U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-T- INC.

DATE: JAN. 14, 2020

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a retailer and wholesaler of electronic and print products, seeks to employ the Beneficiary temporarily as its vice president 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 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 on the grounds that the Petitioner did not establish, as required, that the Beneficiary has been employed abroad in a managerial or executive capacity or that he will be employed in a managerial or executive capacity in the United States.

The matter is now before us on appeal. The Petitioner asserts that the evidence of record, including the materials submitted with the appeal, establish that the Beneficiary was employed abroad in an executive capacity and will continue to be employed in an executive capacity in the United States, thus entitling him to the requested visa classification. The Petitioner does not claim that the Beneficiary has been employed or will be employed in a managerial 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.*

As defined in section 101(a)(44)(B) of the Act, the term "executive capacity" means 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.

Section 101(a)(44)(C) of the Act further provides, in pertinent part, that:

> If staffing levels are used as a factor in determining whether an individual is acting in a[n] . . . executive capacity, [U.S. Citizenship and Immigration Services] shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a[n] . . . executive capacity . . . merely on the basis of the number of employees that the individual . . . directs or has directed.

Based on the statutory definition of executive capacity, the petitioner must first show that the beneficiary performs certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). The petitioner must also prove that the beneficiary is *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 must provide job descriptions that clearly describe the duties performed by the beneficiary and indicate whether such duties are in an executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii) and (iv). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the beneficiary's actual duties and role in the business.

II. EMPLOYMENT ABROAD

In letters accompanying the petition in 2018 the Petitioner and its foreign affiliate, [redacted], in [redacted] Venezuela, stated that the Beneficiary has been employed by the foreign affiliate since 2009 and from 2014 up to the present has headed its sales, marketing and technical services department with a team of six employees. An organizational chart was submitted for [redacted] which identified the Beneficiary's position and his subordinate employees, as well as 14 other employees organized in three other divisions.

The Petitioner provided few details about the Beneficiary's job duties at [redacted] with its initial evidence, simply stating that he is responsible for overseeing his department's sales, marketing, and technical services responsibilities in addition to identifying potential expansion opportunities. In a

request for evidence (RFE) the Director stated that the record was insufficient to establish that the Beneficiary was employed by the foreign affiliate in an executive capacity for at least one of the three years prior to the filing of the instant petition, and identified the types of documentation that should be submitted to overcome this deficiency. In response to the RFE the Petitioner submitted some additional evidence relating to the Beneficiary's subordinate employees, but no further evidence about the Beneficiary's own job duties. The Director found that the Petitioner had not submitted sufficient evidence to show that the Beneficiary was employed in an executive capacity by the foreign affiliate in Venezuela.

On appeal the Petitioner submits no further evidence of the Beneficiary's job duties with [redacted], but asserts that the evidence of record establishes that the Beneficiary, as director of sales, marketing and technical services, influences decision-making at the highest level of the foreign affiliate. According to the Petitioner, the Beneficiary's subordinate employees perform some supervisory functions as well as sales and technical support duties. The job descriptions submitted in response to the RFE cover only four of the six subordinate employees who allegedly work beneath the Beneficiary. They include an "engineer" (identified in the original organizational chart as a "salesman") who performs day-to-day sales-related activities and reports to the Beneficiary, a technical services manager who "is certified in numerous technical service courses for different machinery products and printers" and reports to the Beneficiary, and two technicians who provide "after sales technical support" and repair services and report to the Beneficiary. The Petitioner contends that the Beneficiary's responsibilities primarily involve executive functions, not day-to-day sales, marketing, technical support, and other non-executive activities. The Petitioner cites a federal court decision that the small size of an organization, while relevant, cannot by itself support a finding that an employee is not acting in an executive capacity, and an AAO determination that in considering an organization's staffing level the reasonable needs of the organization as a whole must be considered. *See Brazil Quality Stones, Inc. v. Chertoff*, 531 F.3d 1063, 1070 (9th Cir. 2008) (quoting *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); and *Matter of Leacheng International, Inc.*, 26 I&N Dec. 532, 535 (AAO 2015).

