U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-C-M-S- CORP.

DATE: MAR. 20, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a machine shop, seeks to temporarily employ the Beneficiary as its president 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 California Service Center denied the petition, concluding that the Petitioner did not establish, as required, that: (1) it would employ the Beneficiary in a managerial or executive capacity in the United States; and (2) the Beneficiary has one continuous year of full-time employment abroad in a managerial or executive capacity in the three years preceding the filing of the petition.

On appeal, the Petitioner submits additional evidence related to the Beneficiary's employment abroad and asserts that the Director mischaracterized the nature of his proposed duties in the United States. The Petitioner maintains that the Beneficiary has been employed abroad, and will be employed in the United States, in an executive capacity.

Upon *de novo* review, we will withdraw the Director's determination that the Beneficiary does not have the required one year of full-time employment abroad in a managerial or executive capacity.[1] However, as the Petitioner has not overcome the remaining ground for denial, 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

[1] *See* 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv). The Petitioner submitted sufficient evidence to establish that the Beneficiary has served as the president of the Petitioner's claimed Venezuelan affiliate, with responsibility for oversight of a retail pharmacy company with more than 45 employees, for a number of years. Upon review of the totality of the evidence, we find that the Petitioner established by the preponderance of the evidence that he has been employed abroad in a primarily managerial or executive capacity on a continuous and full-time basis.

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

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

In the denial decision, the Director determined that the Petitioner's description of the Beneficiary's duties indicated that he would be performing a number of tasks not typically performed by someone in a managerial or executive position. The Director further found that the Petitioner did not establish how the staffing and structure in place at the time of filing would be sufficient to support the Beneficiary in a managerial or executive capacity.

On appeal, the Petitioner submits an expanded description of the Beneficiary's proposed duties and asserts that the Director mischaracterized his executive-level business development functions as non-qualifying sales or marketing tasks. The Petitioner emphasizes that the company has a structure in place that will not require the Beneficiary to spend significant portion of his time on non-qualifying activities, and he will instead primarily focus on dictating the company's strategies, growth, and direction. As the Petitioner does not claim that the Beneficiary will be employed in a managerial capacity, the scope of our analysis will focus on whether the Petitioner established that his role will be primarily executive in nature.

When examining the 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, USCIS examines 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

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 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.

The Petitioner was established in 1996 and is described on the Form I-129 as a "machine shop." According to the Petitioner's business plan, it offers "mechanical repairs and services for the automotive industry" and its primary clients are auto mechanic shops. At the time of filing, the Petitioner provided the following breakdown of the Beneficiary's proposed duties as president:

- Designs and implements strategic plans, related but not limited to: expansion, down-sizing, shop location, vendor sources, building client relationships, incentive programs, etc.; 40% or 16 hrs/wk
- Research potential clients and prepare proposals for potential clients; 25% or 10 hrs/wk
- Meets with and presents business proposals to potential clients; 10% or 4 hrs/wk
- Meets with current clients as needed to reinforce relationships, assess needs and satisfaction; 10% or 4 hrs/wk
- Reviews periodic reports from management and supervisory staff to assess the state of operations; 5% or 2 hrs/wk
- Meets with management staff to discuss and review issues and/or concerns, reports and other data that impacts operations of the company; 10% or 4hrs/wk

The Petitioner also included a list of 14 duties which included those listed above, as well as "utilizes full discretion to take any actions needed," "oversees personnel actions with recommendation and consultation of management staff," and "performs periodic walkthroughs of workshop and work stations with management and supervisory staff." This description also included general functions such as acting as the company's representative in all business matters, acting as legal and fiduciary representative, being responsible for discretionary decision making, convening and chairing board meetings, and assigning or delegating duties as appropriate.

The Petitioner's business plan noted that its marketing strategy relies heavily on relationship building, that the Beneficiary has already implemented strategies to "meet with clients at their location on a regular basis," and that he would continue to perform these activities to encourage increased orders and word-of-mouth referrals. Similarly, the business plan mentions that, as part of the Petitioner's sales plan, the Beneficiary "will continue to meet with potential customers at their location to solicit new business."

In a request for evidence (RFE), the Director acknowledged the submitted job description and advised the Petitioner that many of the Beneficiary's proposed responsibilities, requiring "up to 85%" of his time, appeared to involve non-qualifying duties. In response, the Petitioner explained that most of the Beneficiary's time will be allocated to strategic planning and business development functions, which must be considered inherently executive duties. The Petitioner further addressed each of the six areas of responsibility and explained that each duty requires a level of discretionary authority that the company's lower level staff do not have.

However, the Director ultimately concluded that the Beneficiary's duties lacked details regarding his specific proposed daily activities, but appeared to include a number of non-executive duties related to business development, financials, marketing, analysis, contract negotiation, research and customer service. On appeal, the Petitioner provides a somewhat expanded breakdown of the Beneficiary's duties, noting that a detailed daily schedule cannot be provided until he assumes the offered position.[2] The Petitioner maintains that the described duties do not indicate that the Beneficiary would be handling day-to-day activities in the operation of the machine shop, but rather show that he would be responsible for "strategic planning, setting goals, policies, business development, and consultation and meetings with management staff."

We agree that the Petitioner has not established that the Beneficiary's duties would be primarily executive in nature. The Petitioner indicates that the Beneficiary will allocate 40% of his time to designing and implementing "strategic plans" related to expansion, downsizing, exploring additional services or operating hours, building client relationships, developing incentive programs, and vendor sources. While developing company strategy is generally regarded as an executive task, it is unclear how the petitioning company, a six-person shop that has been in business for 20 years, requires an executive to spend this amount of time on strategic planning. In fact, the business plan indicates that the Beneficiary has already implemented marketing, sales, and service strategies that he intends to continue, therefore it is not clear that he will need to engage in strategic planning as part of his day-to-day routine.

