U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-G-D- LTD.

DATE: JULY 26, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a real estate rental and development company, seeks to continue the Beneficiary's temporary employment as its general manager 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 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 relevant evidence and Director erred by evaluating the Beneficiary's position under the criteria for managerial capacity. The Petitioner maintains that it submitted sufficient evidence to show that the Beneficiary will be employed in an 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 managerial or executive capacity for one continuous year within three years preceding the Beneficiary's application for admission into the United States. 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. Section 101(a)(15)(L) of the Act.

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period February 16, 2016, until January 15, 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

In the denial decision, the Director concluded that the Petitioner described the Beneficiary's duties in broad and general terms, and did not provide sufficient information to establish that she would perform primarily managerial or executive-level tasks. The Director also reviewed the Petitioner's claims regarding its staffing levels and found that the Petitioner did not establish that it had grown to the point where it could support an executive position. The Director noted that the Petitioner had not provided adequate information regarding its use of independent contractors, the Beneficiary's supervision of such contractors, or the nature and scope of their duties.

On appeal, the Petitioner asserts that the Director did not adequately explain why the submitted position description was deficient and notes that its submissions adequately addressed how the offered position satisfies all four criteria included in the statutory definition of executive capacity. Further, the Petitioner states that the Director overlooked evidence relating to its use of contractors to perform almost all day-to-day operational tasks of the company.

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.

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) takes 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.

When examining the executive capacity of a given beneficiary, we will look first to 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 a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, USCIS examines 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 and its staffing levels.

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 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 is self-described as a "real property rental & development" business with two employees and no income at the time it filed the petition in December 2016. The Petitioner stated that it has four real estate projects at various stages of development, including: a residential house licensed as a rental property; a condo hotel project still under construction at the time of filing; an agreement to purchase a parcel of vacant land; and an opportunity to purchase four adjacent parcels of land for another condo development.

The Petitioner provided a list of duties the Beneficiary had performed during its initial year of operations, noting that she had made decisions to purchase two properties and had hired an administrator. The Petitioner further described her proposed duties under the extended petition:

> [The Beneficiary] will continue to perform such duties as gathering and analyzing information on residential and commercial real estate market, and establishing feasible long and short term goals for [the Petitioner]; identifying real estate rental or development projects, and hiring agents, architects and engineers and oversee the design process (including plan reviews, edits, coordination and permitting), hiring contractors and oversee the improvement or new construction process (including creating and managing improvement/construction budgets, and creating and managing improvement/construction schedules), and making decision in renting, marketing and selling value-added properties.

The Petitioner noted that the Beneficiary would make decisions regarding the rental of its residential property, oversee a residential development project on the recently purchased vacant land (expected to commence in May 2017), and continue to work on acquiring four parcels of land for development and make decisions regarding the development once acquired.

With respect to the company's largest current project (a condominium hotel renovation project expected to be completed in February 2017), the Petitioner noted that once the project is complete, the Beneficiary would be responsible for recruiting and training personnel to provide rental services; establishing budgets for the rental property operations and monitoring purchases and other spending; overseeing daily operations of the rental property; making shift assignments; addressing renters'

concerns, conducting employee evaluations, and making decisions regarding employee compensation and promotion.

In response to a request for evidence (RFE) asking for additional details regarding the Beneficiary's day-to-day duties and the amount of time she will spend on specific tasks, the Petitioner provided a broad breakdown of how she would divide her time among four responsibilities:

1. The beneficiary will continue to establish [the Petitioner's] goals and policies through gathering and analyzing information on residential and commercial real estate market. (20% of her time)
2. Although being one of [the Petitioner's] two employees, the beneficiary is primarily and solely responsible for the direction of the company through independent contractors. All [the Petitioner's] functions, including property acquisition, property development such as renovation and/or construction, and property rental or sales, are performed at the direction of the beneficiary. The beneficiary does not perform any of these functions herself but directs real estate agents, architects, construction firms etc[.] to take action when she deems appropriate. The beneficiary has been spending 75% of her time in selecting, negotiating, monitoring and directing independent contractors in performing [the Petitioner's] functions.
3. The beneficiary has been exercising and will continue to exercise wide latitude in discretionary decision-making such as selecting independent contractors in performing [the Petitioner's] functions such as real estate acquisition and/or development . . . .
4. The beneficiary has been receiving and will receive only general supervision or direction from the board of directors. The beneficiary spends 5% of her time in communication with . . . the two stockholders to keep them informed of any major decisions relating to property acquisition, development, or disposition, and to obtain their consent in transferring funds from our China Company to [the Petitioner], which usually involves substantial sums of money.

We agree with the Director's determination that the submitted descriptions do not establish that the Beneficiary would perform primarily executive-level duties under the extended petition.

