U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-R-I- INC.

DATE: MAR. 13, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, which operates a franchised "escape room" business, seeks to temporarily employ the Beneficiary as chief executive officer (CEO) of its new office[1] 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 Vermont Service Center denied the petition, concluding that the Petitioner did not establish, as required, that it would be able to support an executive position within one year of approval of the petition.

On appeal, the Petitioner submits additional evidence in support of its claim that the company has hired staff to perform the day-to-day operational tasks of the business. The Petitioner asserts that its operations are sufficiently complex to require the Beneficiary's services in an executive capacity.[2]

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification for 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 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. Section 101(a)(15)(L) of the Act. The petitioner must also establish that the beneficiary's prior education, training, and

[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.

[2] The Petitioner did not claim that the Beneficiary would be employed in a managerial capacity. Therefore, our analysis will address only the Petitioner's claim that the Beneficiary's proposed position would be in an executive capacity.

employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

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).

The term "executive capacity" is defined 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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) takes 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.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner established that its new office would support the Beneficiary in an executive capacity within one year of the approval of the petition.

In the denial decision, the Director acknowledged that the Beneficiary's proposed duties, as described in the record, "appear executive in nature." However, the Director found that, based on the nature, structure, and proposed staffing of the new business, the Petitioner did not show how it would "reach a level of complexity that would realistically support a qualifying executive position." The Director determined that there was insufficient evidence to show that the Beneficiary would be relieved from involvement in the day-to-day operations of the escape room business.

On appeal, the Petitioner provides evidence that it has hired three staff, maintains that these employees perform the company's day-to-day operational tasks, and asserts that it requires the Beneficiary to perform executive duties that could not reasonably be assigned to lower-level workers. The Petitioner emphasizes that the Director erred by focusing on the number of employees to be hired, and did not consider the complexity of the Petitioner's business or its reasonable need for an executive employee to guide the company's growth.

In the case of a new office petition, beyond the description of a beneficiary's proposed job duties, we review the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial or executive capacity. A petitioner has the burden to establish that it would realistically develop to the point where it would require the

beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the evidence must be considered in analyzing whether the proposed managerial or executive position is plausible considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

A. Duties

Based on the definitions 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 company's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

The Petitioner has signed a franchise agreement to operate a ' escape room business. At the time of filing, the Petitioner had one operational room at its location, while the second room was under construction. The Petitioner indicated it would open a second location in its third year of operations.

The Petitioner has consistently stated that the Beneficiary, as CEO, will perform the following duties:

- Direct, plan the management of the company, lead and develop the company's strategy, procedures for business development, specifically in establishment and construction of escape rooms – 20% of time
- Establish the goals and policies of the company relating to its establishment and continuance [*sic*] growth the company's business – 20% of time
- Exercise wide latitude in decision-making of the company relating to efficiency, quality, service, customer satisfaction, and marketing – 10% of time
- Confer with the foreign affiliate on budget issues, capital investment and financial matters – 10% of time
- Direct and oversee organizations financial and budgetary activities of the company – 15% of time
- Direct, coordinate human resources activities relating to appointment of department heads and managers for company's operation – 10% of time
- Analyze activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions – 10%
- Direct, head presentations, public relations meetings, relations with Franchisor – 5% of time. As the CEO of the company the beneficiary will be the face of the company. The beneficiary will represent the company on major events, conferences, media events. The beneficiary will confer with franchisor on directing company's compliance with franchise agreement and growth.

The Petitioner emphasizes that the Director acknowledged that these duties "appear executive in nature." The duties appear executive in nature, in part, because the first three duties listed, accounting for 50% of the Beneficiary time, closely resemble the statutory definition of "executive capacity" at section 101(a)(44)(B) of the Act. However, these general statements do not provide any meaningful insight into the Beneficiary's expected day-to-day duties. 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.).

While these broad responsibilities are indicative of the Beneficiary's level of authority as the senior employee in the company, it was not unreasonable for the Director to question the amount of time the Beneficiary would actually spend on executive-level tasks. On appeal, the Petitioner addresses the Beneficiary's responsibility for directing the company's planning, strategy and business development in more detail, noting that the escape room industry is "high-paced and dynamic," and will require the Beneficiary to stay up to date with competitors. Specifically, the Petitioner indicates that the Beneficiary must constantly monitor the competition, reassess, and reevaluate the entire strategy of the business, its pricing and promotion strategy, technology and its policies and procedures. As an example, the Petitioner states that the Beneficiary already made a decision to change the scenario of one of its quest rooms and to increase the number of players in each room. However, the record does not support the Petitioner's claim that the Beneficiary would spend a full 50% of his time on policies, strategies, and executive decisions within one year.

Many aspects of the Petitioner's operations are determined by the franchisor according to the terms of the franchise agreement. While the Beneficiary can decide which of the franchisor's standard escape room scenarios to offer, the franchisor is responsible for dictating the layout of the room, dictating the supplies that must be ordered, implementing improvements to its system, and setting the "operational systems, procedures, policies, methods and requirements" set forth in the franchise operating model, as well as assisting with the promotion of the business. While there are some executive level decisions that would reasonably be left to the Beneficiary, the Petitioner has not explained how the Beneficiary, rather than the franchisor, would be the one responsible for constantly adapting the [redacted] brand to keep up with the "high-paced and dynamic" escape room industry.

