U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-Q-S-USA-UK, LLC

DATE: JAN. 10, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a manufacturing and packaging service company, seeks to temporarily employ the Beneficiary as the manufacturing and production director 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, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not submit sufficient evidence to establish that the Beneficiary would be employed in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In support of the appeal, the Petitioner submits a brief disputing the basis for denial.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a managerial or executive capacity, or in a specialized knowledge capacity, for 1 continuous year within 3 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, executive, or specialized knowledge capacity. *Id.*

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, shall be accompanied by:

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

II. U.S. EMPLOYMENT IN A MANAGERIAL OR 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. The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as "an assignment within an organization in which the employee primarily":

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

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.

The Petitioner filed the Form I-129 on May 12, 2015 claiming that it was established in 2006 and that it currently has no employees or earnings. In a supplemental explanation the Petitioner stated that its activities in the United States have been limited as a result of the recession and that "resurgence in the economy" is the reason for the Petitioner's current desire to expand its U.S.

operation. At part 9, item 3 of the petition, the Petitioner stated that the Beneficiary "is responsible for ensuring that the fastener and packaging products are produced in an accurate and efficient in [*sic*] accord with precise specifications and processes." The Petitioner added that the Beneficiary would also "reach[] beneficial arrangements" to obtain contractors and facilities that would best meet the demands of the company's operation.

After reviewing the record, the Director issued a request for evidence (RFE) informing the Petitioner that it did not provide sufficient evidence to establish that it would employ the Beneficiary in an executive capacity. The Director offered the Petitioner an opportunity to resolve this evidentiary deficiency by submitting, in part, a statement describing the Beneficiary's proposed executive job duties and the percentage of time he would allocate to each job duty and stating how the Beneficiary would meet each prong of the four-prong definition of executive capacity. The Director also asked the Petitioner to provide evidence of employee wages and job duties.

In response, the Petitioner provided a statement claiming that "[t]he majority of [the Beneficiary's] time would be spent overseeing [the Petitioner's] research and development, manufacturing and production activities" and that his typical daily job duties would include engineering metal parts, developing product specifications, sending emails, "holding Skype or telephone conferences with the onsite manager, [and] acting as a liaison with clients and engineering consultants." The Petitioner noted that the Beneficiary, in his capacity as majority shareholder of both the U.S. and foreign entities, has ultimate decision-making authority with regard to all business matters. The Petitioner did not provide any employee tax documents for 2014 or 2015, indicating that it did not incur "U[.]S[.] tax liability based upon the UK business activities" of its foreign subsidiary and therefore did not pay U.S. income taxes for those years. In a separate statement the Petitioner provided a brief history explaining how the Petitioner and its foreign subsidiary came to be established and discussed the business activities the foreign entity has conducted abroad. The Petitioner also provided 3-, 5-, and 10-year business plans, dated August 28, 2014, explaining the Petitioner's long-term objectives in expanding its business in the United States. The 3-year plan states that the Petitioner would conduct its business as a home office for the first year or two of its operations and further stated that its directors, including the Beneficiary, would be "hands on in all departments working long hours to stabilise [*sic*] growth."

In addition, the Petitioner provided organizational charts depicting its operation and corporate structure. The chart depicting U.S. operations shows the Beneficiary and [redacted] as its director and manager, respectively. Although the chart shows offices in the States of Michigan and Florida, it indicates that the Petitioner's operations, including an engineering facility and a packing/kitting facility, are in Florida. The chart also shows a head office connected to both the Florida and Michigan locations and indicates that the head office consists of sales/marketing, finance, engineering, UK operations, and administration. The second chart, titled "Corporate," indicates that the Petitioner's U.S. operations would be divided into five segments – production engineering, business development, infrastructure and IT, sales and marketing, and finance. The Petitioner also provided documents titled "Directors Management Review Meetings," which list the various agenda items that the Beneficiary and his co-worker, [redacted] considered and handled

between 2010 and 2015 in an effort to expand its operations in the United States. The Petitioner did not, however, expressly state what job duties the Beneficiary would be assigned under an approved petition or assign specific time allocations to the job duties listed in the original supporting statement, where the Petitioner indicated that the Beneficiary would oversee the company's research and development and manufacturing and production functions and further claimed that the Beneficiary would carry out nonexecutive functions, such as engineering metal parts, developing product specifications, and communicating with clients and engineering consultants in his capacity as liaison.

