U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A- CORP.

DATE: MAR. 12, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a wholesaler and retailer of custom shutters and cabinets, seeks to temporarily employ the Beneficiary as its vice president/chief financial officer (CFO) 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 California Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity in the United States.

On appeal, the Petitioner contends that the Director misinterpreted or disregarded the submitted evidence, failed to consider the Petitioner's reasonable needs, and failed to apply the preponderance of the evidence standard to the facts presented.

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 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

[1] The Petitioner previously filed an L-1A "new office" petition on the Beneficiary's behalf which was approved for the period August 1, 2016, until July 31, 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 Petitioner filed a petition to extend the Beneficiary's L-1A status in 2017. The Director of the California Service Center denied that petition and we dismissed the Petitioner's subsequent appeal of the Director's decision.

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 sole issue to be addressed is whether the Petitioner established that it will employ the Beneficiary in an executive capacity in the United States. The Petitioner did not claim that the Beneficiary would be employed 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 also 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.

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. *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 and its staffing levels.

A. Duties

In a cover letter submitted with the petition, the Petitioner summarized the Beneficiary's duties as vice president/CFO as follows (bullets added):

- Carry out the strategic plans and policies as approved by the board of directors;
- Review reports, representation, and financial statements from department managers to determine progress in attaining objectives;
- Formulate planning recommendations to the board of directors and CEO;

- Oversee the performance of department managers;
- Develop the organization's overall financial accounting and financial management systems;
- Develop the financial procedures and standards, and budget management;
- Establish company's financial and accounting policies, goals and objectives;
- Develop financial business plans and forecasts;
- Oversee financing strategies and activities, as well as banking relationships;
- Develop and implement finance, accounting, billing and auditing procedures;
- Oversee department managers to ensure proper maintenance of accounting.

The Petitioner also submitted a chart intended to provide a breakdown of how the Beneficiary would allocate his time. The chart divided approximately 100 job duties into ten groups, and indicated that each group of responsibilities would require 10% of the Beneficiary's time. While lengthy, this breakdown was repetitive, vague, and essentially re-stated the duties described in the above summary, without adding specifics. The groupings lacked any clear structure and many duties appear several times throughout the description. Both the summary of duties and the lengthy list of duties focus on the Beneficiary's level of authority without providing insight into what he is expected to do on a daily basis as the vice president of a nine-person home remodeling company.

In a request for evidence (RFE), the Director advised the Petitioner that it did not sufficiently describe the specific tasks the Beneficiary would perform and the amount of time he would spend on individual tasks.

In response, the Petitioner provided a revised breakdown of the Beneficiary's duties, but did not follow the Director's instructions to list the Beneficiary's specific day-to-day duties and the amount of time to be spent on each task. In fact, the duties were taken directly from the chart submitted at the time of filing and rearranged into five groups of duties; the Petitioner simply deleted parts of its initial description and assigned different percentages to the remaining groups of duties.

The Petitioner asserted that the Beneficiary would allocate 30% of his time to assisting the president/CEO with managing the whole organization, and went on to list broadly-stated duties that generally paraphrase the statutory definition of executive capacity. For example, the Petitioner asserted that he will oversee "policies, activities and strategies" to expand the Petitioner's share of the market; adjust "management policies, objectives and strategies"; "oversee the implement [*sic*] the strategic goals and objectives of the organization"; "formulate management policies"; and "establish, approve and oversee management policies." These are essentially the same as the duties attributed to the company's president/CEO position and the Petitioner did not provide sufficient support for a claim that it requires two top level executives to develop policies and strategies on a day-to-day basis. Further, it did not provide examples of specific policies or strategies that the Beneficiary would be expected to formulate and implement as part of his daily routine. Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *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); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The Petitioner indicated that the Beneficiary would allocate an additional 20% of his time to duties that include: establishing human resources policies and goals; selecting, hiring, and overseeing the performance of department managers; exercising hiring authority, approving personnel actions such as bonuses, benefits and training; reviewing the design and calculation of wage incentives; and overseeing insurance and health plans. However, it appears based on the nature and scope of the business that most of these duties would not need to be performed on a daily basis and, without further explanation, it is unclear how they would require 20% of the Beneficiary's time.

