U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-USA LLC

DATE: JAN. 27, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a freight forwarding and courier service provider, seeks to temporarily employ the Beneficiary as its president 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 an executive capacity.

The matter is now before us on appeal. In support of the appeal, the Petitioner submits additional evidence and 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 AN EXECUTIVE CAPACITY

The Director denied the petition based on the finding that the Petitioner did not establish that the Beneficiary will be employed in an 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, June 28, 2016, claiming five employees and a net income of $2695. In a supplemental statement the Petitioner claimed that the Beneficiary would direct the Petitioner's finances and human resource policies, set goals and create long- and short-term marketing strategies, research and develop new service offerings, meet with managers and review

financial statements to monitor the company's performance, and serve as the company's representative and liaison. The Petitioner also provided an organizational chart, which depicts the Beneficiary as both president – a position whose placement is at the top of the company's organizational hierarchy – and as general manager – a position that is depicted as the direct subordinate of the company's president. The next tier of employees includes an administration manager overseeing an accountant and an unspecified number of bookkeepers, and an operational manager overseeing an assistant manager, a data entry clerk, and two operations assistants. The chart indicates that the positions of administration manager, accountant, and bookkeeper were all vacant at the time of filing.

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, specifying the percentage of time he would allocate to each job duty, and explaining 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 employment agreements for any newly hired employees that would be under the Beneficiary's supervision.

In response, the Petitioner provided a statement containing the following list of the Beneficiary's proposed job duties and their respective time allocations:

- Create, communicate and implement the company's vision, mission and overall direction, so that every employee feels . . . that their role is important to the organization. This would take 25% of his time.
- Set specific goals and create long- and short-term strategies for the development and marketing of our services, which would take about 20% of his time.
- Create financial and human resources policies, such as evaluating the company's staffing needs and determining the guidelines for disciplinary actions, incentives, general rules, recruitment and firing. This would take 15% of his time.
- Lead, guide, direct and evaluate the work of current managers and other executives that may join us in the future. This task would take 10% of his time.
- Research and develop current and new offerings. . . . For this he will be formulating and implementing the strategic plan that guides the direction of the business. This will take about 10% of his time.
- Conduct weekly meetings with the managers to monitor [the] company's performance by reviewing financial statements, sales and other reports prepared by each department. . . . This will take 10% of his time.
- Serve as the face of the company and represent it in international affairs, before the media, and throughout the external community will [*sic*] account for 5% of his time.
- Serve as liaison between [the foreign entity] and [the Petitioner]. This will take 5% of his time.

The Petitioner also explained that while it has been using outsourced services to meet its accounting needs, it plans to hire two in-house employees to fill the accountant and bookkeeper positions. The Petitioner resubmitted the original organizational chart and provided job descriptions and salaries of the employees listed therein. Lastly, the Petitioner provided evidence of wages paid to employees in 2014 and 2015; no wage documents were provided to support the Petitioner's organizational chart depicting the Petitioner's claimed staffing levels as of June 2016 when the petition was filed.

The Director determined that neither the Beneficiary's job description nor the size of the Petitioner's support staff supported a conclusion that the Beneficiary would be employed in an executive capacity. The Director noted that portions of the provided job description were vague in describing the Beneficiary's specific job duties. The Director also questioned how, with a limited staffing structure, the Petitioner would realistically require the Beneficiary to allocate 25% of his time to "mission awareness and morale improvement."

On appeal, the Petitioner asserts that the Director placed undue emphasis on the number of employees at the time of filing and did not consider evidence that the company had additional employees in 2014 and 2015. Further, the Petitioner maintains that the Director did not acknowledge that the company temporarily outsources transportation and pick-up services, technology and network services, or that it receives support from its foreign affiliate on an as needed basis. Finally, the Petitioner contends that the Director did not properly weigh the Beneficiary's duties in light of the company's submitted business plan, which explains why it seeks to transfer an executive employee to improve the U.S. company's performance and pursue expansion opportunities in the U.S. market.

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we concur with the Director's conclusion.

