U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-H-US, LLC

DATE: JUNE 14, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a restaurant management company, seeks to continue the Beneficiary's temporary employment as its "managing director" under the L-1A nonimmigrant classification for intracompany transferees. *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 Texas Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner contends that the Beneficiary was employed abroad in a managerial capacity[1] and would be employed in an executive capacity in his proposed position with the U.S. entity.

Upon *de novo* review, we will dismiss the appeal because the Petitioner has not established that the Beneficiary will be employed in the United States in an executive capacity.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves 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 or executive capacity. *Id.*

II. EXECUTIVE CAPACITY IN THE UNITED STATES

The Petitioner claims that the Beneficiary's proposed U.S. employment will be in an executive capacity. As the Petitioner does not claim that the Beneficiary would be employed in a managerial

[1] Prior to filing the appeal, the Petitioner claimed that the Beneficiary was employed abroad in an executive capacity.

capacity, we will only address the Petitioner's claim and will not discuss whether the Beneficiary's U.S. employment will be in a managerial capacity.

"Executive capacity" means 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.

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). The Petitioner must also 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 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 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. 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. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial 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.

In the petition form the Petitioner claimed 17 employees. Although a supporting statement was provided, it did not list any of the position titles or discuss the duties performed by these claimed employees.

The Director determined that the Petitioner did not adequately support its claim and issued a request for evidence (RFE). The Director instructed the Petitioner to provide its organizational chart showing its staffing and organizational structure, listing employee names and position titles, and briefly describing their respective job duties. The Director also asked the Petitioner to provide its quarterly wage reports for 2017 as well as its payroll summary and IRS Form W-2s issued to employees that are under the Beneficiary's direction.

Although the Petitioner responded to portions of the RFE, it did not provide its organizational chart or supplement the record with information about its employees and their duties. The Petitioner also

neglected to provide the requested wage evidence pertaining to its own staffing. Instead, it provided several 2017 federal quarterly tax returns and corresponding state wage and withholding reports for a separate entity – [redacted] – claiming that this entity is its subsidiary. The Petitioner did not, however, provide evidence of the claimed parent-subsidiary relationship or explain how the submitted wage evidence is relevant to the Beneficiary's proposed position with the petitioning entity.

The Director denied the petition noting that the Petitioner did not comply with the RFE regarding employee wages and provided a 2018 quarterly tax return showing that it had six employees, a number that is inconsistent with the petition form where the Petitioner claimed that it had 17 employees at the time of filing.[2] The Director also found that the Petitioner did not provide an adequate description of its support staff and concluded that the Petitioner did not establish that it had the ability to relieve the Beneficiary from having to perform primarily non-executive job duties at the time of filing.

On appeal, the Petitioner contends that some of the requested wage evidence was unavailable at the time of its response to the RFE and provides 16 Form W-2s issued by [redacted] in 2017 and four Form W-2s issued by the Petitioner itself to employees in 2017, thereby indicating that it had four employees in 2017. However, the Petitioner did not explain how the 16 Form W-2s that pertain to a separate entity are relevant to the Beneficiary's proposed employment with the petitioning entity. Furthermore, the Petitioner did not explain why it provided wage reports and quarterly tax returns for its claimed subsidiary, yet neglected to provide the same documents with regard to its own organization, even though the RFE stated that this evidence is directly relevant to an analysis of the Petitioner's eligibility. As noted in the denial, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Likewise, the Petitioner did not provide its own organizational chart, despite the RFE's specific request for this evidence. As such, it is unclear what role, if any, the employees of a separate entity would have in supporting the Beneficiary in his proposed executive position with the Petitioner, even if there is a parent-subsidiary relationship between it and the separate U.S. entity, as claimed.

Furthermore, the Petitioner has neither discussed nor provided evidence to resolve the inconsistency between the four Form W-2s it provided, which indicate that it had only four subordinate employees to support the Beneficiary's position, and information provided in the petition form, which indicates that the Petitioner originally claimed 17 employees at the time of filing. 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).

Not only has the Petitioner declined to provide a copy of its organizational chart, but it has also neglected to submit the requested wage evidence, such as a payroll summary and/or state wage reports, showing whom it employed at the time of filing. As the Petitioner has not submitted this relevant evidence, we cannot assess its staffing composition or the Beneficiary's placement within the organizational structure, nor can we gauge the likelihood that the Petitioner had the personnel necessary to support the Beneficiary in a primarily executive position within its organization.

[2] The Director incorrectly noted that the RFE included a request for the Petitioner's current tax return. Although the RFE included general instructions for the submission of a U.S. tax return, it did not specifically request a current tax return.

B. Duties

Next, we will address the Petitioner's description of the Beneficiary's job duties in his proposed position. *See* 8 C.F.R. § 214.2(l)(3)(ii).

In support of the petition, the Petitioner provided a document titled "CEO Time Sheet," which included a daily schedule of the Beneficiary's activities during a typical work week. The schedule indicates that the Beneficiary would allocate considerable portions of his time to non-executive activities, such as reviewing supplier invoices and issuing checks to suppliers, conducting sales and restaurant visits as well as engaging in "other outside visits," and managing restaurant staff at three different restaurants during the managers' respective days off on Wednesdays, Thursdays, and Fridays during each work week. According to this daily schedule, the Beneficiary would allocate the majority of his time to these non-executive job duties.

