U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-D-I-, INC.

DATE: JULY 26, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a designer and seller of artistic lamps and furniture, seeks to extend the Beneficiary's temporary employment as its CEO under the L-1A nonimmigrant classification for intracompany transferees.[1] *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 Petitioner did not establish, as required, that the Beneficiary would be employed in an executive capacity.[2]

On appeal, the Petitioner submits a brief claiming that it has the organizational hierarchy necessary to support the Beneficiary in an executive capacity.

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 position involving 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, executive, or specialized knowledge capacity. *Id.*

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[1] The Petitioner previously filed an L-1A "new office" petition on behalf of the Beneficiary, which was approved for a one-year period commencing on October 1, 2015. A "new office" is defined as 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.

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

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 and that the two entities are still qualifying organizations. 8 C.F.R. § 214.2(l)(14)(ii).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that the Beneficiary would be employed in the United States in an executive capacity.

The term "executive capacity" is defined 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.

Section 101(a)(44)(B) of the Act. Further, 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. Staffing

While we will address the Beneficiary's proposed job duties below, the Director's decision was based primarily on a review of the Petitioner's staffing levels and structure. Specifically, the Director focused on the company's organizational structure and the duties of the Beneficiary's subordinate employees to gauge the Petitioner's ability to support the Beneficiary in an executive capacity and to relieve him from having to primarily perform the operational duties of the Petitioner's 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 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 the present matter, the Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, claiming four employees, no gross income, and a net income of -$105,303. The Petitioner initially provided an organizational chart depicting a five-position hierarchy with the Beneficiary in the top position, followed by a vice president (VP) of sales/CFO directly below the Beneficiary, a market analyst and sales manager both subordinate to the VP Sales/CFO, and a sales assistant at the bottom tier subordinate to the sales manager. The chart indicates that the position of market analyst was vacant at the time of filing. The Petitioner also provided job descriptions for each position within the hierarchy, indicating that a significant portion of the VP Sales/CFO's time would involve working with and overseeing the market analyst, who would be responsible for conducting market research and analysis, and the sales manager,[3] whose focus would be on increasing the company's sales revenue and generating performance data. As indicated in the organizational chart, the position of market analyst was vacant at the time of filing, thereby indicating that the Beneficiary's subordinate had one, not two subordinates. It is unclear who, in light of this vacancy, would assume the market analyst's job duties at the time of filing and how a redistribution of job duties would affect the Beneficiary and the remainder of the company's three-person support staff.

The Director issued a notice of intent to deny (NOID) advising the Petitioner that it did not provide sufficient evidence to establish that it would employ the Beneficiary in an executive capacity. The Director noted that the Beneficiary's duties and those of his subordinates must correspond to their respective placements within the Petitioner's organizational hierarchy. Applying this criteria to the facts presented, the Director observed that a number of the duties assigned to the Petitioner's VP Sales/CFO involved working with and overseeing the vacant market analyst position. The Director questioned the managerial nature of the VP Sales/CFO position and the overall lack of subordinate-level managers within the organizational hierarchy to elevate the Beneficiary to an executive-level position.

[3] The job description for the VP Sales/CFO makes repeated references to an "account manager" as one of the two positions subordinate to this employee. However, the Petitioner also provided an organizational chart and employee job descriptions, which indicate that a sales manager, rather than an account manager, reports to the VP Sales/CFO position. In light of these inconsistent references, it appears that the Petitioner used the sales manager and account manager titles for the same position.

In response, the Petitioner provided a statement asserting that it has a "four-level organizational structure" comprised of four employees. The Petitioner stated that it was unable to fill the market analyst position because it had limited time prior to filing the instant petition and claimed that it would "try to hire a professional" to fill the vacancy upon approval of the petition. The Petitioner also explained that the job duties previously provided for the VP Sales/CFO were prospective in nature and would apply to the position once this petition is approved. The Petitioner provided a different job description listing the VP Sales/CFO's duties during the company's initial stage of operation and claimed that the VP Sales/CFO focuses on formulating sales and financial policies and supervising the sales manager position, which the Petitioner claimed is supervisory.

