U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-T-, LLC

DATE: JULY 9, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a company "engaged in the business of technology development and sales," seeks to continue the Beneficiary's temporary employment as chief executive officer (CEO) under the L-1A nonimmigrant classification for intracompany transferees.[1] 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 the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner contends that the Director overlooked an extensive duty description submitted for the Beneficiary, duties provided for his asserted subordinates, and tax documentation indicating that he has professional subordinates who relieve him from primarily performing non-qualifying tasks.

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 September 15, 2016, until September 14, 2017. 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 first issue to be addressed is whether the Petitioner established that the Beneficiary would be employed in an executive capacity under the 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.

The statute defines an "executive capacity" as 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 stated that it and its foreign parent are "engaged in the business of technology development and sales." In support of the petition, the Petitioner indicated that the Beneficiary would supervise managers "who provide technology solutions to customers," provide "key strategic technology and project management directives," develop human resources policies, "set guidelines for quality management," and "identify potential trading deals and contracts." In a separate duty description, the Petitioner further explained that the Beneficiary was tasked with establishing the "goals and policies of the company," formulating "strategic planning," making all the decisions from an executive standpoint, directing and supervising management, reviewing and approving contracts, and representing the company at public events.

In response to the Director's request for evidence (RFE), the Petitioner provided a duty description relevant to the duties the Beneficiary would perform under the extended petition. The Petitioner stated that the Beneficiary would spend 25% of his time on "executive strategic planning," including building "alliances and partnerships" and recommending "yearly budgets." The Petitioner also indicated that the Beneficiary would devote 25% of his time to establishing operational and human resources goals and policies and another 25% on directing the management of the company, including implementing "long and short term plans," developing "culture and vision," and directing "public relations." In addition, the Petitioner explained that the Beneficiary would be responsible 20% of the time for making "executive decisions," consisting of providing "executive leadership" and updating the company "strategic plan, policies and its implementations." Lastly, the Petitioner stated that the Beneficiary would spend 5% of his time on reporting to the company's members.

The Petitioner did not submit a sufficiently detailed duty description describing the Beneficiary's day-to-day executive-level duties that credibly establishes he would devote his time primarily to qualifying tasks. The Beneficiary's duty description includes several generic duties that could apply to any executive acting in any business or industry and they do not provide insight into the actual nature of his role. The Petitioner provided insufficient examples and little supporting documentation to demonstrate the Beneficiary's performance of qualifying duties, such as strategic planning he established, alliances and partnerships he built, yearly budgets he recommended, or operational and human resources policies he established. Further, the Petitioner did not articulate or document long and short term plans the Beneficiary implemented, culture and vision he developed, public relations he directed, or "executive decisions" he made.

We acknowledge that the Petitioner submitted two memorandums issued by the Beneficiary in November and December 2017; however, this documentation does not sufficiently demonstrate that he devoted a majority of his time to executive-level tasks. One letter reflects the Beneficiary instructing the company's employees not to impose their religious beliefs on others during the holidays while the other extended the Thanksgiving holiday. These memorandums do not substantiate the Beneficiary's primary focus on strategic executive matters, including those duties mentioned in his duty description, such as strategic planning he established, alliances and partnerships he built, yearly budgets he recommended, operational and human resources policies he established, amongst others. Specifics are clearly an important indication of whether a beneficiary's

duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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).

To the extent that the Beneficiary submits detail and documentation regarding the Beneficiary's daily duties, this evidence reflects his involvement in non-qualifying operational tasks. For instance, the Petitioner submits several quotations for website and application design services which state that they were "prepared by" the Beneficiary. However, the Petitioner questionably does not include the operational-level duties inherent in providing proposals for his clients in his duty description. The Petitioner also does not submit documentary evidence reflecting the Beneficiary's delegation of non-qualifying operational duties to subordinates, such as the company's website and application development services. The Petitioner provides few examples and little documentation to substantiate the Beneficiary's day-to-day executive-level tasks.

Whether a beneficiary is an executive employee turns on whether the petitioner has sustained its burden of proving that their duties are "primarily" executive. *See* section 101(a)(44)(B) of the Act. Here, the Petitioner does not document what proportion of the Beneficiary's duties would be executive functions and what proportion would be non-qualifying. The Petitioner submits evidence indicating the Beneficiary's involvement in operational-level tasks that do not fall directly under executive duties as defined in the statute, but does not quantify the time he spends on these duties. For this reason, we cannot determine whether the Beneficiary is primarily performing the duties of an executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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 his 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.