The Petitioner indicates that the Beneficiary would spend the remaining 50% of his time on duties related to investment opportunities and projects (20%); developing the organization's financial accounting and management systems, procedures, standards and budgets (20%); and miscellaneous financial duties including reviewing costs and expenses, coordinating audits and tax filings, and overseeing production of monthly financial reports (10%). The Petitioner did not identify any specific investment projects or opportunities he would pursue, nor did it explain the nature of the financial policies and procedures the Beneficiary is expected to implement. In fact, like the rest of the job description, many of the finance-related duties attributed to the Beneficiary were described in vague terms, making it difficult to discern what specific tasks he would be performing within the context of the Petitioner's business. In addition, as discussed further below, it is unclear to what extent subordinate personnel would relieve the Beneficiary from involvement in the company's routine financial, banking, and accounting matters, and as a result, the Petitioner's claim that he would spend half of his time on higher-level financial review and decision-making is not adequately supported by the evidence as a whole.

Finally, we acknowledge that the Petitioner provided an hourly breakdown of the Beneficiary's "typical daily tasks" in which it attempted to describe what he would do during an eight-hour workday. These tasks resembled those provided in other descriptions in the record and did not provide any additional insight into his specific proposed duties.

In general, the fact that a beneficiary will assist in the direction of a business and exercise some discretion over its day-to-day operations does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity. 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. As such, a detailed job description is critical in determining the nature of the employment; reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. In order to meet its burden of proof, the Petitioner must identify the specific tasks the Beneficiary will perform or the services he will provide. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros.*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The job descriptions that the Petitioner has provided do not sufficiently delineate the Beneficiary's actual job duties and thus they do not establish that those duties would be primarily in an executive capacity.

B. Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, we must 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 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 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 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 Petitioner provided evidence that it leases an office/showroom/warehouse and states that it sells "window shutters, customized molding and special cabinets." Photographs of the Petitioner's premises depict a showroom with product samples as well as a warehouse and production area with the equipment needed to create and assemble its products. The Petitioner provided evidence that it was doing business under two fictitious names - [redacted] and [redacted]

The Petitioner's organizational chart submitted at the time of filing showed a president/CEO at the top of the hierarchy with the Beneficiary immediately subordinate to that position. The chart depicted three U.S. positions – a sales manager, an office manager, and a production manager – and a China-based head of the "international division" as the Beneficiary's direct subordinates. The chart also showed a third tier of employees consisting of two sales people subordinate to the sales manager, one warehouse clerk subordinate to the office manager, two production technicians subordinate to the production manager, and two China-based trading department employees subordinate to the head of the "international division." The Petitioner provided a "high level employee list" which included brief job descriptions for the president/CEO, the Beneficiary's proposed position, and the sales, office, production, and international trade managers.

In the RFE, the Director questioned the Petitioner's representation of China-based employees as part of its U.S. staffing structure, pointing out that all three employees are part of the parent company's organizational chart, which does not depict those employees as the Beneficiary's subordinates. The Director also noted that the Petitioner had not provided evidence that it was engaged in international

trade, and found there was insufficient evidence that the China-based employees actually support the U.S. company.[2]

As noted, the job descriptions submitted by the Petitioner indicated significant overlap between the Beneficiary's duties and those performed by the president/CEO, who is claimed to report to the board of directors, establish the company's policies, strategies, goals, and objectives, give direction to the organization, and exercise discretion on business decisions. This overlap makes it difficult to gauge the Beneficiary's actual level of discretionary authority within the scope of an organization in which two of nine employees are claimed to be employed in an executive capacity.

