U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-T-, INC.

DATE: MAR. 26, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an importer and exporter of produce, seeks to employ the Beneficiary as its president and chief executive officer 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 the Beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner states that the Beneficiary has been and would continue to be employed in an executive capacity, contending that the Director did not properly consider the supporting evidence.[1]

Upon *de novo* review, we find that the Petitioner has provided sufficient evidence to show that the Beneficiary was more likely than not employed abroad in an executive capacity. However, we find that the Petitioner has not provided sufficient evidence to overcome the Director's decision with regard to the Beneficiary's proposed employment in the United States. Therefore, 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] The Petitioner does not claim that the Beneficiary has been or will be employed in a managerial capacity. Therefore, we will limit our analysis to whether the Petitioner established that the Beneficiary was employed abroad and would be employed in the United States in an executive capacity.

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 sole issue we will address in this matter is whether the Petitioner provided sufficient evidence to establish that the Beneficiary will be employed in an executive 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 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, U.S. Citizenship and Immigration Services (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.

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 must also 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.

A. Duties

In a supporting cover letter the Petitioner stated that it will work with its foreign affiliate to "facilitate[e] negotiations and common investment ventures." Within the scope of a fruit import-export business, the Petitioner stated that the Beneficiary would "exclusively" perform executive duties indicating that the Beneficiary would allocate 50% of his time to directing and supervising the company's "global operations on existing investments and future investment ventures." The Petitioner also stated that the Beneficiary would devote 10% of his time to each of the following: directing financial activities, evaluating the company's performance to determine the need for improvement and policy changes, and directing contract negotiations and financial obligations.

In a request for evidence (RFE), the Director instructed the Petitioner to provide a statement describing the Beneficiary's typical executive job duties and the percentage of time the Beneficiary would allocate to each duty. The Director stated that the job description should clarify how the Beneficiary's proposed job duties would meet the four-prong criteria of executive capacity.

In response, the Petitioner provided another job duty breakdown that contained time allocations and listed job duties that were inconsistent with information that was provided in the original job description. For instance, the Petitioner stated that the Beneficiary would direct global operations in terms of current and future investments; the Petitioner added that the Beneficiary would carry out this responsibility by leading and supervising "all departments" and making recommendations to the board of directors and that he would allocate 30% of his time to these activities. This time allocation is inconsistent with the original job description, where the Petitioner stated that the Beneficiary would devote 50% of his time to this responsibility. Likewise, the original job description states that the Beneficiary will devote 5% of his time to reviewing financial statements, sales and activity reports, and other financial data; the new job description indicates that the Beneficiary would allocate 10% of his time to this job responsibility, adding that the Beneficiary would "lead" the logistics department manager in the preparation of reports and making recommendations to the board of directors. The Petitioner also claimed that the Beneficiary would analyze produce types by "lead[ing] the Logistics Department Manager" to follow steps in the customs processes and ensuring that the proper department receives and processes produce orders and that he would analyze consumer data by ensuring that the office manager prepares consumer reports and making recommendations to the board; we note that the original job description did not include either type of analysis as part of the Beneficiary's position. On the other hand, the original job description indicated that the Beneficiary would direct contract negotiations and "financial obligations"; however, this job duty was not included in the Beneficiary's more recent job description.

Both job descriptions indicated that the Beneficiary would establish and implement departmental policies and objectives and direct staffing requirements for the logistics, office, and warehouse departments by interviewing and training department managers and staff.

We further note that the Petitioner provided an organizational chart depicting the employees and departments that comprise its organization. The chart indicates that the Beneficiary would oversee an office manager, a director of operations, and a sales director. Despite providing a job description that makes specific references to logistics, office, and warehouse departments, the chart does not specify any department names or indicate which position titles would be consistent with the department names in the job description. The Petitioner must resolve these and the above described incongruities 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).

In the denial decision, the Director concluded that the Petitioner did not establish that the Beneficiary would be employed in an executive capacity. The Director found that the Beneficiary's job description primarily consists of non-executive job duties and noted that the Petitioner did not provide job descriptions for the Beneficiary's subordinates.

Although we agree with the Director's conclusion, we find that the record lacks sufficient evidence about the specific job duties the Beneficiary would perform on a daily basis. As such, we cannot concur with the Director's affirmative finding that the Beneficiary would primarily carry out non-executive functions as part of his daily routine, given that we cannot determine precisely what job duties the Beneficiary would perform. The actual duties themselves are critical to a determination as to the true nature of the employment. *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).