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.*

The Beneficiary's authority and discretion to select, hire, and monitor independent contractors is noted, but the position description does not convey sufficient information about what the Beneficiary would be doing on a day-to-day basis as of the date of filing and beyond. The Petitioner did not explain the Beneficiary's typical interactions with independent contractors in support of its claim that such interactions involve executive level tasks. Given that the Petitioner stated that such duties require 75% of her time, a broad overview of this area of responsibility is insufficient to establish her primary performance of executive duties. 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).

In addition, the Petitioner claimed to have one construction/renovation project nearing completion and another project not set to begin for another six months. It is unclear how oversight of contractors would consistently require most of the Beneficiary's time on a daily basis in light of the nature of the company when the petition was filed.

Further, despite the Petitioner's claim in response to the RFE that the Beneficiary would spend most of her time hiring and overseeing contractors, the Petitioner initially stated that she would be significantly involved in the operation of the condominium hotel which it expected to open within a few months of filing the instant petition. These duties, which included non-executive tasks such as overseeing the property's daily operations, making shift assignments, monitoring the property's spending and purchases, and addressing renters' concerns, were notably absent from the later job description, thus raising questions regarding the accuracy of the percentage breakdown submitted later.

The Beneficiary's remaining duties include: gathering and analyzing information on the [redacted] real estate market, which is a research-oriented task; establishing short- and long-term goals; and reporting to the company's owners and directors, whose role in the management of the company and degree of oversight of the Beneficiary is not explained in the record. While establishing goals and policies is an executive duty, the Petitioner has not provided specific examples of goals or policies the Beneficiary has established or indicated that such duties would require a significant portion of her time, such that she would be primarily focused on the company's goals and policies, rather than on its day-to-day operations.

Even though the Beneficiary holds the senior position within the two-employee organization, the fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. Even though 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, the broad position description the Petitioner submitted is insufficient to establish that her actual duties would be primarily executive in nature.

B. Staffing

The record establishes that the Petitioner employed two employees at the time of filing – the Beneficiary and an administrator, who performs mainly administrative and clerical duties. The Petitioner's organizational chart also shows "Various independent contractors such as real estate agents, architects, construction firms, etc." The Petitioner provided evidence that it has contracted and paid and for construction and architecture services related to development of its condo hotel property. The Petitioner also provided a letter from a real estate broker who states he has worked with the Petitioner as it seeks to purchase four adjacent lots and expects the deal to proceed after a long negotiation process. The Petitioner has not identified or documented other contractors or provided additional information regarding the nature of the Beneficiary's day-to-day interactions with them.

Here, the Petitioner has not established that the Beneficiary's general oversight of construction contractors or collaboration with real estate agents is an executive-level duty or that it equates to "directing the management of the organization." The Petitioner has not established that, as of the date of filing, she was primarily concerned with the broad policies and goals of the organization, that the day-to-day management rested with a subordinate tier of managers, or that she would be relieved from substantial involvement in the day-to-day operations of the business, such as researching the local real estate market, marketing the rental properties once completed, or overseeing the operation of the rental property whose opening was set to occur soon after the petition was filed. The Petitioner has not shown that it grew to the point during its initial year of operations where it requires the Beneficiary to perform primarily executive duties.

On appeal, the Petitioner contends that the Beneficiary's position has all the necessary elements of an executive position, but, again, does not sufficiently elaborate regarding the nature of the Beneficiary's typical day-to-day duties. We agree with the Director's determination that the evidence is insufficient to establish that the Beneficiary would be employed in an executive capacity under the extended petition.

III. BENEFICIARY'S EMPLOYMENT ABROAD

Finally, we note that the Petitioner must establish that the Beneficiary was employed by a qualifying foreign entity for at least one continuous year during the three years that preceding the filing of the initial L-1A petition on her behalf. *See* 8 C.F.R. § 214.2(l)(3)(iii).

The Petitioner stated in the petition that the Beneficiary worked for its foreign affiliate, in China, from 2010 to 2015. However, U.S. Department of State records show that when the Beneficiary applied for a B1/B2 visitor visa in November 2014, she stated on her nonimmigrant visa application that she worked as general manager for in China, and previously worked as a sales manager for

[redacted] in [redacted] from March 2009 until January 2014. She did not list the Petitioner's foreign affiliate as a former employer. While we are not making an adverse determination here based on this information obtained from the U.S. Department of State, the Petitioner may need to address the Beneficiary's statements regarding her employment abroad in any future petition filed by the Petitioner on her behalf.

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.

ORDER: The appeal is dismissed.

Cite as *Matter of J-G-D- Ltd.*, ID# 505959 (AAO July 26, 2017)