U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-M-, INC.

DATE: FEB. 15, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a scrap metal recycling wholesaler, seeks to temporarily employ the Beneficiary[1] as the chief financial officer of its new office[2] 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 Petitioner did not establish, as required, that: (1) the Beneficiary was employed abroad in a managerial or executive capacity; and (2) the new office would support the Beneficiary in a managerial or executive position within one year after approval of the petition.

On appeal, the Petitioner disputes the denial, pointing to a previously submitted percentage breakdown as evidence of his executive job duties abroad. The Petitioner also argues that the Director erroneously concluded that the Beneficiary would not be employed in an executive capacity within one year of the petition's approval.

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 managerial or executive capacity for one

[1] It is noted for the record that the Beneficiary's name as provided by the Petitioner in (1) the petition, (2) the Petitioner's Articles of Incorporation, and (3) "Consent of the Directors in Lieu of Organizational Meeting," refer to the Beneficiary's first name as [redacted] However, the "Given Name" field in the Beneficiary's passport is blank. The Beneficiary's B1/B2 nonimmigrant visa issued on January 5, 2011, states [redacted] in the "Given Name" field. It is unclear whether the Beneficiary's first name is [redacted] or whether he does not have a given first name. We also note that the Petitioner provided an alias for the Beneficiary, "[redacted]" on the petition.

[2] The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). 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. Section 101(a)(15)(L) of the Act. 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).

Further, if the Form I-129, Petition for a Nonimmigrant Worker, indicates that the Beneficiary is coming to the United States in L-1A status to open or to be employed in a new office, the Petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence includes information regarding the new office's physical premises, the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

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.

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) must 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.

II. EMPLOYMENT ABROAD

The first issue we will address in this decision is the Beneficiary's employment abroad, which involves multiple elements. First, the Petitioner must establish that the Beneficiary was employed abroad by a qualifying entity, that such employment lasted for one continuous year, and that it took place within the three years that preceded the filing of the instant petition. Once the Petitioner establishes that these criteria have been met, it must demonstrate that the Beneficiary's position was in a managerial or executive capacity. In this instance, the Director determined that the Beneficiary was not employed in an executive capacity, but did not discuss any of the other foreign employment requirements.

A. Employment in an Executive Capacity

The Petitioner claims that the Beneficiary was employed abroad in an executive capacity.[3] The Director concluded that the Petitioner did not provide sufficient evidence to support this claim. Therefore, the first issue to be addressed in this decision is whether the Petitioner established that the Beneficiary was employed abroad in an executive capacity.

1. Duties

When examining the executive capacity of the Beneficiary's foreign employment, we will look first to the description of the Beneficiary's job duties. The description should clearly describe the duties the Beneficiary performed and indicate whether such duties were in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Based on the statutory 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 1533.

In the L Classification Supplement, the Petitioner stated that the Beneficiary assumed the position of "General Financial Director/Manager" at the foreign entity. The Petitioner claimed that the Beneficiary's foreign position involved: representing the company before "key bank financiers" to negotiate financial agreements; managing "all financial activities, systems, and reporting"; and setting the company's financial goals, determining how to achieve them, and directing the "team" that will implement them.

In a request for evidence (RFE), the Director informed the Petitioner that the above job description was not sufficient and asked for a letter from the foreign entity listing the Beneficiary's typical executive job duties and the percentage of time he allocated to each duty daily. The Director stated that the job description should demonstrate that the Beneficiary meets the four elements that comprise the definition of "executive capacity."

In response, the Petitioner provided a letter from [redacted] a partner of the foreign entity, who provided a percentage breakdown listing the Beneficiary's duties and responsibilities as "the senior-most director of the financial department." [redacted] indicated that 30% of the Beneficiary's time was allocated to activities that he carried out intermittently on a monthly or yearly basis, including holding monthly investor meetings to "[m]aintain investor confidence," reviewing and approving monthly and yearly financial statements within the scope of the current market and tax

[3] The Petitioner did not claim that the Beneficiary was employed abroad or that he would be employed in the United States in a managerial capacity. Therefore, our analysis will address only whether the record contains sufficient evidence to establish that the Beneficiary's employment abroad was in an executive capacity.

considerations, and traveling "at least 2 weeks out of each year" to represent the company before trade unions and business associations. He also stated that 20% of the Beneficiary's time was spent attending meetings daily to negotiate financing terms with banks and other financial institutions; 20% was spent negotiating terms with suppliers and vendors; an aggregate of 20% was spent reviewing data to make recommendations for new projects and business ventures and exercising "ultimate discretion" regarding the purchase of financial reporting software and the implementation of management reporting programs; and the remaining 10% was spent establishing and implementing company policies to "[m]aintain market credibility."