In the present matter, the Petitioner's latest job duty breakdown, aside from being partly inconsistent with the original job description, lacks the necessary degree of detail as to the Beneficiary's actual daily tasks. For instance, the job description states that the Beneficiary will spend 30% of his time leading and overseeing "all [d]epartments" and providing recommendations to a board of directors regarding the Petitioner's "global operations" in terms of current and future investments. However, the phrase "global operations" is vague and does not specify the factors that the Beneficiary would consider or provide an understanding as to the types of "investment ventures" that would be part of the Petitioner's "global operations." The job description also lacks specific information about the Beneficiary's actual daily tasks and thus it precludes us from understanding precisely how the Beneficiary would "lead and supervise all [d]epartments" of the operation. The Petitioner was equally vague in neglecting to disclose specific daily tasks that would explain how the Beneficiary would direct the company's pricing, sales, and product distribution activities. Merely stating that the Beneficiary would "lead the Logistics Department Manager to execute this duty" is not sufficient, as this claim does not specify the actions that are involved in the Beneficiary's leadership of this subordinate position. Likewise, the job description broadly states that the Beneficiary would have discretionary authority to establish and implement departmental goals and policies and analyze and evaluate the efficiency of corporate operations by directing the logistics and office departments. These job duties are vague and lack a definitive statement explaining how the Beneficiary would implement goals and polices or what underlying actions are indicative of his responsibility to "direct" the logistics and office departments.

On appeal, the Petitioner contends that it met its evidentiary burden by a preponderance of the evidence and argues that the Director did not apply the correct standard of proof. We disagree and find that the Petitioner has not met the preponderance of the evidence standard because it has not provided a job description that conveys a meaningful understanding of the actual tasks the Beneficiary would carry out on a daily basis within the scope of a produce import and exporting business. As indicated throughout this discussion, reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. Here, rather than provide sufficient detail or explanation about the Beneficiary's activities in the course of their daily routine, the Petitioner has focused on the Beneficiary's leadership role; this element alone, however, 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 in nature. Sections 101(A)(44)(B) of the Act.

In the present matter, the Petitioner provided two job descriptions that are inconsistent with one another and use broad language to refer to the Beneficiary's discretionary authority over the Petitioner's staff and its day-to-day operations. The provided job descriptions do not allow us to understand precisely how the Beneficiary meets his broad job responsibilities; therefore, we cannot conclude that the Beneficiary primarily performs tasks of an executive nature.

Although we agree with the Petitioner's contention that the job duty breakdown submitted in response to the RFE was not identical to the original job description, the two sets of job descriptions are partly inconsistent with one another in terms of content and percentage breakdown. As discussed above, we also find that neither job duty breakdown adequately described the Beneficiary's actual daily tasks. Further, despite claiming that it previously provided a discussion of its "overall administrative tasks and operations," the record lacks this information and instead contains only brief references to various logistical elements that are part of the process for exporting and importing produce. Contrary to its claim, the Petitioner did not specifically describe the administrative and operational elements within the scope of its business operation, nor did it provide a detailed job description that establishes that the Beneficiary would more likely than not devote his time to executive job duties, rather than to the underlying operational tasks that are common to a produce importing and exporting business.

The Petitioner further asserts that the approval of the Beneficiary's classification as an E nonimmigrant should be considered as probative evidence of the Beneficiary's eligibility for the nonimmigrant classification sought in the present matter. However, this other approval is irrelevant as an E nonimmigrant visa does not require that the qualifying employee primarily perform executive job duties. Therefore, successfully obtaining classification as an E nonimmigrant would not necessarily entitle the Beneficiary to the classification of an L-1 nonimmigrant. As previously discussed, the Petitioner has not established that the Beneficiary would primarily perform duties of an executive nature.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, 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.

At the time of filing the petition, the Petitioner indicated that it had four employees. Although a supporting statement was submitted, the Petitioner did not specify which positions were filled at the time of filing. In its RFE response the Petitioner provided an organizational chart depicting three positions as the Beneficiary's direct subordinates – an office manager, a director of operations, and a sales director. The office manager is depicted as overseeing an office assistant and the sales director is depicted as overseeing two sales managers; the director of operations is not depicted within any subordinate employees. The chart also indicates that the office manager and the director of operations positions were both vacant, thereby indicating that the office assistant and sales director

are the Beneficiary's direct subordinates. The Petitioner did not explain who, if not the Beneficiary, would perform the duties assigned to the director of operations.

