U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-I- INC.

DATE: JULY 12, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which states that it operates an acting school through its subsidiary [redacted], seeks to continue the Beneficiary's temporary employment as its chief executive officer (CEO)[1] 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, concluding that the record did not establish, as required, that the Petitioner is doing business as defined in the regulations and that it would employ the Beneficiary in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner contends that the Director misapplied the regulatory requirements to the facts presented and erroneously denied the petition. The Petitioner asserts that it submitted sufficient evidence to establish that it is doing business and that it will continue to employ the Beneficiary in an executive capacity.

Upon *de novo* review, we find that the Petitioner did not establish that the Beneficiary would be employed in an executive capacity under the extended petition. Therefore, we will dismiss the appeal. Because of the dispositive effect of this finding, we will reserve the remaining issue.

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.

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period March 27, 2017, until March 26, 2018. 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.

§ 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.*

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 issue to be addressed is whether the Petitioner established that it would employ the Beneficiary in an executive capacity under an extended petition. The Petitioner does not claim that the Beneficiary would be employed in the United States in a managerial capacity.

The term "executive capacity" is defined 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 assessing the managerial or executive nature of an offered position, we examine a petitioner's description of the job's duties. *See* 8 C.F.R. § 214.2(l)(3)(ii) (requiring an L-1 petitioner to submit "a detailed description of the services to be performed"). 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 a business.

A. Job Duties

The Petitioner asserts that the Beneficiary, as CEO, will be responsible for overseeing the activities of both the Petitioner and its majority-owned subsidiary, which operates an acting school. The Petitioner described the Beneficiary's duties as follows:

1. Will be required to understand and analyze the acting education industry in southern California in order to expand [the subsidiary's] business effectively and efficiently; also have to establish and formulate the company's short-term and long-term business goals and marketing strategies, assign and arrange tasks, and oversee implementation process . . . (15%)
2. Will preside over meetings with the President . . . regularly to discuss how to promote [the subsidiary], establish and develop its brand positioning strategies . . .

also supervise the implementation of plans and strategies to ensure that advertising and promotion activities are effective (15%)

3. Will review the daily class reports submitted by the Admission Manager . . . to evaluate the current conditions of each class offered, and discuss with the President . . .; analyze what's popular in the industry and develop classes of [the subsidiary] accordingly. (15%)
4. Will oversee and manage [the Petitioner and its subsidiary's] overall human resources and recruitment matters . . . make final decision and approval on hiring, firing, promotion, and job evaluation . . . (15%)
5. Will review and approve [the Petitioner's and its subsidiary's] monthly, quarterly, and annual financial budgets submitted by the office manager . . . make decisions to satisfy financial budgets and goals (15%)
6. Will utilize her connection and influence in China to seek more business partners and expand [the subsidiary's] market share to more Chinese international students who are interested in U.S. filming and acting professional programs; she will work with the President . . . to recruit more talented and prestigious instructor to work at [the Petitioner] (15%)
7. Will preside the regular meeting among . . . all departments, listening to each department's major issues and problems, coordinating major functions among all department's operation, also exercising wide latitude in discretionary decision-making towards the overall business operations and coordination (10%)

The Petitioner emphasizes that this description establishes that the Beneficiary primarily performs executive duties by directing the activities of the president, other department managers, and lower level personnel. However, the record contains other evidence that casts doubt on the accuracy of the submitted job description.

Specifically, the Petitioner submitted a copy of the shareholder agreement executed between itself and [redacted] the subsidiary acting school's president, founder, and current 49% shareholder. Article Two contains the parties' agreed terms with respect to the management and operation of the business; we have summarized the relevant provisions below:

- [redacted] shall have complete control and discretion as to firing of the subsidiary company's employees, faculty and staff.
- The Petitioner may hire subsidiary company employees only if certain conditions are met, including: paying such employees from the Petitioner's share of profits; covering any associated legal and immigration fees; requiring such employees to report to [redacted] and prohibiting any Petitioner-hired employees from interfering with [redacted]s day-to-day management or control of the subsidiary company's operations.
- [redacted] agrees to provide the Petitioner with the subsidiary's profit and loss statements at the end of each quarter so that the Petitioner's accounting firm may conduct an audit.
- [redacted] shall have "100 percent control of all aspects of the day-to-day running of [the subsidiary], including but not limited to control over faculty, acting technique, as

> well as all creative aspects, advertising, marketing, teaching methodology, enrollment, schedules, auditions, disciplinary actions, office functions, and employees."

Based on the terms of the shareholder agreement the Petitioner signed, many of the duties and authorities attributed to the Beneficiary with respect to the subsidiary company are not credible because they are in conflict with those terms. For example, the submitted position description indicates that the Beneficiary will make final decisions with respect to hiring, firing, promotion, and job evaluation, while the shareholder agreement provides [redacted] with sole authority over hiring decisions, disciplinary actions, and employees, and requires his consent for hiring decisions made by the Petitioner, which are also subject to several conditions.

Similarly, the Petitioner claimed that the Beneficiary regularly meets with the president and department managers, oversees marketing strategies, manages advertising and promotional activities, reviews reports from the admissions manager, develops new classes, assigns tasks to the subsidiary's employees, coordinates the functions of the subsidiary company, and oversees the "overall business operations." These duties cannot be reconciled with the provision in the shareholder agreement which gives [redacted] "100 percent control of all aspects of the day to day running of the Company," including the types of activities the Petitioner claims the Beneficiary will manage. In fact the agreement states that employees hired by the Petitioner, which would reasonably include the Beneficiary, are not permitted to interfere with the day-to-day management and control of the subsidiary acting school.

