U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-B-, M.P. C.A.

DATE: MAY 15, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a purchaser and seller of petrochemical products based in Venezuela, seeks to continue the Beneficiary's employment as vice president of its U.S. based subsidiary office under the L-1A nonimmigrant classification for intracompany transferees.[1] *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 record did not establish the Petitioner has a qualifying relationship with its U.S. based subsidiary. The Director also determined that the Petitioner did not demonstrate that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner submits amended tax returns it asserts rectify discrepancies in the stated ownership of the U.S. employer made in error. In addition, the Petitioner states that the Beneficiary does not perform non-qualifying operational tasks, but only executive level duties, including initiating and concluding agreements with the U.S. subsidiary's customers.

Upon *de novo* review, we will withdraw the Director's conclusion that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's U.S. employer.[2] However, we concur with the Director that the Petitioner has not demonstrated that the Beneficiary would act in a managerial or executive capacity under the extended petition; therefore, the appeal will be dismissed.

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[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period June 7, 2016, until June 6, 2017. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary 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 one year within the date of approval of the petition to support an executive or managerial position.

[2] The Petitioner submits evidence on appeal indicating that it more likely than not filed amended IRS Forms 1065 U.S. Return of Partnership Income for 2015 and 2016 to reflect that the U.S. employer is 51% owned by the Petitioner. This is consistent with statements and evidence elsewhere on the record.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, 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. *Id.*

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner has established that the Beneficiary would act in an executive capacity under the extended petition. The Petitioner does not claim that the Beneficiary would be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary would be employed in an executive capacity.

The statute defines an "executive capacity" 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 review 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, 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. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business, its staffing levels, and its organizational structure.

A. Duties

In denying the petition, the Director concluded that the Beneficiary's duties were vague and indicated that he was primarily engaged in non-qualifying operational duties, including securing clients and processing orders. On appeal, the Petitioner contends that the Beneficiary is performing qualifying executive level tasks by identifying customers and negotiating agreements.

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 1533.

The Petitioner stated that its U.S. subsidiary and the Beneficiary "seek out clients to reach agreements whereby [the U.S. subsidiary and the Petitioner] can provide a service to companies who have not shipped outside the U.S., but whose products have a market in Central and South America." The Petitioner indicated that the U.S. subsidiary has shipped various products to South America such as welding rods, electrical outlets, asphalt cloth, animal products, amongst other goods. In a letter provided with the petition, the Beneficiary explained that he is tasked with meeting with existing clients and "negotiating with Colombian companies to provide consulting services for the implementation of the necessary logistics in order to purchase products in Venezuela." The Beneficiary also stated that he purchased "30 metric tons DEG (Dietilenglicol used in the manufacture of refrigerants) and 120 tons of MEG (Monoetilenglicol used in the manufacture of polyester, paints and in the petrochemical industry)." In the Form I-129, the Petitioner noted that the Beneficiary "continues to be insulated from day-to-day non-executive duties through [the Petitioner's] staff."

In response to the Director's request for evidence (RFE), the Petitioner stated that the Beneficiary "does not act as a sales person but rather as an Executive," noting that he makes contact with the presidents and executives of other companies the Petitioner does business with. The Petitioner indicated that the Beneficiary only initiates sales, financing, shipping, and getting products through customs. The company's asserted administrative manager stated in a provided letter that the Beneficiary is only tasked with making initial contact with customer management, but that he "does not concern himself with the mechanics of any of the sales or invoicing." The administrative manager further explained that the Beneficiary spends time meeting with potential clients, reviewing and revising policies and procedures, advising the "Operation Department" on changes to customers rules, approving "additional policy parameters," initiating "the necessary procedures to be used by the Operations Department for the shipments," and making "the initial contact at the highest level of the product producers."

The Petitioner has not submitted a sufficiently detailed duty description that describes his day-to-day executive-level duties or that credibly establishes that he would devote his time primarily to

qualifying tasks. The Beneficiary's duty description includes several generic duties that could apply to any executive acting in any business or industry and they do not provide insight into the actual nature of his role. Although making initial contact with customer management and negotiating transactions could be seen as a qualifying task, the Petitioner has provided insufficient examples and little supporting documentation to demonstrate the Beneficiary's performance of this and other qualifying duties, such as customer management he met or negotiated with, policies or procedures he established or revised, customs rules he advised on, policy parameters or approved, or policy guidance he provided. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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).

To the extent that the Beneficiary submits specifics and documentation regarding the Beneficiary's daily executive duties we do not find that these credibly demonstrate that he is primarily focused on executive level tasks. For instance, in support of the petition, the Petitioner pointed to the Beneficiary's purchases of welding rods and chemicals and his active pursuit of asphalt cloth clients in Colombia. The Beneficiary's name also appears on several transactional documents, such as invoices, shipping documentation, and supporting emails, dating up to February 2017, suggesting his involvement in all operational matters, including sales, ordering, delivery, amongst other non-qualifying functions. For instance, submitted documents and emails indicate that the Beneficiary purchased consumer goods at large retail outlets in the United States and arranged for their shipment to Venezuela and the Petitioner emphasizes the Beneficiary's direct involvement with guiding products through customs and his expertise in this process. In contrast, the Petitioner provides no documentation reflecting the Beneficiary delegating non-qualifying operational tasks to subordinates. The supporting documentation does not demonstrate that the Beneficiary is primarily performing executive level negotiations with other vendors and suppliers. In sum, the Petitioner has not sufficiently documented that the Beneficiary was primarily devoted to executive level duties as of the date the petition was filed.