When examining the executive capacity of the Beneficiary, we will look first for a job description that clearly describes the Beneficiary's specific proposed job duties. *See* 8 C.F.R. § 214.2(l)(3)(iv). 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). Further, we note that 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*, 940 F.2d 1533. Accordingly, we look for information regarding how much time the Beneficiary would spend performing executive tasks versus tasks that are operational or administrative in nature. 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*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In the present matter, the job description is primarily comprised of vague statements that stress the Beneficiary's leadership position within the organization without delineating his specific daily tasks or explaining how the proposed position would meet the four-prong definition of executive capacity. For instance, the first element listed in the Beneficiary's job description indicates that 25% of his time would be devoted to creating and implementing the company's vision. However, other than stating that the Petitioner looks to expand its operations in the United States, it did not specifically define the company's "vision" or "mission" within the scope of a freight forwarding and courier services business. The Petitioner also did not associate any specific daily tasks with this broad area of responsibility. As previously noted, 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.

Next, while the Petitioner conveyed an understanding of the Beneficiary's high degree of discretionary authority in stating that he would set the company's goals and marketing strategies and create policies regarding the Petitioner's personnel and finances, these overall claims are vague and do not specify what underlying tasks the Beneficiary would carry out or what considerations he would take into account in setting the Petitioner's goals, strategies, and policies in the key categories of marketing, finance, and human resources. The Petitioner also does not explain who would actually carry out the marketing tasks or recruit personnel. Further, given that the Petitioner's existence preceded the filing of the instant petition by several years, it stands to reason that certain goals, strategies, and policies were already in place at the time of filing; it is therefore unclear why the Beneficiary would have to allocate approximately 35% of his time to setting, creating, and/or changing the previously existing goals, strategies, and policies. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner also stated that the Beneficiary would allocate 10% of his time to leading, directing, and evaluating the work of subordinate managers and another 10% of his time conducting weekly meetings with the company's managers. However, to the extent that the Petitioner's organizational hierarchy at the time of filing included only one manager, the reference to a management tier comprised of multiple managerial employees is not supported by the record and does not lead to an accurate portrayal of the Beneficiary's role in directing the management of the U.S. operation.

While the Petitioner explains that it anticipates hiring additional employees in the future and illustrates this goal in its business plan, 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 (Reg'l Comm'r 1978). Here, the Petitioner's organizational chart shows that it did not have multiple managers at the time of filing, thereby resulting in the Beneficiary himself having to fill one of the managerial positions – that of general manager – upon his initial transfer, along with his proposed position of president. While the Petitioner addresses this issue on appeal, claiming that the Beneficiary would temporarily assume the role of general manager only until a viable candidate is able to fill that position, such a candidate had

not been found by the time the petition was filed. As such, the Petitioner's needs at the time of filing would not be satisfied if the Beneficiary were to exclusively focus on his proposed role as president of the organization. Further, the Petitioner has indicated that the Beneficiary will simultaneously fill two roles within the company, but has not explained how he will divide his time between his two positions, nor provided a detailed breakdown of his proposed duties as general manager.

In light of the deficiencies catalogued, the Beneficiary's job description does not establish that he would allocate his time primarily to the performance of executive job duties.

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.*

Here, while the Petitioner has established that the Beneficiary will more likely than not establish the goals and policies of the company and exercise wide latitude in discretionary decision-making, the record as a whole does not establish that these would be his primary duties. As previously discussed, the organizational hierarchy illustrated in the matter at hand depicts only one managerial employee at the time the petition was filed. Therefore, the Petitioner did not have the managerial tier of employees through whom the Beneficiary would be able to direct the management of the organization. In fact, the Petitioner indicates that the Beneficiary will simultaneously fill two roles within the company and has not provided an estimate of how much time he would allocate to the general manager position, which is not claimed to be an executive position.

The Petitioner correctly observes that a company's size alone may not be the determining factor in denying a visa petition for classification as a multinational manager or executive without taking into account the reasonable needs of the organization. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS 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 or a "shell 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).

On appeal, the Petitioner contends that its business plan establishes a reasonable need for an executive employee to direct its expansion in the U.S. market, which it describes as a key function of

its organization. It also suggests that the Director placed too much emphasis on the size of the company without considering its prior staffing levels or the company's use of contractors and support from its foreign affiliate's staff. As noted, the Petitioner did not provide any evidence of its staffing levels as of June 2016 and therefore did not corroborate its employment of the five individuals named on its organizational chart. The Petitioner emphasizes on appeal that it employed 10 employees in 2014 and 15 employees in 2015, and has previously employed as many as eight staff concurrently, suggesting that the company was not fully staffed at the time of filing. Based on these figures and the lack of evidence of its staffing levels in June 2016, we cannot determine that the Petitioner had adequate staff, either direct employees or contractors, to relieve the Beneficiary from involvement in the day-to-day operations of the company upon his arrival to the United States. While we do not question the Petitioner's decision to transfer the Beneficiary to implement its new business plan, or the discretionary authority involved in implementing the plan, it must still submit sufficient evidence to establish how his duties would qualify as primarily executive in nature and how the company can currently support a qualifying executive position.

