U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6336512

Date: JAN. 8, 2020

Appeal of California Service Center Decision

Form I-129, Petition for Nonimmigrant Worker (L-1A)

The Petitioner, a holding company operating a dry cleaning business, seeks to continue[1] the Beneficiary's employment as its general manager in the United States under the L-1A nonimmigrant classification for intracompany transferees. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the California Service Center denied the petition concluding that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity under an extended petition.

On appeal, the Petitioner asserts that the submitted evidence clearly demonstrates that the Beneficiary would primarily devote his time to executive-level duties and contends that the Director did not take into account all of his subordinates, including claimed independent contractors working for the company. The Petitioner states that the Director improperly overemphasized its size in denying the petition.

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 managerial or executive capacity for one 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. *Id.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period from February 23, 2017, to February 12, 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).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue we will address is whether the Petitioner established that the Beneficiary would act in a managerial or executive capacity under an extended petition. The Petitioner does not claim that the Beneficiary would be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary would be employed in an executive capacity.

"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.

When examining the executive capacity of a given beneficiary, we will review the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in an executive capacity. *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 1533.

The Petitioner indicated that it is a holding company with two wholly owned subsidiaries in the United States, [redacted] (Dry Cleaning LLC), operating a purchased dry cleaning business, and [redacted] (Franchising LLC). The Petitioner stated that it originally intended that Franchising LLC would import and export motorcycle parts, similar to the Beneficiary's foreign

employer, but explained that he "decided to modify the plan and use [Franchising LLC] to assist our plans of franchising our dry cleaning business." In support of the petition and in response to the Director's request for evidence (RFE), the Petitioner listed a variety of duties for the Beneficiary, but did not provide one comprehensive duty description with the percentages of time he devoted to each task, as requested by the Director. For instance, it listed some of the following duties and responsibilities for the Beneficiary:

General Management:

- Responsible for developing the policies and procedures that determine how the Petitioner's works,
- Create policies and procedures to develop systems and an operational manual which can be replicated so that the Petitioner's subsidiary can sell franchise opportunities, such as how to greet customers, accept payment, keep track of customer clothing, properly hang and present them, clean and maintain them, close the registers at night, market to potential customers, and use social media.
- Finalize and perfect the operations manual over the next several years,
- Determine how to report the financial success of our business and create templates that detail the past week, month and quarter sales,
- Determine global policies such as the paid time off, dress code, independent contractor file, and team evaluation policies based on various procedures and key performance indicators,
- Determine the direction of the company, which markets its enters, and change the plans for its subsidiaries,
- Made the executive decision to focus more on the dry cleaning company, and helped develop this business by developing a dry cleaning smart phone application,
- Developed a franchise model for the business, determine which locations to offer this model, and set forth various parameters on what could make a successful franchise,
- Set franchise offering prices and the percentages of monthly sales, and set prices for the dry cleaning business,
- Determine if and when the Petitioner should open additional subsidiaries,
- Determine where each employee fits within the structure, the financial, marketing, and administrative aspects of the business, and which aspects would be handled by the Petitioner as supposed to its subsidiaries, and
- Determine whether the team members will be direct hires or independent contractors.

Marketing:

- Responsible for overseeing our marketing plan and budget,
- Determine which third party specialists would help us in these efforts, by hiring various contractors, such as website developers and our SEO specialist,
- Determine how much to spend on marketing plan and make changes based on expenses, and
- Determine when to hire a marketing assistant and formulate the positions minimum requirements.

Budgetary Concerns:

- Create and implement the budget and the budgets of our subsidiaries,

- Create an 18-month budget and prepare a financial plan on how the Petitioner will reach goals,
- Formulate when the Petitioner is expected to offer franchise business,
- Determine how much to spend on marketing and increase sales accordingly, formulate budget detailing how much is spent on marketing and costs needed to upgrade equipment, use this information to create the short and long-term financial goals,
- Provide budget information to outsourced accountant who prepares various financial statements, review them and revise budget, and
- Use financial reports to determine cost cuts.

Team Oversight:

- Determine how to hire and fire, including employees and contractors, and
- Determine salaries, bonuses, fringe benefits, sick days, vacations, and insurance packages.

The Petitioner submits substantial documentation reflecting that the Beneficiary was likely engaged in most of the non-qualifying operational aspects of the dry cleaning business operated by its subsidiary. For instance, the Petitioner provided several invoices from dry cleaning contractors including the Beneficiary's name dated near the time the petition was filed. In fact, one such invoice showed the Beneficiary purchasing plastic coverings for clothing, hangers, stain removing powder, and stickers as late as January 2018.[2] In addition, the Petitioner submitted several invoices dated in late 2017 reflecting the Beneficiary ordering cleaning supplies and equipment parts for the dry cleaning business, and another document dated in October 2017 indicating that he arranged drivers for its dry cleaning service. Likewise, the Petitioner's bank account records show the Beneficiary writing checks for the payment of cleaning supplies, paying the dry cleaning business' rent, and handling the company's payroll as of the date the petition was filed. This documentary evidence is in contrast to the Petitioner's assertion that the Beneficiary delegates the non-qualifying operational aspects of its administrative and payroll functions to his subordinates. Indeed, there is no documentary evidence corresponding with the date the petition was filed indicating that the Beneficiary was delegating non-qualifying duties to his subordinates or demonstrating his subordinates performing these tasks.