As noted above, the Petitioner asserts that the Beneficiary qualifies as an executive. 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 they 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.*

In support of the petition, the Petitioner provided an organizational chart indicating that the Beneficiary supervised a chief operating officer (COO) who oversaw an educational consultant. In response to the Director's RFE, the Petitioner provided another organizational chart reflecting that it had hired a programmer subordinate to the COO.

First, we note that 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). As such, the organizational chart we must analyze is that in place at the time the petition was filed on September 5, 2017. Submitted evidence indicates that the Petitioner only employed the COO and educational consultant subordinate to the Beneficiary as of the date the petition was filed.

The Petitioner submitted substantial documentation indicating that it provided a wide range of information technology services, including creating mobile applications and web pages, collecting specifications for this purpose, and providing preventative maintenance, installation services, design work, digital artwork, coding, testing, and technical support to clients. However, the Petitioner did not have operational-level employees in place to perform these services as of the date the petition was filed.

The Petitioner asserts on appeal that these services were performed by foreign entity employees; however, it provides no supporting documentation to substantiate this assertion. The Petitioner does not: identify these claimed foreign employees by name or title; list their educations and duties; account for them in the provided organizational charts; or describe how they contribute to the operational activities of the U.S. company. Therefore, it does not appear that the Petitioner had sufficient operational-level employees to provide its information technology services as of the date the petition was filed. Without sufficient operational employees, it is not clear how the Beneficiary primarily performs executive-level duties and how the COO acts in his asserted managerial role. In fact, as we have discussed, the Petitioner submits several proposals drafted by the Beneficiary and emails reflecting him and the COO working together to formulate solutions for clients.

The Petitioner also asserts that it hired a programmer after the date the petition was filed, leaving question as to who was performing this employee's duties prior to his hiring. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in an executive capacity. *See, e.g.*, section 101(a)(44)(B) of

the Act (requiring that one "primarily" perform the enumerated executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The Petitioner has not demonstrated that it has sufficient operational employees to relieve the Beneficiary from primarily performing non-qualifying tasks. It also has not substantiated that it grew sufficiently during its first year to support the Beneficiary in an executive capacity. In fact, the Petitioner provided little evidence as to its financial status at the time the petition was filed. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive position. There is no provision in the regulations that allows for an extension of this one-year period. If a business does not have the necessary staffing to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible for an extension.

Further, the duties of the Beneficiary's subordinates and the supporting documentation do not support a conclusion that they act in their asserted capacities. As noted, the Petitioner states that the Beneficiary oversees a COO and an educational consultant; however, it has not credibly established that it required an executive and managerial level employee as of the date the petition was filed. The duty description submitted for the COO indicates that he was primarily involved in operational-level tasks, stating that he "collaborated efforts for all the startup process" and "provided support," and submitted emails also indicate his focus on providing services to clients. As such, the evidence does not indicate that the COO acts in a subordinate managerial role as claimed. Further, although the organizational chart reflected that the COO supervised the educational consultant, this managerial responsibility is not reflected in his very brief duty description.

In addition, the Petitioner also did not sufficiently substantiate the educational consultant position subordinate to the COO. For instance, the Petitioner states that the educational consultant creates "adequate curriculum for the projected educational software," implements and researches educational requirements and "improved techniques" relevant to educational software, and helps and guides the programmers. First, we note that the Petitioner did not corroborate that it employed programmers as of the date the petition was filed. Further, it provides little supporting documentation to establish that it required a fulltime educational consultant to develop educational software and applications.

The Petitioner also asserts that the COO and educational consultant are professional subordinates because they hold bachelor's degrees. However, even if the Petitioner had demonstrated that the COO and educational consultant were professional subordinates, this does not establish that the Beneficiary would act primarily in an executive capacity. The regulatory definition of an executive does not provide that a beneficiary qualifies as an executive merely based on the supervision of professional subordinates, but his or her elevated position within a complex organizational hierarchy and a primary focus on directing the management and establishing the goals and policies of the organization. Therefore, the Petitioner's contention that the Beneficiary qualifies as an executive merely based on his supervision of professional subordinates is not convincing.

The Petitioner has not substantiated that it had sufficient subordinate managerial employees as of the date the petition was filed to allow the Beneficiary to primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the business. Submitted documentation indicates that the Beneficiary was engaged in non-qualifying operational duties and the Petitioner has not documented that he was relieved of these tasks at the time the petition was filed. Likewise, the Petitioner did not credibly describe and document the Beneficiary's day-to-day executive-level duties and substantiate that he had managerial subordinates to direct. For these reasons, the Petitioner has not established that the Beneficiary would act in an executive capacity under the extended petition.

III. CONCLUSION

The appeal must be dismissed because the Petitioner has not established that the Beneficiary would be employed in an executive capacity under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of I-T-, LLC*, ID# 1383932 (AAO July 9, 2018)