First, with regard to the Petitioner's claim that it would fill a job vacancy in the future, 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). Thus, the Petitioner's expectation that it will hire additional employees in the future cannot be considered, as the Petitioner's staffing structure at the time of filing, along with other relevant factors, will be considered to determine eligibility. As the Petitioner did not employ the market analyst at the time of filing, the job description that was provided, which is partially premised on a staffing structure that includes a market analyst, does not accurately depict the VP Sales/CFO's job duties, which would likely be affected by a vacancy among her subordinate staff, leaving her to oversee only one employee.

Further, we note that artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive position. Merely assigning managerial position titles to the Beneficiary's subordinate staff is not sufficient to establish that the Petitioner has the requisite subordinate level of managerial employees through whom the Beneficiary would direct the management of the organization. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

In denying the petition, the Director reiterated her concerns about the lack of adequate complexity in the Petitioner's organizational hierarchy at the time of filing, pointing to the vacant market analyst position and lack of evidence showing a staff able to support a primarily executive-level position.

On appeal, the Petitioner resubmits its organizational chart and employee job descriptions, asserting that the VP Sales/CFO is a managerial employee because he oversees a supervisory subordinate – the sales manager. Even though the Beneficiary holds the senior position in the company as CEO, the record does not establish that the Petitioner's organizational hierarchy is equipped with a sufficient managerial tier of employees through whom the Beneficiary would primarily direct the management of the organization and focus on making organizational policies and discretionary decisions. The Petitioner's business plan indicates that during its first year of operation, it "reasonably expected to reach $500,000" in gross income and expand its staff to include a market analyst and a secretary. The evidence submitted shows that the Petitioner did not reach these goals, earning no gross income and was operating with a staff that has no market analyst or secretary. As

neither of these two projected positions was filled by the time this petition was filed, it is reasonable for us to expect the Petitioner to clarify how it would support the Beneficiary in an executive capacity based on the circumstances that existed at the time of filing.

USCIS must take into account the reasonable needs of the organization in light of the overall purpose and stage of development of the organization if staffing levels are used as a factor in determining whether an individual is acting in an executive capacity. *See* section 101(a)(44)(C) of the Act. The regulations require USCIS to examine the organizational structure and staffing levels of the Petitioner at the end of a new office's initial year of operations. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). If a business does not have the necessary staffing after one year to sufficiently relieve a beneficiary from performing operational and administrative tasks, that petitioner is ineligible for an extension. Furthermore, the reasonable needs of the Petitioner will not supersede the requirement that the Beneficiary must be "primarily" employed in an executive capacity, spending his time primarily on executive duties. *See* section 101(a)(44)(B) of the Act.

Based on the Petitioner's staffing composition at the time of filing, we find that the Petitioner lacked the staff necessary to carry out the Petitioner's daily operational tasks and therefore did not establish that the Beneficiary would be able to primarily focus on the broad goals and policies of the organization, rather than being involved in its day-to-day operations. Despite the Beneficiary's discretionary authority over the business, the evidence is not persuasive in establishing that the Petitioner's organization at the time of filing was sufficient to support the Beneficiary in an executive position where he would be primarily focused on directing the management of the company.

B. Duties

When examining the executive capacity of the Beneficiary, we will also look to the Petitioner's description of the job duties as a key indicator of whether the proposed employment fits the statutory definition. 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).

Based on the statutory 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.