The Petitioner's claim that the Beneficiary performs primarily executive functions for [redacted] is fatally undermined by the fact that it has still not produced a detailed description of the Beneficiary's job duties with the foreign affiliate, as required by 8 C.F.R. § 214.2(l)(3)(ii) and (iv). Without a detailed description of the Beneficiary's job duties, including the nature of his interaction with subordinate employees in his division of sales, marketing, and technical services and with the board of directors above him, we cannot determine whether the Beneficiary's work at [redacted] meets the four criteria of executive capacity as defined in section 101(a)(44)(B) of the Act. In particular, without a detailed description of the Beneficiary's job duties indicating how he works with subordinates the Petitioner has not demonstrated that the Beneficiary either "directs the management" or "establishes the goals and policies" of his division, as required by section 101(a)(44)(B)(i) and (ii) of the Act. Furthermore, without a detailed description of the Beneficiary's job duties indicating how he relates to the board of directors (and any other superiors in the organization), the Petitioner has not demonstrated that the Beneficiary "exercises wide latitude in discretionary decision-making" and "receives only general supervision or direction" from higher-ups in the company, as required by section 101(a)(44)(B)(iii) and (iv) of the Act.

For the reasons discussed above, the Petitioner has not established that the Beneficiary was employed by its foreign affiliate in an executive capacity for one continuous year within three years preceding the Beneficiary's application for admission into the United States, as required by Section 101(a)(15)(L) of the Act and 8 C.F.R. § 214.2(l)(3)(ii)-(iv). Accordingly, the petition cannot be approved.

III. EMPLOYMENT IN THE UNITED STATES

In its letter accompanying the petition the position of vice president was summarily described as:

> Assisting President in management of business development and staff. Selection and supervision of the technical staff and sales staff that enters the company, until this staff engages in the company.

The Beneficiary's specific job duties as vice president were listed as follows:

- Appraise and evaluate each business opportunity.
- Determine the best option.
- Negotiate the purchase price.
- Direct accountant on due diligence to ensure financial accuracy.
- Ensure all legalities, licenses, insurance etc. are in place.
- Establish corporate aims, goals, objectives.
- Establish corporate customer relations policy.
- Establish corporate budget for management.
- Direct the change of management.
- Review the management staff, procedures and work ethics.
- Determine changes in policies and procedures to better services and efficiency.
- Train management personnel in new policies and procedures.
- Formulate staff meetings to meet and review current staff.
- Hold staff review discussions with management personnel with view for promotions, demotions, additional staff required and dismissals.
- Complete review of current services and determination of changes and new services to be added to improve customer satisfaction.
- Review of current marketing strategies and assessment of accomplishment.
- Review of new marketing and advertising media and determination of new approaches.
- Reporting to the board of directors of foreign affiliate on determinations and suggestions for improved future trading.

The letter also identified additional positions in the United States which the Petitioner intended to fill, including a technical service manager, salespersons, technicians and an assistant. Appended to the letter was a proposed organizational chart with 15 prospective positions subordinate to the vice president. Only two of the positions had the name of the prospective employee.

In the RFE the Director indicated that additional evidence was needed to show that the Beneficiary would be employed in an executive capacity, and identified the types of documentation that should be submitted. In particular, the Director requested the submission of:

- a letter from the Petitioner describing the Beneficiary's typical executive duties, the percentage of time spent on each, and how they met the four criteria of "executive capacity" as defined in section 101(a)(44)(B) of the Act;
- an organizational chart or diagram of the Petitioner's organizational structure listing the Beneficiary and all employees in his division, department, or team including their names, job titles, job duties, educational levels, and salaries;
- copies of the Petitioner's State Quarterly Wage Reports for the second and third quarters of 2018;
- copies of the Petitioner's payroll summary and federal wage and tax forms showing wages paid to all employees under the Beneficiary's direction; and
- copies of the Petitioner's employment agreements with newly hired employees under the Beneficiary's management.

