U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-G-(USA), LLC

DATE: MAR. 14, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a real estate development business, seeks to temporarily employ the Beneficiary as its "Vice President - Business Development" 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 determining that the Petitioner did not establish, as required, that it would employ the Beneficiary in a managerial or executive capacity in the United States.

On appeal, the Petitioner asserts that the Director did not give proper consideration to the Beneficiary's detailed job description and overlooked substantial evidence demonstrating that the company has both the business need and financial ability to hire managerial and professional employees to support the Beneficiary in an executive capacity.

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 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 primary issue to be addressed is whether the Petitioner established that it would employ the Beneficiary in an executive capacity. The Petitioner did not claim that he would be employed in a managerial capacity.

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.

When examining the executive capacity of a given beneficiary, we will look to the petitioner's detailed description of the job duties. *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 proposed job duties along with evidence of the nature of the Petitioner's business, its staffing levels, and its organizational structure.

A. Duties

Based on the 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 at 1533.

At the time of filing, the Petitioner submitted a letter that included a list of nine proposed duties the Beneficiary would perform as Vice President – Business Development. Those duties included: directing the preparation of annual business plans, real estate project development plans, and budget proposals for approval by the CEO; directing the preparation of subdivision plans, architectural designs, and construction plans for real estate development projects and making proposals to the CEO for final approval; making proposals regarding the overall structure of the company and establishment of divisions; making personnel decisions and/or proposals including hiring and discharging executives, managers and professional staff; directing and supervising the work of managerial and professional staff (including a project manager, marketing manager, business development manager and office operations manager), as well as directing the work of managerial and professional staff of the foreign parent company; interviewing and hiring outside professionals; and, directing and participating in major business negotiations with business partners.

In a request for evidence (RFE), the Director advised the Petitioner that it did not sufficiently explain the Beneficiary's proposed duties and requested a more detailed description identifying the specific tasks he is expected to perform and the percentage of time to be spent on each task.

In response, the Petitioner elaborated on the nine job duties stated at the time of filing and assigned percentages ranging from 2.5% to 10% to eight of those duties. The Petitioner indicated that a full 50% of the Beneficiary's time would be spent on directing and supervising the work of a vice president - finance, project manager, marketing manager, business development manager, and office operations manager, as well as directing the work of managerial and professional staff employed by the Petitioner's parent company who support the Petitioner's U.S. operations. Specifically, the Petitioner stated that the Beneficiary would hold daily meetings with these managerial staff, delegate duties and responsibilities to them, approve major work assignments proposed by the office operations manager, and review reports prepared by each subordinate manager regarding their work progress.

Overall, the description appears to describe an executive position in a fully staffed and operational real estate development company. However, at the time of filing in April 2018, the Petitioner had one claimed employee (the CEO) on its proposed organizational chart, indicated that it was still in the permit application process for its real estate project, and submitted a business plan indicating that it expected to have a staff of 10 or 11 employees by November 2018. In its response to the RFE in July 2018, the Petitioner stated that the business development "is approximately one year behind the original plan." The Petitioner's appeal, submitted in October 2018, does not mention any hiring that has taken place subsequent to the date of filing. Further, while we acknowledge that the Petitioner indicated that the Beneficiary would also oversee staff employed by its foreign parent company, the Petitioner did not identify these employees with any specificity, provide their job descriptions, or provide any evidence of the work they were performing for the U.S. company as of the date of filing.

As such, the job description submitted for the Beneficiary appears to be largely speculative, and it does not provide a clear picture of the nature of his actual proposed job duties within the context of the Petitioner's business as it existed at the time of filing. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner or beneficiary becomes eligible under a new set of facts. *See, e.g.*, *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The fact that the Beneficiary would assist the CEO with the management or direction of the business during its developmental phase 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. Section 101(A)(44)(B) of the Act. While the Beneficiary would likely possess the requisite level of authority with respect to discretionary decision-making, the broad and speculative description is insufficient to establish that his actual duties would be primarily executive in nature.

B. Business Activities, Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual will be acting in a managerial or executive 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. Therefore, a company's size alone may not be the determining factor in denying a visa petition for classification as an intracompany transferee. 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 or a "shell company" that does not conduct business in a regular and continuous manner. *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).

Here, the Petitioner is described as a real estate development company established in 2016, with one claimed employee at the time of filing.[1] The Petitioner provided evidence that it had purchased 31 acres of land in [redacted] in August 2016, and states that it intends to build a 310 lot residential subdivision on the land, with expected construction and development costs of $202 million and estimated sales of $407 million. The Petitioner indicated that it is in the process of obtaining approvals and permits for the development of the subdivision, and provided evidence that it had signed a "Predevelopment Consulting Agreement" with [redacted] and made payments under the terms of the agreement. In response to the RFE, the Petitioner also submitted a Transportation Impact Study related to the project that was last updated in February 2018. The Petitioner did not submit any other documentation demonstrating the progress of the project.

