U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-I- CO.

DATE: JAN. 7, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a wholesale company, seeks to continue the Beneficiary's temporary employment 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 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, asserts that the Director did not consider the previously submitted evidence in its totality, and contends that it met its burden to establish 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 June 14, 2017, until June 13, 2018. 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). This evidence must demonstrate that the beneficiary will be employed in a managerial or executive capacity, as defined at sections 101(a)(44)(A) and (B) of the Act, under the extended petition.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner established that the Beneficiary will be employed in an executive capacity. The Petitioner did not claim that the Beneficiary would be employed in a managerial capacity; therefore, our analysis will address only the Petitioner's claim that the Beneficiary's proposed position would be 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.

The Petitioner provided the following description of the Beneficiary's duties at the time of filing:

(1) Providing leadership and direction for the subsidiary, exploring new business opportunities in the U.S. and international market by networking at conferences and conducting meetings with other company presidents (30%);
(2) Reviewing marketing strategy and goals with department managers regarding core business and products, and their implementation by the subsidiary (20%);
(3) Reviewing the general operations of the subsidiary with department managers to ensure that operations are running efficiently and smoothly (20%);
(4) Negotiating and signing trade contracts (15%);
(5) Evaluating department managers' performance in the subsidiary, executing personnel actions such as hiring, firing, promotion, and demotion of department managers (10%);
(6) Reporting directly to the parent company (5%).

In a request for evidence (RFE), the Director advised the Petitioner that this description lacked sufficient detail to establish that the Beneficiary's duties would be primarily managerial or executive in nature. The Director asked that the Petitioner provide a more detailed statement of the Beneficiary's actual day-to-day duties and the amount of time to be spent on each specific task.

In response, the Petitioner provided a list of duties that closely resembled the initial job description. The Petitioner eliminated the assigned percentages and added a seventh job duty. Specifically, the Petitioner added that the Beneficiary's duties include "lead company team, registered, displayed design-Tradeshow [redacted] show in [redacted] trade show), do product promotion."

In addition, the Petitioner stated that the Beneficiary would continue to perform the same duties if the petition is extended, and noted that her duties would further include:

1. Work with parent company and U.S. subsidiary's department's manager to plan and implement a short-, mid- and long-term strategy for the development of the U.S. company.
2. Oversee the complete operation of the company ensuring it operates and goals [*sic*] are met based on the direction established in the strategic plans.
3. Making decisions about capital allocations, resource management, investments, new business opportunities. Meet with potential customers face to face and promote our company, products, and services.
4. Make final decision on department manager's performance in the subsidiary, administrate personnel actions such as hiring, firing, promotion, and demotion of department employees.

The Director found that the RFE response did not add sufficient detail to the initial description and was therefore insufficient to establish the nature of the Beneficiary's actual duties, such that they could be classified as primarily executive in nature. We agree with the Director's assessment of the position description. The Petitioner has submitted overly broad descriptions of the Beneficiary's duties which do little more than establish her level of authority over the company. While the

information provided supports the Petitioner's claim that the Beneficiary occupies the senior position in the U.S. company, it did not provide additional insight into what she would primarily do on a day-to-day basis under an extended petition.

For example, the Petitioner's stated that the Beneficiary provides "leadership and direction," explores new business opportunities, reviews "the general operations," and oversees "the complete operation of the company," but provided few details or examples in support of its claim that these responsibilities would primarily occupy her time. These statements do not provide the required level of detail regarding what she actually does as a part of her daily routine. While we do not doubt the Beneficiary's authority to make decisions impacting the company or her responsibility for company oversight, the record lacks a detailed account of her specific tasks. 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. The actual duties themselves reveal the true nature of the employment. *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's duties include networking at conferences, face to face meetings with potential customers, promoting the company's products and services, negotiating "trade contracts," and performing "product promotion." The Petitioner did not provide sufficient explanation of these duties and without additional information, we cannot discern whether these are duties performed at the executive level, or more routine marketing, sales and promotional activities. Again, the new information provided in response to the RFE did not include the amount of time to be spent on specific tasks, and did not sufficiently describe the nature of the Beneficiary's duties in the course of her daily routine. To the extent that it did include specific tasks, it suggested that she would be directly involved in sales and marketing activities. Overall, 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).