Further, the Petitioner submitted a letter in response to the RFE highlighting the fact that any changes in strategy or major decisions require the Beneficiary to perform market research and analysis, non-executive duties that do not appear to be delegated to subordinates. Although we do not doubt the Beneficiary's authority to make executive-level decisions regarding the company's direction, the record does not support the Petitioner's claim that he will be required to perform these duties on a regular and ongoing basis or that all of his day-to-day tasks in this area of responsibility would be executive in nature.

The Petitioner states that a total of 45% of the Beneficiary's time will be allocated to researching potential clients, preparing proposals, meeting with clients and potential clients to present business proposals, and meeting with current clients to reinforce relationships. The Petitioner characterizes

[2] According to the Petitioner's business plan, the Beneficiary took over the management of the company in November 2016.

these duties as executive-level "business development" functions that can be distinguished from sales and marketing duties. However, the Petitioner's business plan indicates that these activities are critical to its sales and marketing plans and that the Beneficiary is the one responsible for performing these duties. While the Beneficiary's authority to finalize and sign service contracts indicates his senior position in the company, his responsibility to "meet with potential customers at their location to solicit new business" and his relationship-building activities to encourage increased orders and referrals are not executive-level duties. The Petitioner does not claim that its other employees are engaged in these types of sales, marketing, or "business development" duties, and it has not submitted sufficient support for its claim that the significant amount of time the Beneficiary would spend on research, proposal, and client-facing duties would be executive in nature.

Even though the Beneficiary holds the senior position within the company, the fact that he will manage or direct the business does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(44)(B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. Section 101(A)(44)(B) of the Act. Here, the job description alone is insufficient to meet the Petitioner's burden of proof.

B. Staffing

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it had six current employees at the time of filing in June 2017. The Petitioner's organizational chart identified those employees as a sales manager, a workshop coordinator, and four mechanic shop workers, with the sales manager and workshop coordinator reporting directly to the Beneficiary.

The Petitioner indicated that the sales manager is responsible for customer service, including promoting a friendly environment, providing service in accordance with the company's customer service policies, resolving complaints from customers, and reviewing customer feedback. The Petitioner also indicated that this employee reviews parts and materials orders, controls the entry and exit of materials and equipment, verifies and authorizes budgets for work performed, and ensures that work is delivered on time. Therefore, despite her job title, it does not appear that she would assist the Beneficiary with sales functions. The workshop coordinator performs duties consistent with his job title, including planning and scheduling the mechanics and their work, and reviewing its quality.

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 he "directs" 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.*

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Here, the Petitioner indicates that the Beneficiary will take over as the executive of a machine workshop that has been in business for 20 years, but it has not shown how this company is able to support the Beneficiary in a position in which his actual day-to-day duties would be primarily executive as defined in the statute. The record does not support a finding that the Beneficiary, who would have one subordinate first-line supervisor, would primarily direct the management of the company and focus on its broad goals and policies. The Petitioner correctly points out that the Beneficiary would not be required to provide the company's core services, i.e., repairing engines, machines, and other equipment. However, as discussed, there are other non-executive functions, such as sales and marketing, which are included in the Beneficiary's job description, will require a large portion of his time, and which have not been assigned to subordinate personnel. The Petitioner has not met its burden to show how the Beneficiary's duties would be primarily executive in nature.

Therefore, for all of the reasons discussed, the Petitioner has not established that it will employ the Beneficiary in an executive capacity.

III. QUALIFYING RELATIONSHIP

Although not addressed in the Director's decision, the record as presently constituted contains insufficient evidence of a qualifying relationship between the Petitioner and the Beneficiary's foreign employer. To establish a "qualifying relationship," the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See* section 101(a)(15)(L) of the Act; *see also* 8 C.F.R. § 214.2(l)(1)(ii) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate").

The Petitioner claims that it has an affiliate relationship with the Beneficiary's foreign employer based on the Beneficiary's ownership and control of both companies. *See* 8 C.F.R. § 214.2(l)(i)(ii)(L). The Petitioner provided sufficient evidence to establish that the Beneficiary is the majority owner of the foreign entity. The Petitioner claims that the Beneficiary purchased 100% of its assets and stock from its prior owner, [redacted] on October 31, 2016, for a purchase price of $950,000. The Petitioner submitted an "Asset Purchase Agreement and Sale Agreement" as evidence of this transaction, but did not provide copies of its stock certificates, stock ledger, or other primary evidence confirming that the change in ownership occurred.

Moreover, the Petitioner provided a copy of its 2016 federal tax return which indicates at Schedule K-1 that the company's owners are [redacted] (67%) and [redacted] (33%). The Petitioner did not explain why the Schedule K-1 did not identify the Beneficiary as the Petitioner's

sole owner, as contemplated by the submitted purchase agreement signed in 2016. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the lack of evidence of the Petitioner's ownership, and the inconsistency noted above, the Petitioner has not supported its claim that the Beneficiary is its sole owner or that it has an affiliate with the Beneficiary's foreign employer.

IV. CONCLUSION

The Petitioner did not establish that it will employ the Beneficiary in an executive capacity or that it has a qualifying relationship with the Beneficiary's foreign employer.

ORDER: The appeal is dismissed.

Cite as *Matter of J-C-M-S- Corp.*, ID# 1077599 (AAO Mar. 20, 2018)