CPA-P-, INC.

DATE: FEB. 7, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an auto parts company, seeks to temporarily employ the Beneficiary as its president 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 Petitioner did not establish, as required, that it would employ the Beneficiary in a managerial or executive capacity.

On appeal, the Petitioner submits additional evidence in support of its claim that the Beneficiary will be employed in an executive capacity and contends that the Director failed to consider the petitioning organization's reasonable needs and overall stage of development.

Upon *de novo* review, we will dismiss the appeal.[2]

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

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period October 5, 2016, until October 5, 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 Petitioner subsequently filed a second petition to request an extension of the new office petition, which the Director denied in January 2018.

[2] The record reflects that the Petitioner submitted a new, properly executed Form G-28 on appeal. Therefore, we will recognize , the attorney who submitted the properly executed Form G-28, as the attorney of record in this proceeding.

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. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity. However, the Petitioner does not claim that the Beneficiary will be employed in a managerial capacity, and we will restrict our analysis to whether he will be employed 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.

At the time of filing, the Petitioner submitted the following description of the Beneficiary's proposed duties as president:

- Formulating short- and long-term policies, goals, strategies, procedures and programs to ensure the continuous growth and profitability of the business with minimum oversight from the Board of Directors . . . (10%)

- Planning and directing the company's financial, governance, and commercial operations at the highest level of management . . . with the help of subordinate managers and professionals (10%);
- Exploring and identifying the need for further investment and reporting to shareholders (5%);
- Coordinating international strategic planning with the Venezuelan affiliate (5%);
- Negotiating with banks and vendors and suppliers of products and services to ensure the most favorable terms and conditions (5%);
- Coordinating the setting of accurate budgets for administration and marketing and monitoring these on a biweekly basis (10%);
- Hiring and overseeing the company's management team and delegating supervision to this team of subordinate staff (10%);
- Legally representing the company, having authority to bind it in contract and acting as the corporate bank account signatory (5%);
- Determining with shareholders a marketing and promotion strategy and, if necessary, entering into agreement with a marketing company (5%);
- Ensuring managers and staff members maintain high business standards (3%)
- Supervising and exercising direction over subordinate employees and contractors who perform the day-to-day work with authority to hire and fire the employees (12%);
- Monitoring staff performance through annual evaluations and ensuring highest level of customer/client service (15%); and
- Analyzing strategic alliances that will contribute to [the Petitioner's] growth and profitability (5%).

The Petitioner further stated that the Beneficiary would be responsible to "develop a new local market in the United States to purchase cars and tow them to [the Petitioner's] lot for parts usage," which would require further investment in tow trucks. The Petitioner noted that the Beneficiary would be spending approximately 15% of his time on planning for this venture and arranging for its financing, and would adjust the amount of time spent on his remaining duties accordingly.

In a request for evidence (RFE), the Director acknowledged the submitted description, and advised the Petitioner that it did not sufficiently describe the specific tasks the Beneficiary would perform on a day-to-day basis. In response, the Petitioner submitted a new letter which re-stated the same job duties that the Director had already reviewed and found to be deficient.

We agree with the Director's finding that this description does not delineate the Beneficiary's proposed duties with sufficient clarity, nor does it describe his actual tasks within the context of the Petitioner's business, which it describes in the record as "used auto parts and scrap metal recycling." The Petitioner noted that the Beneficiary will formulate the company's "policies, goals, strategies, procedures and programs," plan and direct its operations, engage in strategic planning, serve as the company's legal representative, and report to the shareholders and Board of Directors. These types of overly broad statements appeared throughout the description but do not define concrete job duties or explain what specific tasks would occupy the Beneficiary's time. 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). Further, we note that the Beneficiary himself is the sole shareholder of the Petitioner's parent company, which wholly owns the Petitioner. This fact raises questions about what his meetings with "shareholders" would entail.

In addition, some of the other duties assigned to the Beneficiary are repetitive and it is unclear why they have been listed as separate and discrete responsibilities. For example, the Petitioner states that he will devote 10% of his time to hiring and overseeing a management team and delegating supervision; 12% of his time to supervising and exercising direction over subordinate employees, with authority to hire and fire staff; 15% of his time monitoring staff performance; and 3% of his time ensuring managers and staff members "maintain high business standards. While we do not doubt that he would have the authority to hire and supervise staff, it is difficult to discern how much time he would actually allocate to these functions.