The Petitioner also indicates that the Beneficiary will spend 25% of his time on directing and overseeing financial, budgetary, and investment matters, but does not further elaborate on the specific tasks he will perform, or indicate who will be responsible for routine financial matters such as banking, bookkeeping, and other financial recordkeeping. Therefore, although we do not doubt that the Beneficiary will make financial decisions for the company, the record does not support that all of his duties in this area would be executive, as claimed.

The fact that the Beneficiary will direct a business as its owner and senior employee does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(44) of the Act. 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. Therefore, even though 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, a broad overview of his responsibilities is insufficient to establish that his actual duties would be primarily executive in nature within one year.

B. Projected Staffing and Business Plan

As noted, the Petitioner intends to operate one escape room location with two rooms. The Petitioner indicates that it will continue with one location until its third year. In the first year, the Petitioner intends to hire one location manager and two staff, in addition to the Beneficiary, who will also work at the escape room location. The Petitioner now provides evidence that it carried out this hiring plan by August 2017, opened its second room, and had three employees as of the date of the appeal.

It has assigned the following duties to the location manager:

- Run the day-to-day operations of the escape room location
- Perform marketing and advertising activities
- Support sales and manage customer communications
- Oversee staff members and provide training for the staff members, manage staff schedule
- Report directly to the CEO with performance updates and progress on company's goals

The two staff members perform the following duties:

- Greeting customers, solving customer-related problems
- Ensuring excellent guest experience
- Monitoring teams during their escape-room experience
- Providing technical support and maintenance of the props and elements of the room
- Managing phone calls and keeping the booking software up to date
- Reporting to the Location Manager

The Petitioner has not provided its operating hours, but the assumptions in the company's business plan suggest that the company is open seven days per week with longer hours on weekends than on weekdays. The franchise agreement requires franchisees to hire "a sufficient number of employees suitably qualified to operate the Business in compliance with the System and the Franchisor's instructions as set forth in the Manual." The Petitioner did not provide additional information regarding this system or manual and it is unclear what level of staffing is required to operate the escape room franchise or whether a three-person staff would be sufficient to handle all the operational needs of the location. We further note that the franchisor requires franchisees to send two "managers or administrators" for initial training, which suggests that the business may require more than one person to perform location manager responsibilities.

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.*

Here, even though the Beneficiary holds the senior position within the company, and the Petitioner indicates that he will primarily focus on the company's strategic direction, policies, and objectives, the record does not show that the lower level staff would sufficiently relieve him from regular involvement in the day-to-day operations of the business. The fact that the Petitioner did not include clearly non-qualifying duties in the Beneficiary's overly broad position description does not lead to a conclusion that he would only perform executive level duties as claimed.

Section 101(a)(44)(C) of the Act requires that USCIS take into account the reasonable needs of the organization in light of the overall purpose and stage of development of the organization if staffing levels are used as a factor in determining whether an individual will be acting in a managerial or executive capacity. However, it is appropriate for USCIS to consider the proposed 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).

The Petitioner intends to employ a CEO, a manager, and two staff at its franchised escape room business. We agree with the Director that the evidence is not sufficient to show that the Petitioner's staff of three employees is sufficient to relieve the Beneficiary from involvement in greeting and providing instructions for groups of customers, monitoring two escape rooms, answering phones, and performing other tasks related to local marketing, preparing reports for the franchisor, and routine clerical, administrative, and finance-related duties during the company's standard operating hours. The Petitioner's claim that the Beneficiary will work at the escape room location (which has a reception area and two escape rooms but no separate office) but will not be involved in any way in providing the company's services is not sufficiently supported by the record.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a beneficiary as long as those tasks are not the majority of a beneficiary's duties, a petitioner still has the burden of establishing that a beneficiary will "primarily" perform

executive duties within one year. *See* section 101(a)(44) of the Act. The Petitioner did not provide a sufficiently detailed breakdown of the Beneficiary's actual proposed tasks or explain how the three-person staff would be sufficient to remove him from involvement in non-executive tasks.

On appeal, the Petitioner refers to non-precedent decisions in which we overturned service center decisions involving L-1A new offices. These decisions were not published as precedent and therefore do not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. The Petitioner maintains that some of the non-precedent decisions referenced also involved smaller companies that did not intend to employ large number of employees within their first year. Our decision here is not based solely on the number of employees subordinate to the Beneficiary. As discussed, the Petitioner did not provide a sufficient position description for the Beneficiary, and the evidence submitted does not show how the three-person staff will be sufficient to perform most of the company's non-executive functions.

The Petitioner has consistently stated that the Beneficiary will occupy the senior position in the new office, but has not submitted a job description or supporting evidence sufficient to demonstrate that he would primarily engage in executive duties, or that the new office would support an executive position, after the initial year of operations.

III. CONCLUSION

The Petitioner did not establish that its new office would be able to support an executive position within one year of approval of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of E-R-I- Inc.*, ID# 1004438 (AAO Mar. 13, 2018)