The fact that the Beneficiary will direct a 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. Whether the Beneficiary is an executive employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" executive. Even though 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, a broad overview of her responsibilities is insufficient to establish that her actual duties would be primarily in an executive capacity.

B. Business Activities, 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 Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it operates a "wholesale" business with five employees. The Petitioner noted that its Chinese parent company develops produces, imports, and exports video servers and provides related technical consultation and other customer services. It stated that the foreign parent established the U.S. subsidiary "in order to build itself into an international trading and video server production company."

The Petitioner stated in its supporting letter that it is engaged in "trading, and providing expert technical consultation, customer service and shor[t]-term training [to] high end enterprises' personnel." It further noted that it was doing business as [redacted] and [redacted] and used these names for its "wholesale electric parts and auto businesses."

As evidence of its business activities, the Petitioner submitted copies of two "Technology Service Contracts" with the same Hong Kong-based client. Under the terms of these contracts, the Petitioner was to provide the client with (1) installation and debugging of hardware products and (2) debugging of system software. The Petitioner provided evidence that it invoiced the overseas client for "consulting fees." All other invoices in the record are for the sale of used luxury automobiles to California-based companies and show that the Petitioner sold these products under the name [redacted] The Petitioner has not provided evidence that it is engaged in wholesale activities, international trade of video servers, or provision of training to client personnel.

The Petitioner provided an organizational chart which depicts the Beneficiary's subordinates as a marketing and sales department manager, an administrator, and an operation department manager. The chart also shows a marketing and sales assistant who reports to the marketing and sales manager. Finally, it includes vacancies for a bookkeeper position and an operation assistant.

While the Petitioner provided position descriptions and evidence of wages paid to the subordinate staff, the submitted descriptions do not appear to be consistent with the nature of the business. As noted, the Petitioner's income generated to date, according to the submitted invoices, has been derived from the sales of individual used automobiles to a handful of clients in southern California and the delivery of technical hardware and software services to a client in Hong Kong. The job descriptions provided for the company employees do not mention any responsibilities for the sourcing, purchasing, or sale of automobiles or the provision of technical services overseas.

Turning to the duties performed by the Beneficiary's direct subordinates, the Petitioner states that the marketing and sales manager assists the Beneficiary in leading and directing the company, reviews its marketing operations, assists with the exploration of new business opportunities, assists with review of marketing strategies and goals, seeks advantageous investment projects, and participates in marketing activities and trade shows. The job duties are poorly defined, overlap with the Beneficiary's own responsibilities in many respects, and do not provide sufficient insight into what specific company functions have been delegated to this employee.

The job duties attributed to the "administrator" lack credibility in light of the nature and structure of the company. The Petitioner states that this employee "accomplishes staff results by communicating job expectations," monitors and appraises job results, and coaches, counsels and disciplines

employees. However, this position has no current or proposed subordinates based on the submitted organizational chart. The Petitioner broadly states that the administrator will "initiate, coordinate and enforce systems, policies, and procedures" as well as "establish policies, procedures and work schedules" but did not indicate what "systems" are in place or why the company's policy-making duties would be delegated to an administrative employee with no subordinate staff. Finally, the Petitioner stated that this position will identify the supply needs for "reception, switchboard, mailroom, and kitchen," none of which appear to exist within the Petitioner's organization.

Finally, the Petitioner provided a position description for the operation department manager which seems to overlap with the duties assigned to the administrator. The Petitioner stated that this position will improve the operational systems, processes and policies, as well as play a "significant role" in long-term planning, and manage payroll and employee benefits. Overall, the Petitioner claims that four of its five employees are focused on aspects of the company's strategies, goals, policies, systems, and processes, with little mention of who performs the company's actual day-to-day administrative and operational tasks. For example, the Petitioner does not claim to have anyone engaged in sourcing and purchasing the automobiles that the company sells domestically or arranging for their delivery to customers, nor does it have staff who are claimed to deliver technical services to international clients. It also does not indicate who currently performs the duties that will eventually be assigned to a bookkeeper or operations assistant.

