U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF VIG-, INC.

DATE: JUNE 26, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a provider of web design and hosting services, seeks to temporarily employ the Beneficiary as president of its new office[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: (1) the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity; and (2) the Beneficiary has been employed abroad in a managerial or executive capacity or in a position involving specialized knowledge. The Director also found that the Petitioner does not qualify as a new office.

The matter is now before us on appeal. On appeal, the Petitioner submits a new statement from its foreign affiliate and asserts that the Director erred by not considering the company to be a new office, and by focusing on specific deficiencies while paying too little attention to the record as a whole.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, 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

[1] The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

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.*

The petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

II. NEW OFFICE

Ordinarily, a petitioner must be able to support a managerial or executive position at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). In the case of a new office, however, the Petitioner need only show that it will be able to support such a position within one year after filing. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

The Director found that the Petitioner did not qualify as a new office at the time of filing, and also that the Petitioner had "not shown that there are employees who will relieve the beneficiary from primarily performing . . . non-qualifying day-to-day duties." On appeal, the Petitioner disputes the Director's finding that the company did not qualify as a new office at the time of filing.

As a threshold issue, we must first consider whether the Director correctly found that the Petitioner did not qualify as a new office. For the reasons discussed below, we find that the Director erred in this determination.

A "new office" has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The Director concluded that the Petitioner was not a new office when it filed the petition in August 2017, because "incorporation and tax information [establish that the Petitioner has] been doing business since 2015."

"Doing business" means the regular, systematic, and continuous provision of goods, services, or both, by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad. 8 C.F.R. § 214.2(l)(1)(ii)(H). The record establishes that the petitioning entity incorporated in May 2015, but the record does not show that the Petitioner began doing business at that time. The record contains no evidence of business activity in 2015, and the Petitioner's 2016 income tax return showed only $5827 in gross receipts for the year. The Petitioner's only reported expenses for the year were "Bank fees," "Supplies," "Telephone," and "Utilities"; the company paid no salaries or rent. The company's minimal income and expenses do not indicate that the Petitioner regularly, systematically, and continuously provided services from August through December of 2016.

We withdraw the Director's finding that the Petitioner did not qualify as a new office at the time of filing. We also withdraw the Director's finding regarding the Beneficiary's position in the United

States, because that finding relied on the underlying conclusion that the Petitioner was not a new office at the time of filing.

While a new office need not show that it can immediately support a managerial or executive position, it must meet other requirements specified at 8 C.F.R. § 214.2(l)(3)(v). We need not discuss whether the Petitioner has met these requirements, because there remains a separate ground for denial of the petition and dismissal of the appeal, to be discussed below. (This decision is not, and shall not be construed as, a stipulation that the Petitioner has met those requirements.)

III. EMPLOYMENT ABROAD IN AN EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that the Beneficiary has been employed abroad in a managerial or executive capacity or in a position involving specialized knowledge.[2] We restrict our analysis to the Petitioner's assertion that the Beneficiary has been employed in an executive capacity. The qualifying employment must have occurred over one continuous year in the three years preceding the filing of the petition. Section 101(a)(15)(L) of the Act.

"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 performed 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 was *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

When examining the managerial or executive capacity of a given beneficiary, we will look 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, 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.

[2] We note that, in a new office petition, the foreign position must have been managerial or executive, rather than one involving specialized knowledge. See 8 C.F.R. § 214.2(l)(3)(v)(B).

The Beneficiary is the majority shareholder and chairman of the foreign entity, a company that provides domain name registration, web hosting, and email hosting. The Petitioner's initial submission provided no further details about the nature of the Beneficiary's employment abroad. The foreign entity's organizational chart showed 17 managerial or executive job titles within the foreign entity, but provided no further information about those positions. The Beneficiary's name and title appear on the organizational chart, but are not connected to the other elements of the chart in a way that would indicate the level of his authority. Promotional materials indicate that the foreign company is a provider of certain web-related services, but provided no additional information about the nature of the organization.

The Director instructed the Petitioner to submit additional evidence to show that the Beneficiary had been employed as a manager or executive, or in a position involving specialized knowledge. The Director listed the regulatory requirements relating to each type of position, and also requested additional information about the Beneficiary's immediate subordinates.

The Petitioner's response did not address the above issues. The Petitioner resubmitted a copy of the same organizational chart, showing job titles without describing the duties or responsibilities of the Beneficiary or his subordinates.

The Director denied the petition, stating that the Petitioner did not submit enough information about the positions held by the Beneficiary and his subordinates to establish that the Beneficiary held a managerial or executive position abroad. The Director also found that the Petitioner had not claimed that the Beneficiary had worked in a position involving specialized knowledge.

On appeal, the Petitioner states:

> Beneficiary . . . was chairman of the board and chief executive of [the foreign company] until 2012 [when] he relinquish[ed] the day to day direction of the company to the director, while [he] remained in the chairmanship, responsible for the a/ company's strategy in short and long term, b/ oversight of the company's finances and 3/ [*sic*] oversight of the company's investment and diversification.

The Petitioner submits a new job description from an official of the foreign company, describing the Beneficiary's position in similar terms:

- Strategic planning for short/long term (30% of time)
- Oversight of the company's finances
- Investment planning

The official also stated that the Beneficiary "has no superior other than the board of director[s]," but did not say whether the company's other officials were subordinate to the Beneficiary's authority.

The newly submitted description provides minimal information about the nature of the Beneficiary's role with the foreign entity. 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). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Id.* The Petitioner has provided only the broadest outline of the Beneficiary's responsibilities, with no significant details regarding his activities in the course of his daily routine.

The Petitioner states, on appeal, that "the totality of the record, not only a particular element, must be considered." The Petitioner contends that the Director did not follow this principle, and that, by concentrating on the lack of a "detail[ed] description of Beneficiary's position abroad," the Director "obscure[d] the entire background of Beneficiary's links to the company, his role and his functions that are executive by nature."

The Petitioner is correct that we must consider the record as a whole. This does not mean, however, that a petitioner need not fulfill *all* eligibility requirements, as long as it fulfills *most* of them. The Petitioner does not identify any alternative evidence in the record that would present a qualifying picture of the Beneficiary's "role and his functions" in the absence of a sufficiently detailed job description.

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. The Beneficiary's claimed ongoing "strategic planning" function would relate to his authority to establish goals and policies, but the Petitioner has not shown that the Beneficiary directed the management of the company for at least one year during the three years preceding the filing of the petition, as required by section 101(a)(15)(L) of the Act. Rather, the Petitioner asserts that the Beneficiary used to be the foreign entity's chief executive, until he "ceded the day to day direction of the company" in 2012, five years before the petition's filing in 2017.

IV. CONCLUSION

The Petitioner did not establish that the Beneficiary was employed in an executive capacity for at least one continuous year during the three years preceding the filing of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of VIG-, Inc.*, ID# 1281589 (AAO June 26, 2018)