In response to the RFE, the Petitioner provided a supplemental job duty breakdown. However, it did not follow the RFE instructions, which asked that the Petitioner indicate the percentage of time that the Beneficiary would allocate to each duty. As with the previously provided time sheet, the new job description also included non-executive job duties in addition to setting performance goals, overseeing the Petitioner's finances, and making discretionary decisions regarding business operations and staffing. Namely, the Petitioner stated that the Beneficiary would also prepare financial and performance reports, purchase equipment and "small wares," and perform human resource tasks like hiring employees. As the Petitioner did not provide the requested time allocations, it is unclear how much time the Beneficiary would devote to these administrative and operational tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Furthermore, the job duty breakdown included several broadly stated job responsibilities that focused on the Beneficiary's discretionary authority to implement investment plans, lead daily operations, "set the company strategic goals," and maintain responsibility "for achieving the approved annual budget and to meet [*sic*] the approved 5 years [*sic*] plan."

In the denial decision, the Director determined that the Petitioner provided a deficient job description that did not delineate the Beneficiary's actual daily tasks.

On appeal, the Petitioner disputes the Director's determination contending that it provided "the most specific summary" possible with the understanding that the Beneficiary's duties "tend to change on a daily basis" based on the operational needs of a holding company that manages multiple restaurants.

Although we recognize that the Beneficiary's job duties vary depending on the Petitioner's operational needs, as we noted above, the daily schedule that the Petitioner references on appeal indicates that the Beneficiary would allocate significant blocks of time to non-executive functions and therefore would not be primarily employed in an executive capacity. Notwithstanding the Beneficiary's discretionary authority over finances and business functions, the fact that the Beneficiary 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. Section 101(A)(44)(B) of the Act. While 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, these elements alone are not sufficient to establish that his actual duties would be primarily executive in nature.

Given the Beneficiary's deficient job description and the lack of sufficient information regarding the support staff the Petitioner had available to carry out its non-executive functions at the time of filing, the record does not indicate that the Beneficiary would be employed in an executive capacity under an approved petition.

Lastly, the Petitioner notes that USCIS approved other petitions that had been previously filed on behalf of the beneficiary. The decision does not indicate whether the Director reviewed the prior approvals of the other nonimmigrant petitions, one of which was a new office petition and was therefore subject to a different set of regulatory requirements than an extension petition. See generally, 8 C.F.R. § 214.2(l)(3)(v). If the previous nonimmigrant extension petition was approved based on the same evidence contained in the current record, the approval would constitute an error on the part of the Director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. Matter of Church Scientology Int'l, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be unreasonable for USCIS or any agency to treat acknowledged errors as binding precedent. Sussex Eng'g, Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Further, USCIS has clarified that "an adjudicator's fact-finding authority . . . should not be constrained by any prior petition approval, but instead should be based on the merits of each case." USCIS Policy Memorandum, PM-602-0151, Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status (Oct. 23, 2017), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf. The memorandum also emphasized that "the burden of proof remains on the petitioner, even where an extension of nonimmigrant status is sought." Id.

As discussed above, the Petitioner has not provided sufficient evidence to establish that it would employ the Beneficiary in an executive capacity.

III. REMAINING ISSUES

In addition, although not addressed in the Director's decision, we find that the Petitioner has not provided sufficient reliable evidence to establish that it has a qualifying relationship with the Beneficiary's foreign employer. The petition shall remain denied and the appeal dismissed for this additional reason.

To establish a "qualifying relationship" under the Act and the regulations, a petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e., one

entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376.

In the present matter, the Petitioner claims that it and the Beneficiary's foreign employer have a parent-subsidiary relationship because the foreign entity owns the majority of the U.S. Petitioner. *See* 8 C.F.R. § 214.2(l)(1)(ii)(K) (for definition of *subsidiary*).

Regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities. *See, e.g.*, *Church Scientology Int'l*, 19 I&N Dec. 593; *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). Ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

We find that the record contains inconsistent evidence pertaining to the Petitioner's ownership. Namely, although the Petitioner provided an operating agreement, a stock ledger, and a stock certificate listing the foreign entity as its sole owner, it also provided two 2016 federal tax returns that are inconsistent with these ownership documents and with one another. First, although both tax returns are dated 2016 and list the Petitioner as the filing entity, each contains a different federal tax identification number and lists a different principal business activity and principal business or service. As the record does not contain state-issued documents listing the Petitioner's federal tax identification number, we cannot determine which tax return, if any, actually pertains to the Petitioner. Regardless, neither tax return contains ownership information that is consistent with the information contained in the operating agreement and stock ledger. While one tax return states that the filing entity is a holding company that engages in "business acquisition" and is 99% owned by the foreign entity and 1% by the Beneficiary, the other return states that the filing entity is a wholesale foods company that sells food products and is 50/50 owned by the Beneficiary and the U.S. Petitioner. Although it appears that the latter tax return may pertain to an entity other than the Petitioner, we cannot make that determination with any degree of certainty because the Petitioner is listed as the filing entity in that return. As noted earlier, the Petitioner must resolve this incongruity in the record with independent, objective evidence pointing to where the truth lies. *Ho*, 19 I&N Dec. at 591-92. Given the inconsistent evidence regarding the Petitioner's ownership, we cannot conclude that the Petitioner has provided sufficient evidence to support its claimed parent-subsidiary relationship with the foreign entity.

Based on the dispositive effect of our findings regarding the Beneficiary's proposed employment in an executive capacity and the inconsistent evidence regarding the Petitioner's ownership, the appeal will be dismissed and we will reserve the issue regarding the Beneficiary's employment abroad in a managerial or executive capacity.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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 M-H-US, LLC*, ID# 3795289 (AAO June 14, 2019)