In its initial cover letter, the Petitioner stated that it built a large showroom, imported product samples, and expected to hire up to six employees by the end of its "actual" first year of operation, explaining that the Beneficiary had only been in the United States to run the business for eight months. The Petitioner also provided a percentage breakdown claiming that 55%, i.e., the majority of the Beneficiary's time,

would be allocated to making hiring and firing decisions regarding two of the company's employees – the VP Sales/CFO and secretary – and evaluating their respective performances, directing the VP Sales/CFO in the implementation of the annual business plan, and conducting regular reviews of the company's performance. The Petitioner did not specify the parameters or data the Beneficiary would review in evaluating company performance or state who would provide the underlying performance data. The Petitioner also did not elaborate on the specifics involved in directing the VP Sales/CFO in the implementation of the business plan. The Petitioner also stated that 20% of the Beneficiary's time would be allocated to reviewing and approving the annual business plan and determining whether to make adjustments to the budget. However, these broad statements could generally apply to most CEOs in any industry and are not indicative of duties that the Beneficiary would perform on a day-to-day basis within the context of the Petitioner's business.

Lastly, the Petitioner indicated that 15% of the Beneficiary's time would involve establishing business development strategies and adjusting the Petitioner's organizational structure and "management team." However, it is unclear that developing business strategies or making staffing adjustments are job duties that the Beneficiary would perform on a routine daily or even weekly basis. Rather, it appears that these, and any other staffing adjustments, would only require the Beneficiary's time on an as-needed basis and thus do not represent the types of tasks that would likely consume the Beneficiary's time as part of a regular daily or weekly routine.

In response to the NOID, the Petitioner provided a statement clarifying that the job description submitted in the initial supporting statement listed the Beneficiary's proposed job duties and was not reflective of duties he performed during the Petitioner's initial year of operation. The Petitioner provided a list of the Beneficiary's six responsibilities, which applied to his initial year of employment with the U.S. entity. Namely, the Petitioner claimed that the Beneficiary focused his attention primarily on directing the VP Sales/CFO in implementing the business plan and establishing the Petitioner's first showroom, evaluating that individual's performance for competency and efficiency, and reviewing the company's performance with respect to the annual business plan. Instead of expanding on the Beneficiary's specific job duties, the Petitioner emphasized executive characteristics of the proposed position, pointing to the Beneficiary's unfettered decision-making authority with regard to all business matters, including business strategies, the Petitioner's organizational structure, and all human resources concerns, such as hiring, firing, and overseeing the work of the VP Sales/CFO.

In denying the petition the Director determined that the record lacks sufficient evidence to support the conclusion that the Beneficiary's proposed position would require the Beneficiary to primarily perform tasks of an executive nature.

On appeal, the Petitioner resubmits the original job description, maintaining the claim that the Beneficiary will be employed in an executive capacity. However, the Petitioner does not supplement the record with additional information about the Beneficiary's specific daily job duties. The actual duties themselves reveal the true nature of the employment. The actual duties themselves reveal the true nature of the 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). 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. *Id.* Given the absence of this critical information establishing precisely what actual tasks the Beneficiary would perform within the context of a four-person retail operation, the Petitioner has not established that he would primarily perform tasks of an executive nature.

For the reasons discussed above, the evidence submitted does not establish that the Beneficiary would be employed in an executive capacity under the extended petition.

III. DOING BUSINESS FOR THE PREVIOUS YEAR

In addition, while not addressed in the Director's decision, we find that the record lacks sufficient evidence to establish, as required, that the Petitioner has been doing business for the previous year. 8 C.F.R. § 214.2(l)(14)(ii)(B); *see also* 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining "doing business"). In the Form I-129 and support letter, the Petitioner conceded that it had zero gross annual income and no revenue as of the end of August 2016.[4] The Petitioner received its first and only documented shipment of goods for its showroom in July 2016, only two months prior to the date this petition was filed, and has not documented any sales transactions or other evidence that it has been engaged in the regular, systematic, and continuous provision of goods or services. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in an executive capacity under the extended petition or that the Petitioner is still doing business.

ORDER: The appeal is dismissed.

Cite as *Matter of H-D-I-, Inc.*, ID# 488260 (AAO July 26, 2017)

[4] The petition was filed in September 2016.