U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-, INC.

DATE: JUNE 28, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which intends to market medical laboratory equipment manufactured by its foreign parent company, seeks to temporarily employ the Beneficiary as its chief executive officer 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 Beneficiary has been employed abroad in a managerial or executive capacity; and (2) the Beneficiary will be employed in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by ignoring factors such as offsite subordinates.

Upon *de novo* review of the record, including materials submitted on appeal, we will dismiss the appeal.

We conclude that the Petitioner has established that the Beneficiary was employed abroad in an executive capacity. The Petitioner has documented that the foreign entity has a management structure that would support an executive position, and sufficient subordinate employees to relieve the Beneficiary from primarily performing non-qualifying operational tasks. The Director found that the Petitioner had not provided job descriptions for the Beneficiary's immediate subordinates abroad, but these descriptions are in the record of proceedings. We withdraw the Director's decision on this ground. The denial stands, however, because the record does not show that the petitioning U.S. company could support a primarily executive position at the time of filing.

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.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner has consistently claimed that it seeks to employ the Beneficiary in an executive capacity. Therefore, we restrict our analysis to whether the Petitioner will employ the Beneficiary in an executive, rather than 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.

When examining the claimed 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.

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 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.

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

The Petitioner submitted the following list of the Beneficiary's intended duties:

1. Creating, communicating and implementing the company's vision, mission, and overall direction. Developing the company's operational policies and business development strategies and plans for short-term and long-term objectives (15%)
2. Oversee the company's marketing strategy (35%)
   - Decide based on the advice of managerial team, to increase, change, modify, or upgrade the products lines
   - Review and approve the plan of establishing the distribution network
   - Decide partners in marketing and sales
   - Supervise the performance of customer services
   - Review and approve marketing and public relations plans
   - Represent the company in the major marketing and public relations events
3. Oversee operations and business activities to ensure results are consistent with the overall strategy and mission (30%)
   - Design and develop the organization's functional structure to implement the company's global development strategy.
   - Lead and motivate subordinates to advance employee engagement and develop a high performing managerial team
   - Meet regularly with the managerial team to review the performance of each operation
   - Build trust and relationships with key partners and stakeholders
   - Analyze business hurdles and provide solutions to ensure company survival and growth
4. Direct the company's finance (10%)
   - Develop high-quality investing and expansion decisions to advance the business and increase profits
   - Review financial and non-financial reports to devise solutions or improvements
5. Maintain awareness of the competitive landscape, opportunities for expansion, customers, market, and new industry developments and standards. Look for potential acquisitions, sales, or potential joint ventures to enhance shareholder value (10%)

The above job description is largely identical to the one relating to his position abroad; the key differences were variations in some time percentages, and some different sub-elements in the category regarding marketing strategy. The Petitioner did not explain how the Beneficiary could plausibly perform nearly the same duties for the two companies, when the size, structure, and activities of the U.S. company are different from those of the foreign parent company.

In the denial notice, the Director found that the "description of the beneficiary's proposed position in the U.S. was insufficient to demonstrate what the beneficiary will do on a day-to-day basis." On appeal, the Petitioner maintains that the Beneficiary's "proposed duties are primarily in [an] executive capacity," but the Petitioner offers no supporting argument except to repeat the job description submitted earlier.

The submitted job description is untenable in the context of the Petitioner's staffing at the time of filing. The Petitioner asserts on appeal that the Beneficiary would continue to have executive-level responsibilities at the foreign entity, an assertion we shall address in more detail below.

A petitioner must establish that the position offered to a beneficiary meets applicable requirements at the time the petition was filed. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978); *see also* 8 C.F.R. § 103.2(b)(1), which requires a petitioner to meet eligibility requirements at the time of filing, and continuing through the adjudication of the petition. At the time of filing, the petitioning entity was at a very early stage of development; it is not evident that it had yet begun doing business (defined as the regular, systematic, and continuous provision of goods, services, or both). *See* 8 C.F.R. § 214.2(l)(1)(ii)(H). Because the Petitioner declined to be treated as a new office, it had to be doing business and able to support an executive position at the time of filing. The Petitioner has not done so, and therefore has not met its burden of proof.

B. Staffing

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 a beneficiary 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 an 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 Petitioner stated that the company "will have four fundamental functions": manufacturing, sales, research and development, and administration. The Petitioner stated: "In the next few years, we expect to set up a manufacturing facility in North America," and that the company is "also developing several new products" to be introduced "in the next couple of years." These future circumstances did not apply at the time of filing. A petitioner must establish eligibility at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). We can only take future plans into account in the context of a petition for a "new office" that has been doing business for less than one year. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F).[1]

[1] The Petitioner previously filed a new office petition on behalf of this Beneficiary, but that petition was denied. In the present proceeding, the Petitioner specified that it did not seek to be treated as a new office.

