U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF U-M- SA DE CV

DATE: JAN. 19, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a marketing firm in Mexico, filed the petition on behalf of its new U.S. subsidiary, It seeks to temporarily employ the Beneficiary as chief executive officer (CEO) of the U.S. company's new office under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the California Service Center denied the petition, concluding that the record did not establish, as required, that: (1) the new U.S. office will employ the Beneficiary in an executive capacity within one year of approval of the petition; and (2) the U.S. office has secured sufficient physical premises.

The matter is now before us on appeal. In its appeal, the Petitioner submits various exhibits, mostly duplicating prior submissions, and asserts that the Director erred with regard to specifics of the company's office space and staffing. The Petitioner also maintains that it has established that it will employ the Beneficiary in a primarily 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.* The new office must support a managerial or executive position within one year of the petition's approval. 8 C.F.R. § 214.2(l)(3)(v)(C).

II. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that its new U.S. office would employ the Beneficiary in a primarily executive capacity within one year of the approval of the petition.[1]

An executive capacity is an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

A. Duties

When examining the executive capacity of the Beneficiary, we will review the Petitioner's description of the Beneficiary's 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 a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The definition of executive capacity has two parts. First, the Petitioner must 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 managerial or 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 distributes free materials such as notebooks to college students. The materials contain promotional content, such as advertisements and coupons, from local businesses. The U.S. company's business plan stated that the Beneficiary "will devote full time to administration to administration and management of [redacted] and to growing its business by utilizing his vast experience and skills to obtain clients desirous of successfully marketing to college students."

After the Director asked for more details about the Beneficiary's intended work in the United States, the Petitioner stated:

[1] The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity.

> Currently, [the Beneficiary] is negotiating agreements with U.S. universities and colleges, reporting back to the board in Mexico, securing advanced funding to print the materials by acquiring sponsors, and overseeing an assistant(s) who helps with the day-to-day upkeep of the company. [The Beneficiary] enjoys a wide-latitude to enact policy that steers the company and makes broad decisions about with who [redacted] enters into partnerships. For example, he has already decided to focus on smaller businesses in the United States rather than large corporations like [redacted] in order to build a broader client base that is less vulnerable to losing individual clients.

The Petitioner also submitted a list of the Beneficiary's initial duties:

- Open and initiate the office in the US.
- At the beginning answer the phone calls and emails of the company.
- Get the meetings and appointments of the company.
- Create the strategy and the course of the company.
- Find the universities [to] offer the notebooks.
- Get the personnel for the key positions to startup the company in the US.
- Find and follow up [with] the new clients that get the sponsorship of the notebook.

In the decision denying the petition, the Director stated that the Petitioner did not provide enough information to show that the Beneficiary's daily duties would be primarily executive (or managerial) in nature.

On appeal, the Petitioner asserts that it "provided evidence of specific descriptions of the day to day activities of the CEO," and that the Beneficiary "is responsible for steering the company and deciding with whom to partner." At issue is not the level of the Beneficiary's authority, but whether his duties would be *primarily* executive within one year after approval of the petition. The submitted job description combines the high-level function of setting company strategy with non-qualifying tasks such as answering the telephone. The Petitioner has not shown that qualifying executive functions would predominate within one year of approval of the petition.

B. Staffing

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

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the

organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and 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 an 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 U.S. company's business plan indicated that the company would eventually employ the following subordinate staff:

- Chief Financial Officer
- Public Relations Director
- Operations Manager
- Two Sales Representatives

A "Personnel Plan" included in the business plan indicated that the company would hire three employees during the first year. Growth plans after the first year of operations cannot establish eligibility under the new office provisions in the regulations.

After the Director asked for additional details, the Petitioner stated that the U.S. company's initial employees would be "the CEO, an Assistant, and a Sales Representative within the first year." The Petitioner submitted the following job descriptions for those two intended employees:

Assistant

- Make and take calls for the CEO
- Organize client information and files at the direction of the CEO
- Welcome clients arriving on-site to meet with the CEO or Sales Rep
- Organize CEO's calendar and schedule
- Perform other day-to-day office tasks at the behest of the CEO

Sales Representative

- Make[], present and [be] responsible [for] the sales strategy of the year.
- Represent the company with clients.
- The creative mind in the company.
- Develop a sales team for the company.
- Responsible [for] sale [of] all the media tools that the company has.
- Make a database of clients for the company.

In the denial notice, the Director stated that the Petitioner did not provide sufficient information about the duties that the Beneficiary's subordinates would perform. Therefore, the Director found that the Petitioner had not shown that those subordinates would relieve the Beneficiary from primarily having to perform non-qualifying tasks.

On appeal, the Petitioner repeats the job descriptions quoted above and states that it has established that the two named subordinates will carry out the U.S. company's day-to-day functions. Those job descriptions indicate that both the assistant and the sales representative would be front-line workers, primarily performing clerical or operational tasks. The Petitioner did not establish any lower layers of management that the Beneficiary would oversee in an executive capacity. The Beneficiary would be a first-line supervisor of non-professional employees whose duties would be neither executive nor managerial.

The Petitioner has not established that the U.S. company will employ the Beneficiary in a primarily executive capacity during the first year following approval of the petition.

III. NEW OFFICE

If the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner must submit evidence that it has secured sufficient physical premises to house the new office. 8 C.F.R. § 214.2(l)(3)(v).

In its business plan, the U.S. entity stated plans to employ three individuals during its first year, growing to seven in the fifth year. The company leased space in a shared office suite; the [redacted] exclusive space consisted of a 15'7"×18'11" office and a 6'×6' workstation. The Petitioner asserted that "[t]he leased space is sufficient to house the 3 employees that [redacted] Promotions will initially employ."

In the denial notice, the Director stated: "the actual space that is rented as a new office is one single office and a cubicle. The kitchen and the shared conference room . . . [cannot] be deemed as a work space." The Director found that the Petitioner had not shown "that the new office will have sufficient space for a workforce of 5 employees as projected in [the Petitioner's] statements."

On appeal, the Petitioner observes that, while the U.S. company will grow, it "will initially employ only three employees." This figure appears in the pre-filing business plan, and therefore does not represent an after-the-fact revision. We agree with the Petitioner that the initial office space need not be large enough to hold employees whose planned hiring is years in the future.

The Petitioner has documented sufficient physical premises for its planned three-person first-year work force. We therefore withdraw this ground for denial, but will still dismiss the appeal because the other ground, already discussed, still stands.

IV. CONCLUSION

The Petitioner has secured sufficient physical premises for the new office's planned first year of operations. The Petitioner has not, however, established that the new office will support an executive position within one year of approval of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of U-M- SA de CV*, ID# 916276 (AAO Jan. 19, 2018)