The Director determined that neither the Beneficiary's job description nor the size and scope of the Petitioner lead to the conclusion that the Beneficiary would be employed in an executive capacity.

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary would be employed in an executive capacity.

When examining the executive capacity of the Beneficiary, we will look first to the description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(iv). Published case has determined that the duties themselves will reveal the true nature of the beneficiary's 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). Therefore, we look for a job description that clearly describes the Beneficiary's proposed job duties.

The definition of executive capacity has two parts. First, the Petitioner must show that the Beneficiary performed 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 would *primarily* be engaged in executive duties, as opposed to ordinary operational activities alongside the company's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

In the present matter, the Petitioner did not provide a specific list of the Beneficiary's proposed executive job duties as requested in the RFE. Instead, the Petitioner's RFE response contains notes from numerous directors' meetings, which preceded the filing of the petition and which listed various actions that were assigned to the Beneficiary and his co-worker, seemingly in an effort to further and eventually expand the Petitioner's operations. While the Petitioner states that the Beneficiary will assume the top-most position with the organizational hierarchy and make discretionary decisions on the Petitioner's behalf, neither his placement within the organization nor his decision-making authority would be sufficient to establish that the nature of the Beneficiary's underlying job duties would be primarily that of an executive. We note that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41. Here, the Petitioner focuses on the Beneficiary's use of discretionary authority and his organizational placement without specifying what types of executive job duties the Beneficiary would typically carry out on a daily basis. Further, as previously noted, the information in the Petitioner's initial supporting statement indicates that an unspecified portion of the

Beneficiary's time would be allocated to such nonexecutive functions as engineering metal parts, developing product specifications, and communicating with clients and engineering consultants. In addition, while the same supporting statement indicates that the Beneficiary would "oversee" various other departments within the organization, the fact that the Petitioner claimed no employees or contractors at the time the petition was filed indicates that such oversight is a projection of tasks that the Beneficiary would perform sometime in the future, after a staff of workers become available to perform the job duties within the departments the Beneficiary would oversee. A visa petition may not be approved based on speculation of future eligibility or after a petitioner or beneficiary becomes eligible under a new set of facts. *See, e.g.*, *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

On appeal the Petitioner compares itself to a new office because, although it was established in 2006, it has experienced "limited activity" since then. However, we note that the Petitioner did not request that the Beneficiary's position be considered under the new office regulations at 8 C.F.R. § 214.2(l)(3)(v) on Form I-129, L Classification Supplement, where it indicated that the Beneficiary would not be coming to the United States to open a new office. The Petitioner's claim on appeal that it qualifies as a new office constitutes a material change to the initial petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Further, 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, 8 U.S.C. § 1101(a)(44)(B). 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 a 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 stated that it did not have any employees at the time of filing, and was therefore not comprised of a complex organizational hierarchy. Rather, the organizational charts in the record show that the Beneficiary and his one prospective subordinate would be the Petitioner's only two employees. While the Petitioner's business plans indicate that the Petitioner plans to hire additional employees in the future, as demonstrated in the Petitioner's proposed organizational charts, a visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See, e.g.*, *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. at 49.

On appeal, the Petitioner submits a brief in which it contends that the definition of executive capacity does not require that the qualifying organization must be of a particular size and scope. The Petitioner then goes on to point to the various discretionary decisions that the Beneficiary will make, indicating that such authority is sufficient to classify the Beneficiary as an executive. While we do not dispute that the Beneficiary would have a high level of discretionary authority and would operate autonomously within the U.S. organization, these two characteristics alone are not sufficient to establish that the Beneficiary would be employed in an executive capacity. As indicated above, a subordinate level of managerial employees is inherent to the definition of executive capacity, as this management tier, along with other employees and/or contractors who would perform the organization's operational and administrative tasks, would elevate the Beneficiary's role within the organization to that of an executive whose primary concern would be to direct the management of the organization and focus on the organization's broad goals and policies rather than its day-to-day operations. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See also*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology International*, at 604.