The Petitioner stated that, in the near term, the U.S. company "will focus on establishing its own distribution system" for products manufactured by the foreign parent company. The Petitioner stated that the company will mainly perform the following activities:

- Establishing relationships with the regional distributors
- Obtaining approval from the relevant authorities for marketing products to different regions and countries
- Provide timely support to distributors and end users by responding to inquiries in connection with the products, problems encountered and customer complaints
- Study industry trends to develop future products
- Promote [its brands] by leveraging the distribution network, professional associations, traditional and online marketing

At the time of filing, the Petitioner had three employees in the United States:

- Office Manager
- Senior Quality Engineer
- Application Scientist

The Petitioner provided minimal information about the duties of the above three employees. Regarding the office manager, the Petitioner stated:

> [S]he is responsible for coordinating the services provided by offsite professional service providers including but not limited to CPA, legal counsel, recruiter, IT support, logistic service and etc. She is also responsible for coordinating the schedule of the company staffs, the event schedule and the coordination with [the] parent company. [The office manager] is the key personnel to ensure the [Petitioner's] smooth operation . . . on a daily basis.

The Petitioner did not identify any of the tasks performed by the senior quality engineer. The Petitioner stated that the senior quality engineer works with the foreign parent company and with third-party laboratories "to conduct necessary test[s]" and to assure product quality. These vague assertions do not provide any meaningful information about the role the senior quality engineer plays in the process. Sample test results in the record are signed by a "Study Director" and a "Quality Reviewer," neither of whom appears to be the Petitioner's senior quality engineer.

Although the Petitioner called one of its employees an "application scientist," the Petitioner stated that this employee "has been spending 50% of his time to support sales and 50% of [his] time engaging in R&D" (research and development), because the company had not yet hired a sales manager. The Petitioner provided no details about the employee's non-sales work except to state that "he is responsible for working with professional labs and institutes in both U.S. and China to develop and design new products." The Petitioner did not establish that, at the time of filing, the application scientist engaged in professional-level scientific activity.

The Petitioner documented agreements with various third-party service providers, indicating that the Beneficiary himself need not perform functions such as bookkeeping and product testing, but the Beneficiary does not have executive-level control over those contractors.

In the denial notice, the Director noted that the Petitioner had only one employee (the office manager) during the second quarter of 2017. The Director questioned "how the Beneficiary would be relieved from performing non-qualifying tasks" at a "company with only one employee." The Petitioner filed the petition, however, early in the fourth quarter of 2017, by which time the Petitioner had hired two more employees as discussed above. Their absence several months before the filing date is not, itself, grounds for denial of the petition.

Making a broader point, the Director found that the company lacked "a subordinate level of managerial employees for the Beneficiary to direct" at the time of filing. The Director properly found that the Petitioner's future hiring plans cannot establish eligibility at the time of filing.

On appeal, the Petitioner asserts that it "is a multi-national company" whose "US office will work together with [the] China office to deliver products to worldwide customers. Thus . . . the Chief Executive Officer will supervise the departments and employees in more than one location." The Petitioner adds: "There is no legal requirement for subordinate employees to be on the petitioner[']s U.S. payroll." The Petitioner's organizational chart also included the foreign entity, consistent with the Petitioner's assertion that the Beneficiary would continue to control the foreign company while employed in the United States.

We will consider a beneficiary's control over employees abroad under some circumstances. *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), concerned a company with "staff members within the parent company's headquarters office in Japan [who] exclusively support the Beneficiary's work." Those foreign employees were effectively the Beneficiary's subordinates because they provided services to the petitioning U.S. company. The Petitioner has not shown that similar circumstances apply in the present case. The foreign company was already actively engaged in manufacturing before it had a U.S. subsidiary. The Petitioner has not shown that there is significant interaction between the U.S. and foreign entities beyond the Beneficiary's continued involvement as the head of both companies. The relationship between the two entities appears to be more akin to a supplier/seller arrangement than two components of an integrated whole.

A beneficiary cannot qualify as an intracompany manager or executive, however, simply by being physically present in the United States while maintaining control over a business abroad. (The mere presence of an agent or office does not constitute doing business. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H).)

As we noted above, the Petitioner has not documented business activity in the United States. A financial statement lists assets and liabilities, but not income, and the Petitioner appears to be drawing on startup capital from the foreign parent company. Continuing to run the foreign company

from a token office in the United States would not qualify the Beneficiary for L-1A status (and any future growth of the company cannot establish eligibility at the time of filing).

We note that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa petition for classification as an intracompany manager or executive. *See* section 101(a)(44)(C) of the Act. However, it is appropriate to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *See, e.g., Family Inc.,* 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Based on the deficiencies discussed above, the Petitioner has not established that it will employ the Beneficiary in an executive capacity in the United States.

III. CONCLUSION

The Petitioner established that the Beneficiary's past employment abroad qualifies as an executive capacity, but has not met that threshold for the Beneficiary's intended U.S. employment.

ORDER: The appeal is dismissed.

Cite as *Matter of V-, Inc.*, ID# 1352248 (AAO June 28, 2018)