In the denial decision, the Director determined that while the Beneficiary possesses the discretionary authority that is typical of an executive, his job description was overly broad and lacked a sufficient explanation of the specific duties he performed on a daily basis.

We agree with the Director's conclusion and also find that the job description does not provide a meaningful understanding of the specific daily tasks the Beneficiary performed during his employment abroad. As indicated above, 30% of the Beneficiary time was allocated to tasks that he performed intermittently on an as-needed basis. Such duties do not represent the Beneficiary's actual tasks in the course of the Petitioner's daily routine and therefore do not explain how the Beneficiary allocated his time on a daily basis. Further, the record does not establish that there is a need, within the scope of a metal recycling business, to hold daily two-hour meetings with lending institutions to negotiate credit and lending terms. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The job description also indicates that purchasing financial reporting software and embarking on new projects and business ventures are routine occurrences within the foreign entity. The record does not, however, indicate that either activity occurs routinely on a daily or even weekly basis within the scope of the foreign entity's business; therefore, it is not likely that making business decisions regarding the purchase of financial reporting software or reviewing feasibility studies in consideration of new business ventures are tasks that the Beneficiary needed to perform routinely on a daily or weekly basis, as the job description suggests. Likewise, while establishing policies and ways to implement them may be consistent with an executive-level position, the record does not indicate that policy-making activities would be part of the Beneficiary's daily routine.

On appeal, the Petitioner contends that accepting the job description as evidence of the Beneficiary's level of discretionary authority necessarily means that the Director conceded that job description constituted sufficient evidence to establish that the Beneficiary primarily allocated his time to executive-level job duties. We disagree and find that the job description is insufficient for the reasons discussed above. Contrary to the Petitioner's contention, the degree of discretionary authority is only one of several factors we consider to determine whether a beneficiary's position is in an executive capacity; a position may involve a heightened degree of discretionary authority, yet require a beneficiary to allocate the primary portion of his or her time to non-executive job duties.

As such, the actual duties, not the level of discretionary authority alone, are true indicators as to the nature of the employment. *See 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).

The Petitioner also asserts that it is unable to specify the Beneficiary's daily job duties, claiming that the duties change depending on the needs of the company. We note, however, that this claim does not excuse the Petitioner from having to meet its burden of proof; a determination of whether the Beneficiary's employment was in an executive capacity requires a description of the Beneficiary's job duties. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). A vague job description does not constitute sufficient evidence to support the claim that the Beneficiary's employment was in an executive capacity.

In the present matter, the RFE expressly instructed the Petitioner to provide a detailed job description that includes specific information about the Beneficiary's activities *in the course of his daily routine*. As indicated in our analysis, the Petitioner did not comply with that instruction and instead provided an ambiguous job description with time allocations that do not comport with the nature of the foreign entity's business. While the job description indicates that the Beneficiary had a level of discretionary authority over the foreign entity's financial matters and business concerns, this factor alone is not sufficient to establish that the job duties he performed were primarily of an executive nature. Despite claiming that it met its burden in establish that the Beneficiary allocated his time primarily to executive-level duties, the Petitioner has not adequately supported this claim and instead, provided a job description that lacks the necessary degree of detail to convey a meaningful understanding of the actual tasks the Beneficiary performed daily within the scope of the foreign entity's metal recycling business. As such, we cannot conclude that the Beneficiary allocated his time primarily to job duties of an executive nature.

2. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the evidence when examining the claimed executive capacity of a beneficiary, including the employer'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.

In the denial decision, the Director determined that the record lacks sufficient evidence to establish that the foreign entity's operational needs and organizational complexity were sufficient to relieve the Beneficiary from having to allocate his time primarily to non-executive job duties.

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.*

In the present matter, the Petitioner's RFE response includes the foreign entity's organizational chart, which indicates that the Beneficiary is the general manger of finance and that he is subordinate to one of the company's four partners. The chart also shows that the Beneficiary directly oversees the work of a cashier and an accounts manager and that the accounts manager oversees an accounts assistant. Despite claiming that the cashier is a professional position that requires a degree in accounting or bookkeeping, the Petitioner did not provide evidence to support this claim, nor did it specify whether the "degree" referenced was a four-year baccalaureate degree.[4] The record also lacks sufficient evidence to establish that the accounts manager is actually a managerial or supervisory position. Despite the accounts manager's placement in the foreign entity's hierarchy, the position description includes no supervisory or managerial job duties, and thus it does not appear that the accounts manager is a managerial employee.