Overall, the list of job duties the Petitioner submitted in support of the petition and in response to the RFE (which it now submits for a third time on appeal) conveys the Beneficiary's authority over the Petitioner's business, but does not clarify what he will do as part of his daily routine. The Petitioner emphasizes the Beneficiary's development of policies, strategies, and performance of higher level planning and decision-making activities, but does not provide sufficient information to support a finding that he would focus primarily on these duties. 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 actual duties themselves will reveal the true nature of the employment. *Fedin Bros.*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

We acknowledge that, on appeal, the Petitioner attempts to clarify the Beneficiary's duties by providing an example of how he carries out one of his stated responsibilities. Specifically, the Petitioner states that he will "implement short- and long-term strategies by researching and vetting potential markets in countries to decide whether or not [the Petitioner] should invest in those markets." The Petitioner goes on to state that once the Beneficiary decides to pursue an opportunity in a new market he "makes contact with potential clients and negotiates the most favorable terms and conditions for new contracts and executes them." The Petitioner further explains that the Beneficiary's subordinates would make sure that the terms of the contracts are carried out by handling "day-to-day activities." However, the Petitioner does not explain how researching and vetting potential markets or reaching out to potential clients qualify as executive-level duties, nor does it specify how much time he would spend on such activities.

The fact that the Beneficiary will direct the 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. As discussed further below, we cannot determine to what extent the Beneficiary's subordinate employees would assist him with non-executive tasks required to operate the business, and the record does not sufficiently support the Petitioner's claim

that he will spend his time primarily on higher-level planning, strategy, and decision-making activities.

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 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 Beneficiary 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.

According to a submitted business plan, the Petitioner operates as a wholesaler of new and used auto parts, servicing retailers in the United States, and it also exports auto parts to South America, Central America, and the Caribbean. The record also mentions a scrap metal recycling line of business, and there is evidence that the Petitioner's 42,000 square foot premises include a yard or lot for cars (as well as a car crusher), a warehouse, and an office.

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it had six employees at the time of filing in April 2018 and the company's payroll records confirm this number. The Petitioner's organizational chart shows a total of ten employees, including four employees who were not on its payroll when the petition was filed: the Beneficiary, an administrative assistant, an operations manager, and a warehouse/maintenance worker. The Petitioner explained that the Beneficiary and the administrative assistant (his spouse) would be reinstated as employees upon approval of the petition, once they are authorized to work again. The Petitioner also stated that the operations manager [redacted] had been on maternity leave for all of 2018 (through September) but did not provide a date for her return.[3] 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, the Petitioner's documented staff at the time of filing included the following six workers:

Warehouse Manager [redacted]
Warehouse Assistant Manager (2) – [redacted]

[3] The record does not contain evidence of wages paid to the "warehouse worker" or "maintenance worker" [redacted] whose name appears on the submitted organizational charts.

Operations & Logistics Manager – [redacted] (acting for [redacted])
Purchasing & Sales Manager – [redacted]
Purchasing/Sales Executive (2) – [redacted] and [redacted]

The Petitioner's organizational chart also showed vacancies for a marketing specialist, a business relations specialist, and an IT technical support employee, and identified a contracted accountant and attorney who would report to the Beneficiary.

The Petitioner provided descriptions for the positions of warehouse manager, operations and logistics manager, and purchasing and sales manager, as well as resumes for the employees claimed to hold these positions.

The Petitioner stated that the operations and logistics manager: "ensures conformance of company operations to all applicable laws and regulations"; establishes "short- and long-term operating and financial objectives for the Parts Department"; ensures "company growth projections, sales objectives and desirable profits are consistently met"; works with the sales manager to ensure maximum profit and parts turnaround; analyzes the auto parts industry and marketplace to analyze new opportunities; exercises discretion over hiring and firing lower level employees; establishes and maintains a training program; exercises managerial discretion over the day to day operations; supervises and evaluates personnel; and reviews and approves financial reports for submission to the president.

The Petitioner submitted a resume for [redacted], the holder of this position who was claimed to be on maternity leave at the time of filing. She describes her duties as "operations and logistics manager" as follows (note: errors in the original text have not been changed):

> This is inspected to monitor or organize the patio, supervises each employee functions, seeks the way to keep the patio sanected, since the type of employment both many liquids and you have to keep clean and operative the same, it is necessary for the environmental part and for the appliances that are used in the patio, for example the forlink maintain a safe and active space helps us to process optima

[redacted] resume listed a few previous sales positions, a position as a machine operator, and no educational background. We cannot determine that the position she describes in the resume is the same position the Petitioner has described in its letters. While we acknowledge that the duty description in the resume likely contains translation errors, the duties do not appear to be remotely similar to the higher level managerial tasks the Petitioner attributed to the position. Therefore, we find that the Petitioner's description of the operations manager's duties is lacking in probative value.

The Petitioner indicates that the purchasing and sales manager [redacted] is responsible for: conducting call projects focused on growing the business in the U.S. and South America; collecting, analyzing and loading customer data into the CRM system; answering questions on products and distribution, and providing recommendations; proactively calling existing customers to research needs and maintain relationships; interfacing with distributers and buyers; and promoting specials

via inside sales call projects. Based on this description, the purchasing and sales manager would be primarily performing routine sales duties. resume states that his position with the Petitioner is "Auto Parts Sales Supervisor and Inventory," but does not list any job duties. The Petitioner did not explain why he would he used a different job title in his resume.