The Petitioner also provided quarterly tax returns and IRS Form W-2s it issued to its employees in 2016. With the exception of the 2016 first quarterly tax return during which the Petitioner paid wages to four employees, the quarterly tax returns for the three remaining quarters indicate that the Petitioner paid wages to five employees. Although this information is consistent with the Petitioner's issuance of five Form W-2s, the Petitioner claimed only four employees on its Form I-129, thereby indicating that the five-person organizational chart that was provided in response to the RFE does not reflect the Petitioner's staffing composition at the time of filing. The record also shows that, with the exception of the Beneficiary and the sales director, the three remaining employees in the organizational chart received salaries that were commensurate with those of part-time workers. These factors lead us to question which positions were filled when the instant petition was filed, what duties the subordinate staff carried out, and how a four-person staff that was partly comprised of part-time employees would have been able to relieve the Beneficiary from having to primarily engage in non-executive operational tasks of a produce import-export operation at the time the instant petition was filed.

Further, as discussed earlier, the Beneficiary's latest job description indicates that he would "lead" various department heads in the execution of his job duties. Namely, the Petitioner indicated that the Beneficiary would "lead and supervise all Departments" and that he would "lead" a logistics department manager and an office manager in the course of directing operations, reviewing financial activities, and directing produce orders. However, the Petitioner's organizational chart does not indicate that a logistics manager position was part of its staffing composition at the time of filing. It is therefore unclear who would generate the Petitioner's performance reports, perform financial activities, and follow through with the logistics of the shipping and customs process, all of which hinge on a position that was not part of the organization at the time the petition was filed. In the absence of a logistics manager, it appears that the Beneficiary would have to directly participate in carrying out many of the Petitioner's operational tasks, which may be critical to its daily function, but are not tasks of an executive nature.

Likewise, the Petitioner's organizational chart, quarterly tax returns, and 2016 W-2s indicate that it did not employ an office manager or a director of operations at the time the petition was filed. While the Petitioner employed an office assistant as a subordinate of the office manager position, it did not list the office assistant's job duties or establish that a part-time office assistant was capable of carrying out the duties of an office manager. It is therefore unclear who, if not the Beneficiary, would absorb the responsibility of performing the tasks of any of the multiple positions that were vacant at the time of filing. While no beneficiary is required to allocate 100% of his or her time to executive-level tasks, the petitioner must establish that the non-executive tasks the beneficiary would perform are only incidental to the proposed position. As the Director correctly noted, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial

or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988). Here, the Petitioner has not established that it is adequately staffed such that it can support the Beneficiary in an executive position.

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.*

In the present matter, the record indicates that a single employee – a sales director – comprised the Petitioner's entire managerial tier that was directly subordinate to the Beneficiary. The remaining staff included two other employees with no evidence to establish precisely which two positions were filled at the time of filing or the duties that were carried out. Although the Petitioner claims that it incorporated each employee's job description into "a detailed description of the corporation," information about certain employee job duties was only briefly conveyed in the Beneficiary's job description; such information is not sufficient to convey a meaningful understanding as to which underlying operational tasks were common to the Petitioner's produce importing and exporting operation and who was performing those tasks.

On appeal, the Petitioner claims that the Director focused on the size of the organization to the exclusion of other relevant evidence. However, it is appropriate for USCIS 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 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). While a detailed job description is a critical to a determination of whether the Beneficiary would be employed in an executive capacity, we cannot omit from our discussion considerations of the Petitioner's staff and organizational complexity. Such factors contribute to a more comprehensive understanding of the Petitioner's operations and its capacity to relieve the Beneficiary from having to primarily perform its operational tasks, and these factors also allow us to gauge the extent to which the Petitioner's organizational hierarchy was sufficient to elevate the Beneficiary to an executive-level position.

As indicated above, the Petitioner's managerial tier at the time of filing was comprised of a single employee. Despite their managerial position titles, the Petitioner has not established that its sales

managers are part of a management tier. We have considered the Beneficiary's top-most placement within the organization and his leadership role with respect to the business matters and employees of that organization; however, we find that the Petitioner has not demonstrated that at the time of filing it had the organizational complexity to relieve the Beneficiary from having to devote his time primarily to the non-executive functions of the operation.

III. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary will be employed in the United States in an executive capacity. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.

Cite as *Matter of W-T-, Inc.*, ID# 998413 (AAO Mar. 26, 2018)