U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-K-&-B- INC.

DATE: MAR. 28, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an importer of kitchen and bathroom products, seeks to temporarily employ the Beneficiary as its president and CEO under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) § 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 record did not establish, as required, that the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity.

On appeal, the Petitioner submits a brief and supporting evidence, and asserts that the Beneficiary will be employed in a qualifying executive capacity in the United States.

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.*

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner does not claim that it will employ the Beneficiary in a managerial capacity. Therefore, we restrict our analysis to whether the Petitioner will employ the Beneficiary 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.

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). 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 1533.

When examining the claimed 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 an executive capacity. *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

The Petitioner initially stated that the Beneficiary as president and CEO will perform the following duties and the percentage of time that will be spent on each duty:

- Plan, determine, and direct corporate policies, objectives, and strategies for business operations (25%):
    - Formulate, produce, and implement the strategic business plan that guides the operation, development and direction of the company;
    - Setup policies, strategies, and visions for the company's operation;
    - Establish business goals and set up company structures for marketing, management, and development;
    - Prepare and approve operational procedures and standards.

- Direct and exercise discretionary authority over business operations (25%):
    - Supervise and oversee the complete, comprehensive, and overall operations of the company in accordance with the direction established in the strategic plan;
    - Direct and formulate business plans to generate revenue, profitability, and growth;

  - Negotiate and finalize contracts and partnerships with other business entities on behalf of the company;
  - Oversee operations to insure business efficiency, service quality, and the cost-effective management resources.

- Oversee and maintain awareness of the external and internal competitive landscape, situation of business markets, expectation of customers, new industry developments and standards, and opportunities for business expansion and growth (20%):
  - Oversee operations in marketing;
  - Setup operational policies in marketing and decide which methods to adopt in response to new industry developments and standards.

- Setup the budget and annual operating plans for the company and arrange funds for the company's business operations and development (10%):
  - Direct and coordinate financial and budgetary activities in order to properly fund business operations;
  - Review business activity reports and financial statements to determine progress and status in attaining objectives;
  - Revise objectives and plans based on current economic conditions;
  - Report business performance and financial status to our parent company;
  - Evaluate the performance of executives for compliance with established policies and objectives;
  - Decide on budgets, funds allocations, employee bonuses, benefits, and operational expenses.

- Direct human resources activities, including the hiring and firing high-level staff and employees (10%):
  - Hire and fire executives, officers, and managers;
  - Lead, guide, direct, and evaluate the work performance of executives, officers, and managers;
  - Hire business professionals to make sure the company's operations are successful, and supervise corporate compliance with regulations and laws.

- Weekly/Monthly/Quarterly Routines (10%):
  - Submit annual reports to the parent company and coordinate business operating policies, strategies, and marketing plans in the US;
  - Create monthly, quarterly, and annual operating plans that support the strategic direction set by the board;
  - Correlate operating plans with annual operating budgets and submit those plans to the board for approval;
  - Report and attend meetings with the board of directors and the senior management of the parent company;
  - Represent the organization in the media, local communities, and other public events.

In a request for evidence (RFE), the Director stated that the Petitioner had not sufficiently described the Beneficiary's intended duties in the United States. The Director asked the Petitioner to explain how the Beneficiary's intended position would meet the requirements of executive capacity. In response, the Vice President of Finance and CFO of the petitioning entity stated:

> [I]n connection with the L-1A Extension Petition, I make the following statement to verify (1) [the Beneficiary's] employment; (2) Primarily executive duties; (3) How [the Beneficiary] will direct [the Petitioner]; (4) How [the Beneficiary] will establish the goals and policies of [the Petitioner]; (5) How [the Beneficiary] will exercise wide latitude in discretionary decision-making; and (6) Whether [the Beneficiary] will receive only general supervision or direction from the board of directors of the parent company while he is employed by this company . . . .

The Petitioner's response included a description of the Beneficiary's duties and the percentage of time spent on each duty similar to that initially submitted.

The Director denied the petition, finding that the Petitioner did not provide a sufficient description of the Beneficiary's duties.

On appeal, the Petitioner asserted that the Beneficiary performs a broad range of executive-level tasks to achieve complex business goals. The Petitioner included a description of the Beneficiary's duties and the percentage of time spent on each duty similar to that previously submitted.