In addition, the Petitioner does not document what proportion of the Beneficiary's duties would be executive functions and what proportion would be non-qualifying. The evidence indicates that the Beneficiary devotes at least some of his time to non-qualifying tasks such as sales activities, purchasing products, and processing orders, but the Petitioner does not quantify the time the Beneficiary spends on these different duties. This lack of documentation is important because several of the Beneficiary's daily tasks do not fall directly under executive duties as defined in the statute. For this reason, we cannot determine whether the Beneficiary is primarily performing the duties of an executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Even though the Beneficiary holds a senior position within the organization, the fact that he will manage or direct a business 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. 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; however, the position descriptions alone are insufficient to establish that his actual duties would be primarily executive in nature.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in an 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.

On the Form I-129, the Petitioner stated that its U.S. subsidiary employed three individuals as of the date of the petition. The Petitioner submitted an organizational chart reflecting that the Beneficiary supervised a manager who in turn oversaw "administration and finance" and "operation" departments, including three employees. The chart also showed that the Beneficiary oversaw an "outsourced CPA." In a letter provided with the petition, the Beneficiary stated that the company had recently hired a chemical engineer, an employee tasked with "general administration," and an administrative assistant.

On appeal, the Petitioner provides a conflicting description of the Beneficiary's duties and subordinate staff leaving question as to whether it has sufficiently developed during the first year to support him in an executive capacity. For instance, in response to the RFE, the Petitioner emphasized that the Beneficiary is completely relieved of operational level duties by an administrative manager and other subordinates. However, on appeal, the Petitioner asserts that it is "not realistic" to expect the company to have sufficient operational employees after only one year of operation. As such, the Petitioner states in one instance that the Beneficiary is completely relieved of non-qualifying duties by a manager and other subordinates, but elsewhere indicates that these subordinates do not exist and that it would "unrealistic" to have these employees in place after only one year. The Petitioner must resolve discrepancies 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).

We are not convinced by the Petitioner's contention that it is unrealistic to have sufficient operational staff in place after only one year. In fact, it is required by regulation to employ sufficient staff within one year to sufficiently support the Beneficiary in an executive capacity. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the intended U.S. operation one year within the date of approval of the petition to support an executive position. There is no provision in USCIS regulations allowing for an extension of this one-year period. If the business does not have the necessary staffing after one year to sufficiently relieve the Beneficiary from performing operational and administrative tasks, the Petitioner is ineligible for an extension.

The Petitioner also does not submit adequate evidence to substantiate the employment of the Beneficiary's subordinates. For example, the Petitioner indicated that it employed an administrative

manager subordinate to the Beneficiary; however it provided no payroll, tax, or other documentation to corroborate this employee. It also submitted no duties for this claimed manager.

Likewise, the Petitioner only provides vague duties and internally generated payroll documentation relevant to the company's other asserted subordinates. For instance, the Petitioner vaguely states that the asserted chemical engineer would be tasked with "new business development" and act as a liaison between providers and customers, yet it does not explain this new business development, the providers and customers this employee will handle, or otherwise provide a sufficiently detailed description of her duties. Similarly, the Petitioner does not submit detailed descriptions of the duties of the general administration employee, only vaguely noting her focus on "bookkeeping," nor does it explain in detail the duties of the administrative assistant. Further, the Petitioner only provides internally generated payroll documentation from one month in March 2017 for the claimed chemical engineer, general administration employee, and administration assistant. In contrast, the Petitioner did not submit probative and verifiable state quarterly employer's tax documentation requested by the Director. Furthermore, as we have noted, the record includes no documentation reflecting the Beneficiary's delegation of non-qualifying duties to subordinates; however in contrast, the Petitioner does submit documentation indicating the Beneficiary's performance of these tasks.

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). As such, the relevant organizational chart to analyze is that existing as of the date of the petition's filing. The evidence indicates that the staffing of the Petitioner was not sufficient to support the Beneficiary in an executive capacity as of the date of the petition's filing. Without clarification and sufficient supporting evidence as to which employees were performing the non-qualifying operational duties of the business, it appears that the Beneficiary was substantially engaged in these duties as of the date the petition was filed, particularly since it provides documentation supporting this conclusion and little evidence substantiating his claimed executive level tasks. The evidence does not indicate that, as of the date of the petition's filing, the Beneficiary was removed from performing non-qualifying operational tasks and that he primarily spent his time focusing on executive level duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in an 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).

As noted, the Petitioner asserts that the Beneficiary qualifies as an executive. 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.*

However, as discussed, the Petitioner has not sufficiently demonstrated that, as of the date this petition was filed, the Beneficiary had a subordinate level of managerial employees to direct as necessary to allow him to primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. In fact, the Petitioner submits no evidence to corroborate the Beneficiary's lone managerial subordinate. The evidence indicates that the Petitioner was engaged in a wide range of product purchasing and shipping activities, but it does not adequately articulate and document the employees performing these tasks. Likewise, the Petitioner does not clearly and credibly describe and document the Beneficiary's day-to-day executive level duties. For these reasons, the Petitioner has not established that the Beneficiary would act in an executive capacity as of the date of the petition's filing. For this reason, the appeal must be dismissed.

III. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in an executive capacity under an extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of I-B-, M.P. C.A.*, ID# 1061576 (AAO May 15, 2018)