In the present matter, the Petitioner neither claimed nor provided evidence to show that it employed a subordinate level of employees or had contractors performing operational and administrative tasks at the time the petition was filed. It is therefore unclear how, with such a limited organizational structure, the Petitioner would have the ability to relieve the Beneficiary from having to allocate his time to primarily operational and administrative tasks. While formulating the goals and policies of the organization may be one aspect of the Beneficiary's proposed position, the evidence indicates that this element would not be the Beneficiary's primary focus. Rather, the record indicates that the Petitioner's early stage of development would require the Beneficiary to carry out both executive and nonexecutive tasks and that the latter category of tasks would consume the primary portion of the Beneficiary's time until the Petitioner is able to advance to the next phase of development. As such, we cannot conclude that the Petitioner was ready and able to employ the Beneficiary in an executive capacity at the time of filing and on the basis of this adverse finding the instant petition cannot be approved.

Lastly, the Petitioner claims on appeal that USCIS approved an L-1A petition that was filed simultaneously by the same Petitioner on behalf of another employee. We note that each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. 8 C.F.R. § 103.2(b)(16)(ii). In matters relating to a nonimmigrant visa petition validity involving the same petitioner, beneficiary, and underlying facts, USCIS will generally give some deference to a prior determination of eligibility. However, the mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a separate petition of another visa. *See, e.g., Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988).

In the present matter, the Director reviewed the record of proceeding and concluded that the petitioner was ineligible for the nonimmigrant visa based on the Petitioner's inability to establish eligibility. In both the RFE and the final denial, the Director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. If the previous petition filed by the same Petitioner on behalf of a different beneficiary was approved based on the same minimal evidence as contained in the instant record of proceeding, the approval would constitute error on the part of the Director. Even if a service center Director had approved the nonimmigrant petition on behalf of the Beneficiary's proposed subordinate, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

III. EMPLOYER-EMPLOYEE RELATIONSHIP

In addition, while not addressed by the Director, a remaining issue to be examined is whether the Petitioner established that the Beneficiary and the foreign entity had an employer-employee relationship at the time of the Beneficiary's claimed employment abroad and whether the Petitioner has such a relationship with the Beneficiary.

Section 101(a)(15)(L) of the Act states that only foreign nationals who were "employed" abroad and are coming to the United States "to continue to render services to the same employer or to an affiliate or subsidiary thereof" will merit classification as an intracompany transferee. 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, where he will be temporarily employed in a managerial or executive capacity. This is in contrast to provisions in the Act, such as section 101(a)(15)(E), which permits the foreign national to file a nonimmigrant petition on behalf of himself or herself provided that the foreign national meets certain other conditions regarding a treaty trader or treaty investor.

The factors of ownership and control are critical in determining whether the Beneficiary had an employer-employee relationship with his employer abroad and whether he has such a relationship with the Petitioner. *See Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440, 451 (2003) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992)).

In the matter at hand, the record indicates that Beneficiary directly owns and controls the majority of the Petitioner and the foreign entity where the Beneficiary has been employed. The record further shows that the Beneficiary assumed the top-most position within the foreign entity's organization and that the same would be true of the Beneficiary's proposed position with the Petitioner. The Petitioner claims that the Beneficiary was not and would not be subject to a higher authority in either of his respective positions. Thus, by virtue of owning the majority of the Petitioner and the foreign entity, thereby controlling both entities, the Beneficiary's employer-employee relationship with either entity is compromised. For this additional reason, the appeal will be dismissed.

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of S-Q-S-USA-UK, LLC*, ID# 126486 (AAO Jan. 10, 2017)