The Petitioner's job description grouped the Beneficiary's activities into three categories – operations, marketing, and finance. The business and operational category primarily focused on the Beneficiary's leadership role with respect to the company's business operations, noting that the Beneficiary will formulate the Petitioner's strategic business plan, set up policies, and establish business goals. The Petitioner claimed that the Beneficiary would "prepare and approve operational procedures and standards," but it did not elaborate on the types of procedures the Beneficiary would implement, nor did it explain how "standards" are relevant to its importation business. The Petitioner claimed that the Beneficiary would "represent the organization in the media, local communities, and other public events," however, it did not explain what the Beneficiary would do in representing the organization and it did not provide the context of the word "media" or explain how public relations applies within the scope of an importation business. In addition, the Petitioner claimed that the Beneficiary would "negotiate and finalize contracts and partnerships with other business entities," but it did not specify the entities it deemed as partners.

The category titled marketing was comprised of another set of broadly stated activities, which focused on the Beneficiary's discretionary authority with respect to the company's marketing. The Petitioner claimed that the Beneficiary would "set up company structures for marketing," "oversee operations in marketing," and "setup operational policies in marketing," however, the record does not contain the Petitioner's marketing plan and expenditure(s), nor did it explain how "marketing" is relevant to its importation business. Also, the Petitioner states that the Beneficiary will "oversee operations in marketing"; however, it has not explained how he will oversee the marketing operations led by the Sales & Marketing Manager who is depicted as being two levels below the Beneficiary on the organizational chart.

The third and final category itemizes nine additional activities in the finance category. The Petitioner vaguely stated that this category would require the Beneficiary to "[d]irect and coordinate financial and budgetary activities in order to properly fund business operations," review business activity reports and financial statements, and revise objectives and plans based on current economic conditions. The remainder of the duties described under this area of responsibility were overly broad and included "report business performance and financial status to our parent company" as well as evaluating "the performance of executives for compliance with established policies and objectives" and deciding "on budgets, funds allocations, employee bonuses, benefits, and operational expenses." The Petitioner did not, for example, describe the objectives and plans the Beneficiary will revise on the Petitioner's behalf.

The Petitioner also stated that the Beneficiary will "create monthly, quarterly, and annual operating plans that support the strategic direction set by the board," "correlate operating plans with annual operating budgets and submit those plans to the board for approval," and "report and attend meetings with the board of directors and the senior management of the parent company." The Petitioner's articles of incorporation indicated that its board of directors consists of only the Beneficiary and his immediate subordinate, the Vice President of Finance and CFO. The Petitioner has not explained how the Beneficiary will receive guidance and direction from the board that consists of only himself and an employee that he supervises.

B. Staffing

The Petitioner claimed nine U.S. employees at the time of filing. The Petitioner initially submitted an organization chart identifying the following structure:

- President & CEO (the Beneficiary)
  - Vice President of Finance & CFO
    - Sales & Marketing Manager
      - Salesman
    - Office Manager
      - Office Clerk (3)
      - Controller
      - Accountant
    - Warehouse Manager
      - Warehouse Worker (4)

In the RFE, the Director requested more information about the Petitioner's employees. In response, the Petitioner provided an organizational chart (previously submitted), and a summary of job positions and duties, educational levels, and salaries addendum for the Beneficiary's subordinates. The addendum stated that the Vice President of Finance and CFO will perform the following duties:

- Develop financial strategies to compliment and serve the company's business goals by generating financial planning documents;
- Capital management and accounting management;

- Review business activity reports and financial statements to determine progress and status in attaining business objectives and adjusting inventory and logistics operations in responses;
- Develop and maintain internal systems of controls to safeguard financial assets; and
- Evaluate financial staff performance and make human resource decision based on business strategy.

In denying the petition, the Director acknowledged the Petitioner's submission of an organizational chart, but found that the Petitioner did not provide job descriptions to show what the claimed subordinates actually do. The Director concluded that the Petitioner did not show that it currently employs individuals who would relieve the Beneficiary from non-qualifying duties.

On appeal, the Petitioner asserted that the Beneficiary's proposed position of president and CEO "is an Executive Position as evidenced by the position's job descriptions, staffing levels, and the specific requirements of the organization in light of the overall purpose, function and stage of the organization's development as required by the petitioner in its business operation in the U.S. economy." The Petitioner provided an organizational chart, and a summary of job positions and duties, educational levels, and salaries addendum for the Beneficiary's subordinates (both previously submitted). The addendum identified the following:

- From March 22, 2016 to present, the Petitioner employed *J.X.*, MBA, in the position of Vice President of Finance, CFO, with a salary of $6,900 per month;
- From October 31, 2016 to present, the Petitioner employed *C.C.*, Bachelor's degree, in the position of Sales & Marketing Manager with a salary of $5,300 per month;
- From February 27, 2017 to present, the Petitioner employed *K.H.*, MBA, in the position of Office Manager with a salary of $4,700 per month; and
- From April 16, 2018 to present, the Petitioner employed *S.C.C.*, MBA, in the position of Warehouse Manager with a salary of $3,000 per month.