The Beneficiary's duty description also emphasized that the Beneficiary would create operational procedures for franchising its dry cleaning business. However, the Petitioner stated that this would be a wholly prospective enterprise, noting that this effort had "only just begun" and that it would happen "over the next several years." It further explained that these franchising plans would likely not be ready until the summer of 2019. Likewise, the Petitioner emphasized its development of a mobile dry cleaning application for this franchising business; however, there is no evidence to support this assertion or its claimed engagement of contracted software developers it asserts have been working on this project. Further, the Beneficiary's duties also point to the Beneficiary's marketing efforts, including formulating a marketing plan and budget, and hiring contractors for this purpose. But again, there is little supporting evidence that the Petitioner or its subsidiaries are engaged in substantial marketing activities such that this would make up a significant portion of the Beneficiary's time. In fact, submitted finances for the Petitioner and its subsidiaries showed little expenses for marketing activities. For instance, Dry Cleaning LLC's finances from January through October 2018,

[2] The petition was filed on February 12, 2018.

corresponding to a time after the date the petition was filed, showed only $1,695.71 in "advertising and promotion" expenses during this period.

In contrast, the Beneficiary's duty description suggested that the Beneficiary would likely be involved in all of the day-to-day operational aspects of its subsidiary's dry cleaning business, such as determining how to greet customers, accept payment, close registers, clean clothes, amongst other non-qualifying aspects of the business. Although the Petitioner asserts that the Beneficiary would only focus on these operational aspects with respect to its asserted franchising plan, its timetable for rolling out this business plan suggests otherwise. In light of the lack of evidence of its claimed franchising business and the substantial documentation showing the Beneficiary's involvement in non-qualifying operational tasks, it appears likely that he is primarily engaged in operating the dry cleaning business.

Whether the Beneficiary is an executive employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" executive. *See* sections 101(a)(44)(B) of the Act. Here, the Petitioner does not sufficiently document what proportion of the Beneficiary's duties would be executive functions and what proportion would be non-qualifying operational duties. The Petitioner lists the Beneficiary's duties and provides documentation indicating his involvement in operating its subsidiary's dry cleaning business, but does not adequately quantify the time he spends on these non-qualifying tasks. For this reason, we cannot determine whether the Beneficiary was primarily performing executive capacity duties as of the date the petition was filed. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). We acknowledge that the Petitioner lists several prospective duties that may be qualifying, such as those related to its proposed franchising business, but there is little evidence that the Beneficiary was primarily performing these duties as of the date the petition was filed. 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).

Further, to the extent the Petitioner articulates apparent qualifying duties for the Beneficiary they are generic and could apply to any executive working in any industry. These vague duties do little to substantiate that the Beneficiary was primarily involved in executive-level tasks on a daily basis. For instance, there is little detail or documentation to substantiate the policies and procedures the Beneficiary set, the budgets he created, investors he attracted, administrative aspects he delegated to subsidiary companies, or pricing policies he established. The Petitioner did not clearly articulate the qualifying duties the Beneficiary performed daily, beyond noting one-off business decisions he made, such as his decision to pursue its unsupported franchising business. In addition, the Petitioner did not detail or document the "global policies" the Beneficiary implemented, the performance indicators he set, personnel decisions he made, sales or financial goals he implemented, or budgetary decisions he promulgated. In fact, the Beneficiary's duty description indicated that he spent a "majority of his time" on budgetary matters, including coordinating with an outsourced accountant and reviewing financial reports submitted by this contractor; however, there is little supporting documentation to substantiate these activities.

Even though the Beneficiary holds a senior position within the organization, the fact that he will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in an 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. *Id.* The Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making; however, the position descriptions alone are insufficient to establish that her actual duties would be primarily executive in nature.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in an 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 submitted an organizational chart reflecting that the Beneficiary supervised the Petitioner and both of its subsidiary companies. Within Dry Cleaner, LLC, the Beneficiary was shown to supervise an office manager overseeing a cashier, "laundrymen," ironers, and drivers; however, only the office manager and cashier were identified by name, while the ironers and drivers were shown as "outsourced." Further, the chart indicated that the Beneficiary also oversaw its franchising subsidiary which was shown to employ a software developer (listed as outsourced), a sales manager (shown as "to be hired"), and "attorneys" (outsourced) as well as a "sales team" (outsourced) reporting to the sales manager. It also showed that the Beneficiary supervised an administration and marketing department consisting of a "to be hired" marketing director overseeing a marketing division, including a "to be hired" marketing assistant, an outsourced website developer/SEO, and "additional service providers" utilized "on an as needed basis." Within the administration and marketing department there was also an administration division including an administrative assistant, who was identified by name, and outsourced "payroll services." Finally, the chart reflected that the Beneficiary supervised a financial department consisting of an "outsourced" accountant.