As noted, the Petitioner initially indicated that it would have a staff of 10 to 11 employees in place by November 2018, and expected to achieve completion and sale of the residential properties by November 2020. However, in response to the RFE, the Petitioner indicated that it was approximately one year behind and still in the process of obtaining approvals and permits before development activities could commence.

The Petitioner's initial organizational chart indicated that its proposed staff would include: a president and CEO; one or two vice presidents; "office operations management and administration" (2 employees); a business development manager with two subordinate staff; a project manager with four subordinate staff; a marketing manager with two subordinate staff; and external contractors, including engineers, architects, brokers and other onsite workers. The organizational chart submitted in response to the RFE was slightly revised in that it identified the Beneficiary by name along with his proposed "Vice President – Business Development" position, identified a proposed "Vice President – Finance" position subordinate to him, and identified [redacted] as the "office

[1] The only employee named on the initial organizational chart was the Petitioner's CEO. In response to the RFE, the Petitioner claimed to have two employees - the CEO and an Office Operations Manager. The Petitioner has not submitted payroll documentation or other evidence of wages paid to employees, and therefore has not established which position was staffed when it filed the petition.

operations manager." At most, it appears that the Petitioner claimed to employ the CEO and the office operations manager prior to the denial of the petition.

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.*

Here, the Petitioner's description of the Beneficiary's proposed duties is predicated on him spending a full 50% of his time supervising subordinate managerial staff who have not yet been hired, and for that reason, the description has limited probative value in establishing the nature of his expected duties upon approval of the petition. The Petitioner did not establish how its current staff of, at most, one subordinate employee would support both a CEO and a vice president. Further, the Petitioner has not shown that it had a need for the Beneficiary to perform primarily executive duties as of the date of filing based on its current stage of development, even if we consider the Petitioner's subsequent claim that intends to transfer its CEO back to China in the near future.

We acknowledge that the record contains an advisory evaluation of the Beneficiary's position written by an associate dean at the repeats the job description that the Petitioner provided in response to the RFE and opines that the Beneficiary's job duties satisfy the statutory definition of "executive capacity," as defined at section 101(a)(44)(B) of the Act. However, it is unclear what information or documentation he reviewed, beyond the Beneficiary's position description, in order to reach this conclusion. He states that he is familiar with the type of business operated by the Petitioner, but his letter does not include any specifics regarding the nature and scope of the Petitioner's business, the fact that its only project is in the pre-development phase, or the fact that the subordinate staff mentioned throughout the Beneficiary's job description have not been hired As a result, we find his determination to be conclusory and based primarily or solely on a broad job description that was speculative and lacked the details needed to establish the true nature of the Beneficiary's day-to-day duties as of the date of filing.

We may, in our discretion, use as advisory opinion statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we are also ultimately responsible for making the final determination regarding a foreign national's eligibility. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.* We have already acknowledged the Beneficiary's authority over the company which he will apparently share with the

senior executive to whom he will report. However, for the reasons already discussed, the totality of the evidence does not establish that the Beneficiary's primary duties would be executive in nature. Because the expert evaluation was based on a speculative job description, and not on a review of all relevant evidence, we find that it has limited probative value.

Finally, we note that, in a statement accompanying its Form I-290B, Notice of Appeal or Motion, the Petition emphasizes that it "submitted into evidence numerous documents, including a business plan and financial records, etc., to establish that the new office has the resources to hire and is in the process of hiring subordinate employees to support the beneficiary."

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.

The L Classification Supplement to Form I-129, at Section 1, item 12, specifically asks the petitioning employer to respond to the question "Is the beneficiary coming to the United States to open a new office?" The Petitioner responded "No" to this question and, with the exception of the statement quoted above, it has not indicated that it intended to file a new office petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Accordingly, we will not treat this petition as a new office petition; the Petitioner must establish its ability to support the Beneficiary in an executive position as of the date of filing.

In light of the foregoing discussion, the Petitioner has not shown that it would employ the Beneficiary in an executive capacity.

III. DOING BUSINESS

Although not addressed in the Director's decision, we find that the Petitioner has not established that it was doing business at the time of filing. To establish that it is doing business, a Petitioner must demonstrate that it is engaged in the "regular, systematic, and continuous provision of goods or services." 8 C.F.R. § 214.2(l)(1)(ii)(H).

As discussed, the Petitioner's real estate development project is in the pre-development and permitting phase and, as such, the record does not show that it is engaged in regular and systematic business activities that meet the definition of "doing business." For this additional reason, the petition cannot be approved.

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 J-G-(USA), LLC*, ID# 2501105 (AAO Mar. 14, 2019)