Based on the deficiencies discussed, the Petitioner has not established that the Beneficiary would be employed in an executive capacity.

III. QUALIFYING RELATIONSHIP

In addition, while not addressed by the Director, we identify a remaining issue that impacts the Petitioner's eligibility, which is whether the Petitioner established that it has a qualifying relationship with , the Beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

> (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> *(1)* Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
>
> . . . .
>
> (L) *Affiliate* means
>
> *(1)* One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

> *(2)* One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. . . .

In the Form I-129, the Petitioner stated that it has an affiliate relationship with the Beneficiary's foreign employer. Specifically, the Petitioner stated that the Beneficiary owns 60% and his spouse owns 40% of the U.S. entity while the Beneficiary owns 47%, his spouse owns 50%, and and each own 1% of the foreign entity. Although the Petitioner's ownership breakdown is reiterated on page 7 of its business plan, and stated in an amendment to its articles of organization filed with the Florida Secretary of State in 2013, we note that in the Petitioner's 2014 Form 1065, U.S. Return of Partnership Income, Schedule B-1, Part II, the Petitioner indicated that the Beneficiary owns a 99.99% interest in the company.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *See Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the present matter, a comparison of the Petitioner's original claim as made in the Form I-129 and in the Petitioner's business plan with the information provided earlier in the Petitioner's 2014 tax return indicates that the Petitioner's claims regarding its ownership are inconsistent. While the petition, business plan, and the 2014 tax return commonly indicate that the Beneficiary owns the majority of the U.S. entity, the Petitioner's tax return is inconsistent with the other two documents in terms of the specific percentage the Beneficiary actually owns. The Petitioner has not resolved this inconsistency with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

We further note that even if the Petitioner had provided consistent evidence regarding its ownership, the ownership breakdowns described above would not establish an affiliate relationship between the two entities as the Petitioner claims. To establish eligibility in this case, the Petitioner must establish that it and the foreign employer share common ownership and control. Control may be "*de jure*" by reason of ownership of more than 50 percent of outstanding stocks of the other entity or it may be "*de facto*" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982).

First, the Petitioner has not established that the two entities are owned and controlled by the same parent or individual, as required by the definition of "affiliate" at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1). While the evidence of record indicates that the Beneficiary owns a majority interest in the Petitioner,

the evidence also indicates that the Beneficiary owns only 49.97%, i.e., less than a majority, of the foreign entity and does not exercise *de jure* control over that entity.

Further, given that the U.S. entity is owned by two individuals with the Beneficiary owning a majority interest, while the foreign entity is owned by five individuals with the Beneficiary's spouse owning a 50% interest, we cannot conclude that the two legal entities in question are owned and controlled by the same group of individuals with each individual owning and controlling approximately the same share or proportion of each entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(2).

The Petitioner has stated that "[b]oth companies are majority owned by [the Beneficiary's spouse] and [the Beneficiary]." However, we are not required to accept a combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies. Here, the Petitioner has neither claimed nor provided evidence that the Beneficiary and his spouse have such agreements or proxies in place. In fact, without such agreements or proxies, and based on the ownership interests described, we find that the Beneficiary has *de jure* control over the petitioning entity while his spouse has *de jure* control over the foreign entity.

The Petitioner's statements suggest that it considers both companies to be majority owned by the Beneficiary and his spouse together based on their marital relationship. Spousal and familial relationships do not constitute qualifying relationships under the regulations. *See Ore v. Clinton*, 675 F. Supp. 2d 217, 226 (D.C. Mass. 2009) (finding that the petitioner and the foreign entity did not qualify as "affiliates" within the precise definition set out in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L), despite petitioner's claims that the two companies "are owned and controlled by the same individuals, specifically the Ore family").

Based on the deficiencies discussed above, the Petitioner has not established that it has a qualifying relationship with the foreign entity. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons. 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 D-USA LLC*, ID# 197045 (AAO Jan. 27, 2017)