As noted, the Petitioner asserts that the Beneficiary would qualify as an executive under an extended petition. 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. 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.*

The Petitioner has not submitted sufficient evidence to establish that the Beneficiary acted within a complex organizational hierarchy as of the date the petition was filed. For example, although the Petitioner submits a robust organizational chart, several of its positions, such as those related to its prospective franchising business were listed as "to be hired." However, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the intended U.S. operation one year within the date of approval of the petition to support an executive position. There is no provision in United States Citizenship and

Immigration Service (USCIS) regulations allowing for an extension of this one-year period. If the Petitioner does not have the necessary staffing after one year to sufficiently relieve the Beneficiary from performing operational and administrative tasks, they are ineligible for an extension. As such, we will only consider those employees and contractors employed by the business as of the date the petition was filed. Again, the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

State quarterly wage documentation from the first quarter of 2018 corresponding with the date the petition was filed reflects that the Petitioner employed only the Beneficiary and the claimed administrative assistant, while this same documentation specific to Dry Cleaner, LLC indicates that this subsidiary had two employees at this time, the asserted cashier and office manager. However, it is noteworthy that the asserted office manager was shown to earn only $3,600 during that quarter, as compared to the $5,591.71 paid to the cashier, leaving question as to whether the office manager was acting as a subordinate supervisor as claimed. Further, the duties of the office manager did not sufficiently substantiate his role, noting only that he "prepares a budget detailing how he expects the company will operate" and that he is "responsible for staffing this subsidiary."

However, the submitted tax documentation indicates that the dry cleaning subsidiary had only one other employee on staff beyond the office manager, leaving question as to the assertion that this employee would be substantially focused on staffing issues. In addition, the Petitioner indicated that the Beneficiary spent a majority of his time on budgetary matters, leaving uncertainty as to its claim that it had another manager devoted to these tasks. In addition, it is noteworthy that there is no evidence on the record reflecting the Beneficiary delegating tasks to his claimed subordinates; in fact as discussed, there is substantial documentary evidence indicating that he was engaged in all of the operational matters of the dry cleaning business, such as sending clothes out for cleaning, purchasing supplies, arranging drivers, amongst other such non-qualifying tasks.

Furthermore, the Petitioner provided little evidence to substantiate the several independent contractors listed in its organizational chart. On appeal, the Petitioner emphasizes that the Director did not properly consider these contractors when assessing the Beneficiary's eligibility. However, as noted by the Director, the Petitioner did not, and still does not on appeal, submit supporting documentation to substantiate the engagement of these contractors, including its claimed software developers, sales team, attorneys, accountant, website developer, and payroll services contractors. Likewise, the Petitioner provides little evidence to corroborate that the Beneficiary regularly directs these employees, that they under his executive-level control, and that they can be considered a part of its organizational structure.

In fact, the Petitioner provided bank records demonstrating that the Beneficiary was writing checks to its few employees, leaving question as to its assertion that it engaged outsourced payroll services within its organizational chart. Further, although the Petitioner referred several times to a mobile dry cleaning application that would be at the heart of its franchising business plan, there is no evidence of this application or the claimed software developers to whom it was outsourcing this work. In addition, the Beneficiary's duties reference his regular engagement with an outside accountant; however, there is no evidence of this or supporting documentation reflecting him delegating work to this contractor. Therefore, although we acknowledge that independent contractors can be considered within a

Petitioner's organizational structure, it must sufficiently substantiate their engagement and establish that they are under the regular control of the Beneficiary or its greater organization. Here, as noted by the Director, the Petitioner has not provided sufficient supporting evidence to demonstrate that its claimed independent contractors can be considered a part of its greater organizational structure.

On appeal, the Petitioner emphasizes that the Director improperly considered its size in denying the petition. The Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in an executive capacity. S*ee* section 101(a)(44)(C) of the Act. However, it is appropriate for us 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-executive operations of the company or a company that does not conduct business in a regular and continuous manner. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The supporting evidence reflects that as of the date the petition was filed, the Petitioner and its other subsidiaries had only three subordinates below the Beneficiary. This low level of staffing leaves uncertainty as to whether it was sufficiently staffed to primarily relieve the Beneficiary from non-qualifying operational tasks and to support him within a complex organizational hierarchy where he would primarily focus on the broad goals and policies of the organization rather than its day-to-day operations. As such, the focus of our analysis is not exclusively on the size of the company; but rather, whether it had sufficient staffing to primarily relieve the Beneficiary from performing non-qualifying operational duties as of the date the extension petition was filed. However, as we have discussed at length, the Petitioner submitted substantial documentation reflecting the Beneficiary's involvement in non-qualifying operational tasks and it has not sufficiently articulated and documented his qualifying executive-level duties, beyond a one-time decision to pursue a prospective franchising business model. As such, the submitted evidence indicates that the Petitioner has not developed sufficiently within one year to support the Beneficiary within a complex organizational hierarchy.

For the foregoing reasons, the Petitioner has not established that the Beneficiary would act in an executive capacity under an extended petition.

ORDER: The appeal is dismissed.