With respect to the subsidiary's finances, the Petitioner asserts that the Beneficiary will review and approve its monthly, quarterly, and annual financial budgets and make decisions regarding its financial budgets and goals. However, the terms of the shareholder agreement merely specify that the subsidiary needs to provide the Petitioner with its quarterly results for audit; it does not expressly give the Petitioner authority to approve its budgets or make financial decisions.

Based on the foregoing, we cannot determine that the provided job description accurately reflects the Beneficiary's actual duties and responsibilities with respect to the subsidiary acting school. The Petitioner must resolve this discrepancy in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the Petitioner's initial evidence contained clearly conflicting information with respect to the Beneficiary's duties and those performed by her claimed direct subordinate at the subsidiary company, and this issue has not been resolved.

The shareholder agreement does state that the subsidiary's shareholders will make certain "major decisions" in equal capacity, but most of the enumerated areas of shared authority are removed from the day-to-day operations of the company. The major decisions specified in the agreement relate to loans or loan refinancing or restructuring; requests for additional capital contributions; third-party contracts; sale or disposition of company shares; mergers and liquidations; bankruptcy filings; claim settlement; instituting lawsuits; and amending or modifying the shareholder agreement. These provisions relate to the Petitioner's ownership-based control of the subsidiary, but do not establish that the Beneficiary herself is primarily directing the management of the subsidiary's day-to-day

operations. The Petitioner has not indicated that the Beneficiary would contribute to making any of these "major decisions" as part of her regular routine.

The one area in which there is no overlap between the Beneficiary's claimed responsibilities and those granted to the subsidiary's president by the shareholder agreement relates to the promotion of the acting school to Chinese students and recruitment of such students. However, this area of responsibility is described in broad terms and is not clearly executive in nature. Moreover, the Petitioner indicates that these duties would require 15% of the Beneficiary's time, but it is unclear how she would spend the rest of her time on a day-to-day basis given that most of the submitted position description is in direct conflict with the terms of the Petitioner's shareholder agreement with [redacted].

Finally, while the Petitioner is described at times as an "investment" company that may eventually acquire other subsidiaries or engage in other activities, the Petitioner has not claimed that its current business activities extend beyond, at most, recruiting Chinese students for its subsidiary. As such, the Petitioner has not established that it has other activities for the Beneficiary to manage or direct.

Based on the foregoing, while it appears that the Beneficiary shares authority with the subsidiary's other shareholder over certain corporate-level decisions, the record does not establish that she primarily directs the management of the company or that she is responsible for establishing its goals, policies and objectives. The Petitioner has not provided a credible and probative description of the Beneficiary's actual job duties and therefore has not established that she would perform primarily executive duties.

B. Staffing and Organizational Structure

The Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it has five employees, and submitted an organizational chart depicting a total of 18 individuals, including the Beneficiary, four additional employees (the subsidiary's president, admission manager, office manager and office assistant), and 13 independent contractors (10 instructors as well as a consultant, a bookkeeper, and a web marketing employee). The Petitioner's supporting evidence reflects that all employees, with the exception of the Beneficiary, are paid by the subsidiary acting school.

In the denial decision, the Director emphasized that the Petitioner itself has no employees other than the Beneficiary.[2] The Director acknowledged that the acting school is staffed but noted that "those employees are not consider employees of the U.S. entity" or performing duties to support the Beneficiary's claimed executive duties with the Petitioner. Therefore, the Director concluded that the Beneficiary, as the Petitioner's sole employee, did not have a staff that would support her in an executive capacity.

[2] In response to the RFE, the Petitioner submitted an employee list for the subsidiary which included two additional positions – an accountant and executive assistant. Based on the Petitioner's bank statements and copies of cancelled checks, it appears that these two new staff are paid by the Petitioner and not the subsidiary. However, the Petitioner did not claim to employ these individuals at the time of filing. 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). Further, the Petitioner did not provide information regarding the duties performed by these two individuals.

As discussed above, the evidence in the record indicates that the subsidiary entity's president and co-owner is responsible for management of the subsidiary and its employees, and the Beneficiary's authority over the subsidiary's operations and staff is limited by the terms of the submitted shareholder agreement. Even if there are circumstances in which we may consider a subsidiary's staff in determining whether a given beneficiary will be employed in an executive capacity, such circumstances are not present in this case, where most of the management responsibilities for the subsidiary have been expressly granted to the subsidiary's other owner.

As discussed above, the record does not sufficiently establish that the Beneficiary possesses the authorities or carriers out most of the responsibilities stated in her job description. While it appears that she is charged with using her connections overseas to recruit potential Chinese students for the subsidiary acting school, the Petitioner did not identify any staff who would relieve her from performing non-qualifying tasks associated with this responsibility.

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, 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.

Here, the evidence as a whole casts doubt on the Petitioner's claim that the Beneficiary would actually perform the duties stated in her position description. The Petitioner here has not met its burden to establish that her actual duties would be in an executive capacity.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons. 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 G-I- Inc.,* ID# 4491747 (AAO July 12, 2019)