The Petitioner claimed nine U.S. employees on Form I-129, however, the Petitioner's organizational chart identified 15 employees by name. The Petitioner's organizational chart depicted a corporate structure in which the Beneficiary as president and CEO directly oversees one employee, the vice president of finance and CFO. The vice president of finance and CFO is depicted as overseeing three employees, (1) a sales and marketing manager, (2) an office manager, and (3) a warehouse manager. On appeal, however, the Petitioner asserts in its brief that the following positions are directly supervised by the Beneficiary as president and CEO: vice president of finance and CFO, sales and marketing manager, office manager, and warehouse manager.[1] The Petitioner has not resolved these discrepancies in the record with independent, objective evidence pointing to where the truth lies.

[1] The Petitioner stated on the Form I-129 that the Beneficiary would be paid $50,000 per year while on appeal, the Petitioner indicates the employees that he "[d]irectly [s]upervise[s]" would be paid more than him. Specifically, the Petitioner claims on appeal that these subordinate employees would be paid the following amounts per year: (1) Vice President of Finance and CFO, $82,800; (2) Sales & Marketing Manager, $63,600; (3) Office Manager, $56,400. Also, the Petitioner's State of California Form DE 9C for second-quarter 2018 indicated that the Beneficiary's direct subordinate, the Vice President of Finance and CFO, quarterly wage of $21,228.48 is above that of her supervisor's (the Beneficiary, president and CEO) quarterly wage of $20,769.60.

Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

We also note that the Petitioner's initial submission included an employee list identifying *J.X.* as Vice President of Finance and CFO with a salary of $7,300 per month; however, in the RFE response and on appeal, the Petitioner identified a salary of $6,900 per month for this employee. The Petitioner did not explain this change in salary for its Vice President of Finance and CFO.

We further note that the Petitioner's IRS Form 1120 for 2016 annotated $110,000 as compensation of officers[2] for this year. The Petitioner's IRS Form 1125-E, Compensation of Officers, of IRS Form 1120 for 2016 indicated that one officer, the Beneficiary, received compensation of $110,000 for this year. The Beneficiary's Form W-2 for 2016 indicated that he received wages, tips, and other compensation of $50,000.04 for this year. The Beneficiary's IRS Form W-2 for 2016 does not reconcile with the Petitioner's federal tax return for this year.

In response to the Director's RFE, the Petitioner submitted a job description addendum indicating the Vice President of Finance and CFO will "evaluate financial staff performance and make human resource decision based on business strategy," however, the organizational chart indicates that the Petitioner's finance personnel – controller and accountant – report directly to the office manager, not the Vice President of Finance and CFO. Again, the record does not support the organizational hierarchy claimed by the Petitioner.

In denying the petition, the Director acknowledged the Petitioner's submission of an organizational chart, but found that the Petitioner did not provide job descriptions to show what the claimed subordinates actually do. The Director concluded that the Petitioner did not show that it currently employs individuals that would relieve the Beneficiary from non-qualifying duties.

On appeal, the Petitioner does not directly address this finding or submit evidence to address the Director's concerns regarding the company's structure. The Petitioner states, more generally, that the record established that it has an organizational hierarchy that would support an executive position. The Petitioner, however, did not provide sufficient evidence about the subordinate work force, even after the Director specifically asked for that information in the RFE. It cannot suffice for the Petitioner to assert, without elaboration, that managers would work under the Beneficiary's authority. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

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 an owner or sole managerial employee. A beneficiary must

[2] Line 12, Compensation of officers.

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, although the Petitioner indicated that it has lower-level staff to allow the Beneficiary to focus on the management and broad policies and goals of the organization, it has not sufficiently shown what duties the Beneficiary's subordinates would perform to relieve the Beneficiary of responsibility for non-qualifying tasks. The Petitioner also submitted conflicting information regarding its staffing levels and salaries. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* As stated above, when examining the claimed executive capacity of a beneficiary, we look at several factors such as the company's organizational structure, the duties of the Beneficiary's subordinate employees, and the presence of other employees to relieve the Beneficiary from performing operational duties. In light of the above described inconsistencies, we find that the Petitioner has not established that it will employ the Beneficiary in a position where the primary portion of his time would be allocated to executive job duties.

For these reasons, we find that the Petitioner did not establish it will employ the Beneficiary in an executive capacity.

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 M-K-&-B- Inc.*, ID# 2591098 (AAO Mar. 28, 2019)