U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-C-, INC.

DATE: JUNE 13, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a clothing importer, seeks to continue the Beneficiary's temporary employment as its vice president 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 Vermont Service Center denied the petition concluding that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner asserts that the Director erred in denying the petition and contends that the Beneficiary would act in an executive capacity under the extended petition.

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 April 20, 2015, until April 19, 2016. 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 its parent company based in Bangladesh exports clothing products to Europe and the United States, including tee shirts, polo shirts, nightwear, men's and women's

undergarments, and children's clothing. The Petitioner indicated that the Beneficiary is tasked with formulating the business policy and guidelines of the company. The Petitioner explained the Beneficiary's duties as follows:

> i) Direct the overall management of [the Petitioner's] business activities in the region including[:]
> ii) Marketing, sales administration, finance and technical service;
> iii) Formulating business policy, guidelines, procedure[s] and new business goals as needed;
> iv) Evaluating unit's business performance, developing and implementing remedies as necessary to improve performance;
> v) Maintaining business contacts and relations with top executives of major company's customers with headquarters in the relevant business areas;
> vi) Conducting all personnel evaluations including hiring personnel as necessary, firing and promotions;
> vii) Exercise and enjoy wide latitude in discretionary decision making, etc.

The Petitioner also indicated that the Beneficiary supervises two "regular employees along with occasional independent contract employees who undertakes [*sic*] freight forwarding, shipping, warehouse delivery, assortment, releases cargo from carriers and local deliveries and pick up to and from warehouse and then to customers."

The Petitioner did not submit a sufficiently detailed duty description describing the Beneficiary's day-to-day executive-level duties or credibly establishing that 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 marketing he oversaw, sales administration he managed, technical services he directed, or business policies or guidelines he formulated. The Petitioner did not describe and document remedies he developed and implemented, business contacts he maintained, or personnel decisions he made. In fact, the Beneficiary's duty description largely reiterates the regulatory definition of "executive capacity." *See* 8 C.F.R. 214.2(l)(1)(ii). 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 customs forms, invoices, bills of lading, and other such documentation reflecting its shipment of clothing from Bangladesh to the United States. However, several "arrival notices" it provided list the Beneficiary as the only Petitioner contact, the most recent from April 2017, dating more than a year after the petition was filed. In contrast, the Petitioner submits no

supporting documentation indicating that the Beneficiary delegates to subordinates the non-qualifying operational tasks reflected in the shipping, receiving, billing, and customs forms. 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.

The Petitioner submitted an organizational chart reflecting fifteen positions, including import, marketing, distribution, and accounts managers reporting to a president. The chart also indicated that the "president" oversees a designer. In addition, the chart included several operational level positions subordinate to the managers including "shipping and receiving," "feedback," "AGM," "store in charge," delivery assistant, and a "senior executive" and an "executive." In a letter submitted in response to the Director's request for evidence (RFE), the Petitioner stated that the Beneficiary oversees two "regular" employees and occasional independent contractors to undertake freight forwarding, shipping, warehouse delivery, assortment, and other similar shipping and receiving duties.

The Petitioner did not submit supporting evidence to demonstrate that it has sufficient subordinates to relieve the Beneficiary from primarily performing non-qualifying operational duties. In the RFE, the Director requested that the Petitioner submit an organizational chart listing all of its employees by name and title, including a summary of their duties, education levels, and salaries. Further, the

Director indicated that the Petitioner should provide documentation to support its employees such as IRS Forms W-2 or 1099 to substantiate wages paid. However, the Petitioner submitted no documentation to corroborate any of its employees, such as tax or payroll evidence. It only vaguely indicates that it has two "regular employees" subordinate to the Beneficiary; however, it does not identify these employees by name and job title, nor does it describe their duties. Likewise, the Petitioner further asserts that it hires independent contractors from time to time to perform shipping and delivery duties, but it again does not identify these contractors, explain their duties, or submit sufficient supporting documentation to corroborate their engagement.

The evidence does not indicate that, as of the date the petition was filed, the Beneficiary was relieved from performing non-qualifying operational tasks and that he primarily spent his time focusing on executive level duties. Further,, the Petitioner submitted evidence reflecting the Beneficiary's involvement in non-qualifying operational level duties. There is no evidence that the Beneficiary is delegating these duties to subordinates. In fact, the Petitioner asserts that the Beneficiary will act as the vice president of the company, but this position is not listed in its organizational chart. 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). 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).

Therefore, absent required supporting evidence, 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 has grown sufficiently during its first year to support the Beneficiary in an executive capacity. 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.

As noted, 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.*

As discussed, the Petitioner has not substantiated that it has subordinate employees 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 activities and it has not documented that the Beneficiary has been relieved of these tasks. Likewise, the Petitioner does not credibly describe and document the Beneficiary's day-to-day executive level duties. In fact, even if we are to accept that the Petitioner has two employees and that it engages contractors for shipping and receiving duties, this would not appear sufficient to demonstrate that the Beneficiary acts in an executive capacity directing the management of an organization. For these reasons, the Petitioner has not established that the Beneficiary would act in an executive capacity under the extended petition. Therefore, the appeal must be dismissed.

III. FOREIGN EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

In addition, we will enter an additional basis for denial. The evidence in the record does not demonstrate that the Beneficiary acted in a managerial or executive capacity abroad. The Petitioner only states that the Beneficiary was "responsible for overall management, administration, formulating business policies, [and] guidelines of the [foreign employer]." This duty description is overly brief and generic and does not convey the Beneficiary's actual day-to-day duties abroad. This lack of detail is particularly noteworthy since the Petitioner contends that the Beneficiary acted in his capacity abroad from 2006 until his entry into the United States in April 2015. In addition, the Petitioner does not describe the Beneficiary's subordinates abroad, their duties, or their education levels. It submits no evidence to demonstrate that the Beneficiary was primarily relieved of non-qualifying duties while working abroad. Therefore, the Petitioner has not demonstrated that the Beneficiary acts in a managerial or executive capacity abroad. For this additional reason, the appeal must be dismissed.

IV. CONCLUSION

The appeal must be dismissed because the Petitioner has not established that the Beneficiary would be employed in the United States in an executive capacity under the extended petition or that he was employed in a managerial or executive capacity abroad.

ORDER: The appeal is dismissed.

Cite as *Matter of M-C-, Inc.*, ID# 1166589 (AAO June 13, 2018)