The Petitioner did not submit any of the requested materials in its response to the RFE.

In denying the petition the Director found that the job duties listed in the Petitioner's original letter did not appear to be primarily executive in nature, but were rather more indicative of an employee who would perform the tasks needed to provide a service or produce a product. The Director also found that the Petitioner did not appear to have a sufficient organizational structure to support the proposed executive position since the record indicated that the U.S. entity at present had no employees.

On appeal the Petitioner objects to the Director's characterization of the vice president's duties as not primarily executive in nature. The Petitioner submits a couple of online job search apps from ZipRecruiter and America's Job Exchange listing the job duties and responsibilities of vice presidents, and asserts that these lists closely correlate with the job duties of the proffered position in this petition. The relevance of this evidence in unclear since the Petitioner does not explain how the duties and responsibilities of vice presidents as listed in these online job search apps meet the statutory criteria of "executive capacity" at section 101(a)(44)(B) of the Act.

The Petitioner acknowledges that it has no employees at present, but asserts that it is using the human capital of its foreign affiliate to fulfill its work needs until the Beneficiary is transferred to the United States, after which it will begin to hire for the job positions on its prospective organizational chart. While we can consider the use of employees from a related overseas corporation, *see Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO April 14, 2016), the Petitioner must submit evidence of their actual employment and provide specific details as to how they support the Beneficiary. It has not done so in this case.

The Petitioner cites several AAO decisions in previous petitions for intracompany transferees in which executive or managerial capacity was established for the beneficiary despite the small size of the U.S. business. While the Petitioner is correct that its small size is not in itself disqualifying, it must still demonstrate that the Beneficiary will in fact be working in an "executive capacity" in the United States, as defined in section 101(a)(44)(B) of the Act.

The Petitioner must establish its eligibility for the requested immigration benefit at the time the petition is filed and throughout the adjudicatory process. *See* 8.C.F.R. § 103.2(b). Without any subordinate employees at the outset of his intended assignment in the United States, it is unclear how the Beneficiary could avoid spending the bulk of his time performing the day-to-day operational tasks of running an office. Some of the Beneficiary's job duties are so broadly or vaguely described that it is difficult to discern exactly what the Beneficiary's role would entail. Others, as discussed by the Director in his decision, involve day-to-day business operations that do not involve high-level executive functions. Furthermore, the Petitioner has not indicated the percentage of time the Beneficiary will spend on each duty, either in its initial letter, or in its subsequent response to the RFE, or now on appeal. Therefore, even if some of the duties listed for the Beneficiary may be executive in nature, the record does not indicate that the duties will be primarily executive in nature, as required to meet the statutory criteria of "executive capacity" in section 101(a)(44)(B) of the Act.

It is inherent to the definition of "executive capacity" – the criteria for which include "direct[ing] the management of the organization or a major [part thereof]" and "establish[ing its] goals and policies" – that the entity must have a subordinate level of employees for a beneficiary to direct and the beneficiary must primarily focus on the broader 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 "direct" the enterprise as the owner, co-owner, or sole managerial employee. Whether a beneficiary's job meets the definition of "executive capacity" turns on whether the Petitioner sustains its burden of proving that the duties are "primarily" executive in nature, as set forth in section 101(a)(44)(B) of the Act. Having broad discretionary authority over a petitioner's day-to-day business operations does not infuse a position with the definitional elements of "executive capacity."

For the reasons discussed above, the Petitioner has not established that the Beneficiary will be employed in the United States in an executive capacity, as required by Section 101(a)(15)(L) of the Act and 8 C.F.R. § 214.2(l)(3)(ii). On this ground as well the petition cannot be approved.

III. CONCLUSION

The Petitioner has not established that the Beneficiary was employed abroad in an executive capacity for one continuous year within three years preceding the Beneficiary's application for admission into the United States and that he will be continue to be employed in an executive capacity in the United States. The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of M-T- Inc.*, ID# 6268377 (AAO Jan. 14, 2020)