We also find that the job descriptions that the Petitioner provided for its department managers are vague and do not adequately establish what they actually do on a day-to-day basis. For instance, despite the heavy focus on financial management in the Beneficiary's own job description, none of the supporting employees have been tasked with routine finance functions. The Petitioner indicates that the office manager is responsible for a range of activities that include administration, finance, warehouse, and inventory; however, the only finance related duties mentioned in the job description include preparing financial projections and reports. It is therefore unclear who would carry out the underlying daily tasks associated with financial management, including bookkeeping, accounting, invoicing, and banking.

Further, we note that the Petitioner provided evidence that it operates two separate lines of business under two different fictitious names. The Petitioner has not explained how the work of producing, assembling, marketing, and selling these separate products lines is divided among the staff of its three-person production and sales departments. As with the Beneficiary's job description, the descriptions provided for the subordinates are general with no specific reference to the Petitioner's business activities. In fact, the Petitioner submitted contracts indicating that it installs custom cabinets and closets, but it does not claim to employ installation staff. Without sufficient information about the tasks performed by the Beneficiary's support staff we are unable to determine the extent to which they would effectively relieve the Beneficiary from having to engage daily in the performance of non-executive job duties.

Finally, with respect to the "international trade" department, the Petitioner explained in response to the RFE that the three foreign employees in the department "will be paid by the parent company but controlled by U.S. entity on international trade issues." However, the Petitioner did not provide evidence that it engages in import or export activities with the foreign entity. It provided evidence that it has at times imported equipment or cabinetry parts from various Chinese suppliers, but has not adequately supported its claim that these activities would support an international trade department within the foreign entity that would be under the Beneficiary's direct control.

[2] In addition, the Director observed that most U.S. employees had been hired in the year preceding the filing of the petition, and questioned whether they are permanent employees, or whether they were added "for the sole purpose of creating a larger organizational structure." However, as noted above, the Petitioner filed a new office petition in 2016 and it is therefore reasonable that it hired a significant number of its staff in 2017.

The Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in denying a visa petition for classification as an L-1A intracompany transferee. S*ee* 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. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As noted, the Petitioner is doing business as [redacted] and [redacted] and has two separate product lines with separate bank accounts and their own individual purchasing, production, installation, sales, and marketing needs. The Petitioner claims that it will have two executives and three managers overseeing a team of two sales people, two production technicians and one warehouse clerk, but has not established how the lower-level staff would perform all of the operational and administrative tasks for both lines of business. For example, the Petitioner does not claim to have employees who are responsible for purchasing materials, despite the fact that the Petitioner reported $745,000 in purchases on its 2017 income tax return.

Further, as discussed, the position descriptions provided for the Beneficiary, the company president and the claimed subordinate managers are vague and do not describe the individual employees' actual job duties within the context of the Petitioner's business. Therefore, while the Petitioner has documented that it employs eight staff who would be subordinate to the Beneficiary, we cannot determine based on the information submitted to what extent this staff would be able to relieve the Beneficiary from significant involvement in the day-to-day activities of the company. The Petitioner has not established that it has a reasonable need for a second executive position.

As emphasized by the Petitioner on appeal, it must establish that it meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *Matter of Chawathe*, 25 I& N Dec. 369, 375-76 (AAO 2010). In other words, a petitioner must show that what it claims is "more likely than not" or "probably" true. To determine whether a petitioner has met its burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). Here, the Petitioner's descriptions of its employees' duties were so general that they lack probative value and the evidence as a whole does not establish how the day-to-day operational and administrative work needed to operate two lines of business are allocated among the subordinate staff.

Finally, the Petitioner contends that the Director did not consider the congressional intent in creating the L-1 visa category and also points to the current U.S. policy to "Buy American Hire American." We note, however, that an immigration benefit cannot be granted to a petitioner that has not established that it meets the eligibility requirements for the benefit being sought.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons. 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 A- Corp.*, ID# 2480006 (AAO Mar. 12, 2019)