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, and they must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Here, although the Petitioner states that it has sufficient lower-level staff to allow the Beneficiary to primarily focus on the broad policies and goals of the organization, and to remove her from significant involvement in the day-to-day operations of the company, the record does not support that claim. Because the submitted position descriptions for the Beneficiary and her subordinates are overly broad, and in some instances lacking credibility, and because the Petitioner has not provided a clear description of the full nature and scope of the company's activities, we cannot determine how or to what extent the actual day-to-day, non-executive activities of the business are delegated to the subordinate staff. As noted, there are a number of operational and administrative tasks that have not been assigned to any specific employee and we cannot determine whether or to what extent the Beneficiary would be relieved from performing such tasks.

On appeal, the Petitioner contends that the Director erred by basing the denial on the small number of staff. 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, we must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, it is appropriate to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *Family Inc.*, 469 F.3d at 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when we note discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

We acknowledge that the Petitioner was still in a preliminary stage of development and recorded its first revenues 2017. We have interpreted the statute to prohibit discrimination against small or medium-size businesses. However, we have also consistently interpreted that Act to require any given petition, regardless of size, to establish that a beneficiary's position "primarily" consists of executive duties, and that it has sufficient personnel to relieve a beneficiary from performing operational and administrative tasks. The reasonable needs of a petitioner will not supersede the requirement that a beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008). Regardless, our determination here is not based on the size of the company, but rather on the lack of detailed, probative information regarding the nature of the company's activities and the specific duties to be performed by the Beneficiary and her subordinates under an extended petition.

For the reasons discussed above, the Petitioner has not established that the Beneficiary would be employed in an executive capacity.

III. ONE YEAR OF EMPLOYMENT ABROAD

Although not addressed in the Director's decision, we find that the Petitioner has not established that the Beneficiary had at least continuous year of full-time employment abroad in a managerial or executive capacity in the three years preceding the filing of the initial L-1A petition on her behalf. *See* 8 C.F.R. § 214.2(l)(1)(iii)-(iv).

On the Form I-129 L Classification Supplement, the Petitioner stated that the Beneficiary worked for its Chinese parent company as vice president from May 2016 until June 2017. However, the Beneficiary visited the United States on several occasions during this time period and those periods of time spent in the United States do not count towards her one year of employment abroad. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A). As one of the Beneficiary's stays in B-1 nonimmigrant status was over four months in length (August 2016 until January 2017), the Petitioner did not establish that she was employed abroad for one full year between May 2016 and June 2017.

We acknowledge that the Petitioner stated in its supporting letter that the Beneficiary previously worked with its foreign entity from the time she graduated with her undergraduate degree in 2008, but it is unclear why the Petitioner did not list any prior employment on the Form I-129. The Petitioner did not provide any details regarding this claimed prior employment or claim that it was in

a managerial or executive capacity. In addition, a "Certificate of Employment" prepared by the foreign entity mentions only the Beneficiary's employment as vice president beginning in May 2016. If the Beneficiary did in fact work for the Petitioner's foreign parent company prior to assuming the position of vice president in May 2016, then additional documentation would be needed to substantiate that claim and the managerial or executive nature of the position. Based on the current record, the Petitioner did not establish that the Beneficiary has the required one year of qualifying employment abroad prior to her transfer to the United States. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner did not establish that it will employ the Beneficiary in an executive capacity or that the Beneficiary had at least one continuous year of full time employment with a qualifying entity abroad in the three years preceding the filing of the initial L-1 petition.

ORDER: The appeal is dismissed.

Cite as *Matter of J-I- Co.*, ID# 2032193 (AAO Jan. 7, 2019)