As noted earlier, the Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec.at 376. In this instance, we cannot conclude that the three-person support staff within the Beneficiary's department comprises the requisite managerial level of subordinates for the Beneficiary to direct or that the organizational complexity within this department is sufficient to elevate the Beneficiary's position to that of an executive. As such, we do not find that the foreign entity's staffing is sufficient to either necessitate or support the Beneficiary in an executive-level position.

3. Continuous Employment Abroad Within the Requisite Time Period

The Director's discussion of the Beneficiary's foreign employment in this matter focused exclusively on the executive nature of the position he is claimed to have held. However, as previously noted, determining whether the Beneficiary's position abroad was of an executive nature is not dispositive of the Beneficiary's foreign employment requirements. As stated earlier, not only must the Petitioner establish that the Beneficiary was employed abroad in an executive capacity, but it must also provide evidence to show that the Beneficiary's employment abroad: (1) was with a qualifying entity; (2) took place during the three years prior to filing the petition; and (3) lasted continuously for one year within the requisite three-year period.

[4] In evaluating whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The above requirements were listed in the RFE and the Director observed that the record, as constituted at that time, did not support the Petitioner's claim that the Beneficiary had been employed by the foreign parent entity since 2002. The Petitioner was allowed an opportunity to provide additional evidence, including personnel and payroll records and a statement "from the [B]eneficiary's supervisor(s)" regarding his employment with the foreign entity.

We note that while the Petitioner provided two letters verifying and describing the Beneficiary's employment abroad, each letter was signed by one of the foreign entity's four listed partners, neither of which was the partner depicted as the Beneficiary's direct supervisor on the foreign entity's organizational chart. Thus, neither employment letter was in compliance with the specific instructions in the RFE. The Petitioner also provided "salary slip[s]" for February through August 2016 and for December 2016. However, these documents are insufficient evidence of the Beneficiary's foreign employment because (1) they account for only eight months of the required 12-month period and (2) the employee name listed on these pay slips was not that of the Beneficiary. We further note that the pay slips include employee-related fields, such as the number of days worked and the amount of leave and the number of absences accumulated during the specified pay period; however, all fields, with the exception of the employee name, net salary, and employee identification number, were left blank.

In addition, we note that in the course of reviewing the evidence and contemplating the Petitioner's eligibility, we found documents outside the record that the Petitioner will need to address in any future filing. Specifically, in a nonimmigrant visa application that the Beneficiary completed and submitted to the Department of State in November 2010, the Beneficiary identified and as his "present" employers at that time. Further, when asked to describe his job duties in the 2010 visa application, the Beneficiary stated that he handles operations, including its human resources and marketing and that he "also look[s] after the group finances," claiming that "all companies are family concerns." The Beneficiary expressly stated that he did not solely work for thereby indicating that his claimed employment with that entity may not have been full-time. While we cannot rely on information that the Beneficiary provided in a nonimmigrant visa application, which is outside the instant record, the Petitioner will have to address this information and overcome any inconsistencies that may result therefrom in any future filing where the Beneficiary's employment abroad is an eligibility factor.

Regardless, the record in this instance contains deficient paystubs and employment verification letters that are not in compliance with the Director's specific RFE instructions. Therefore, we find that the Petitioner has not provided sufficient evidence to show that the Beneficiary was a full-time employee of and that he was continuously employed by that entity during the required time period and for the prescribed duration of one year.

III. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

Because the above issue concerning the Beneficiary's employment abroad is dispositive of this appeal, we will briefly address the remaining issue pertaining to the Beneficiary's proposed employment.

The Director determined that the Petitioner did not establish that it would be able to support the Beneficiary in an executive position within one year of the petition's approval. Based on our review of the Petitioner's supporting evidence, including its business plan as well as its proposed organizational hierarchy and hiring plan, we find that the Petitioner has not adequately demonstrated that it would grow sufficiently in its organizational complexity such that it would have the ability to relieve the Beneficiary from having to primarily perform non-executive job duties and elevate him to an executive position where he would primarily direct the management of the organization and establish its goals and policies. Therefore, we agree with the Director's finding and need not further address this issue in the instant decision.

IV. CONCLUSION

The Petitioner has not established that the Beneficiary's employment abroad meets the statutory criteria, nor has the Petitioner provided sufficient evidence to show that it will employ the Beneficiary in an executive capacity within one year of the petition's approval.

ORDER: The appeal is dismissed.

Cite as *Matter of J-M-, Inc.*, ID# 639589 (AAO Feb. 15, 2018)