Finally, the Petitioner indicated that the warehouse manager would report directly to the Beneficiary and perform the following duties: comply with federal, state and local warehousing, material handling and shipping requirements by studying existing and new legislation and enforcing adherence to requirements; safeguarding warehousing operations by establishing security procedures; controlling inventory levels by conducting physical counts and reconciling with data storage system; maintaining physical condition of warehouse by planning and implementing new design layouts, inspecting equipment and issuing work orders; achieving financial objectives by preparing an annual budget and analyzing variances; scheduling and assigning warehouse employees to complete operational requirements; recruiting, selecting, and training warehouse assistants; working with warehouse assistants to search nationwide to find the best possible auto parts deals; and determining appropriate inventory levels.

The Petitioner provided a copy of resume, in which he indicates that he completed ninth grade, that he currently works for the Petitioner as a "Car Dismantler," and that he previously held the same position with another company from 2011 until 2015. The Petitioner did not submit an explanation for this discrepancy in his job title and did not establish that he is actually performing the duties attributed to the "warehouse manager."

Based on the unresolved discrepancies between the Petitioner's descriptions of the Beneficiary's subordinates and the information provided on the submitted resumes for these individuals, we find insufficient evidence to establish that the employees are actually performing the claimed job duties. The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, as noted, the Petitioner did not have the Beneficiary or the administrative assistant on its payroll at the time of filing. The Petitioner submitted a letter from stating that he has been performing the duties of both the operations manager and purchasing and sales manager positions throughout 2018, but he does not explain how he manages to fully perform two different full-time positions in a 40 hour workweek. In addition, the Petitioner did not explain what duties are performed by its two "warehouse assistant managers" or by the two "purchase/sales executives," and it did not provide evidence of any wages paid to its lower-level warehouse/maintenance worker.

Therefore, although the Petitioner has documented its employment of a total of six employees, it has submitted a credible position description for, at most, only one member of its subordinate staff – the sales and purchasing manager - who, as noted, is described as performing sales duties, rather than acting in a supervisory or managerial capacity as his title suggests. A petitioner's evidence must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; tiers of subordinate employees and job titles alone are not probative and will not establish that an organization can sufficiently support an executive position.

Here, based on the limited information provided regarding the Beneficiary's actual duties, and the lack of probative information regarding the duties performed by the company's other employees, we cannot determine that the company has sufficient staff to relieve the Beneficiary from engaging in operational and other non-executive tasks.

The Petitioner cites *Nat'l Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act primarily in a managerial or executive capacity. First, we note that the Petitioner has not furnished evidence to establish that the facts of the instant petition are analogous to those in *Nat'l Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the former Immigration and Naturalization Service (INS). In *Nat'l Hand Tool Corp.*, the court emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations when reviewing managerial or executive capacity. We have interpret the regulations and statute to prohibit discrimination against small or medium-size businesses.

However, consistent with both the statute and the holding of *Nat'l Hand Tool Corp.*, the Petitioner is required to establish that the Beneficiary's position consists of primarily executive duties and that it will have sufficient personnel to relieve the Beneficiary from performing operational and/or administrative tasks. Like the court in *Nat'l Hand Tool Corp.*, 889 F.2d at 1472, n.5., our holding is based on a conclusion that the Petitioner did not meet its burden to establish that the Beneficiary would be performing primarily executive duties and does not rest on the size of the Petitioner.

On appeal, the Petitioner also cites to *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), and asserts that the Director failed to consider the reasonable needs of the Petitioner's international organization as a whole, and the Petitioner's current stage of development. The Petitioner notes that the Beneficiary holds the same executive position he held with the parent company, and emphasizes that he will be "managing the essential executive duties associated with the development and expansion of the United States market for the Petitioner's international organization." Although the Petitioner stated that the Beneficiary will devote a small portion of his time to "coordinate international strategic planning" with the foreign parent company, the record does not document any collaboration between the two companies, demonstrate that staff of the foreign entity support the U.S. company's day-to-day operations, or establish that the Beneficiary is primarily responsible for directing a function for the international organization.

The fact that he oversees the U.S. subsidiary of the foreign entity is not sufficient to meet the Petitioner's burden to show that his actual duties would be executive in nature, or to establish that he will be primarily directing an essential function for the larger international organization. Furthermore, the Petitioner bears the burden of documenting what portion of the Beneficiary's duties will be executive and what proportion will be non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991). The Petitioner has not provided clear and credible breakdowns of the job duties to be performed by the Beneficiary and the company's other employees and therefore has not met this burden.

In sum, the Petitioner has consistently stated that the Beneficiary will occupy the senior position in the company, but has not submitted a job description or supporting evidence sufficient to demonstrate that he would primarily perform executive duties consistent with section 101(a)(44)(B) of the Act.

III. CONCLUSION

The appeal will be dismissed because the Petitioner did not establish that the Beneficiary will be employed in the United States in an executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of S-CPA-P-, Inc.*, ID# 2121999(AAO Feb. 7, 2019)