U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H- INC.

DATE: MAY 15, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an investment, imports, and exports business, seeks to continue the Beneficiary's employment as its chief executive officer 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 California Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner resolves a discrepancy regarding its business address and offers evidence to support the claim that the Beneficiary will be employed in an executive capacity.

Upon *de novo* review, we find that the Petitioner has not overcome the basis for the denial. 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 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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period July 28, 2016, until July 27, 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.

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 Petitioner claims that the Beneficiary will be employed in an executive capacity. As the Petitioner does not claim that the Beneficiary will be employed in a managerial capacity, we will only address the Petitioner's claim 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.

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.

The 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 the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the 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

In a supporting cover letter, the Petitioner stated that the Beneficiary's main job duties would include the following: establishing objectives and management policies, directing the management of the organization, presiding over business meetings, reviewing business proposals and the company budget, overseeing each department and the performance of the "executive director" and general manager, hiring

"higher rank managers," reporting to the board of directors, and negotiating on the Petitioner's behalf. The Petitioner also provided formal job descriptions, which included job duty breakdowns for the Beneficiary's first year of employment and his proposed employment under an extended petition. With the exception of the listed actions and initiatives the Beneficiary carried out during the Petitioner's first year of operation, the job descriptions were otherwise identical, generally focusing on the Beneficiary's discretionary decision-making authority with respect to the Petitioner's business activities, finances, and subordinate staff. Both job descriptions consisted of ten groups of duties with each group being allocated 10% of the Beneficiary's time. Each group of duties was placed in one of four categories: "About goals and policies"; "About directing the management [and] discretionary decisions"; "About goals and policies [and] discretionary decisions"; and "About discretionary decisions."

In a request for evidence (RFE), the Director notified the Petitioner that the previously submitted job description did not adequately describe the Beneficiary's proposed position because it lacked detailed information about his specific daily activity. Despite being notified of this evidentiary deficiency, the Petitioner submitted a job duty breakdown that was substantially similar in content to the original job description; the Petitioner claimed that the new job description included "the actual job duties as detailed as possible, and specifies the percentage of time (as small as possible) required for each duty." Although the new job description contained some additional elements, the new information does not lead to a better understanding of the Beneficiary's job duties. For instance, the first "About goals and policies" subsection in the updated job description indicates that in addition to the previously listed job duties, the Beneficiary would also perform the following: ensure development of an effective organization structure and promote "a positive internal climate"; enhance and enforce policies and procedures; "[s]et and drive the company's culture . . . and lead the senior management team"; and communicate the company's "strategy and vision."

The Petitioner made similar changes throughout the remainder of the job description, adding the following elements to the second "About goals and policies" subsection: plan, develop, and organize "the company's fiscal function and performance"; "[i]mprove the budgeting process"; and allocate the company's money based on an assessment of its priorities and expenditures. However, vague phrases such as these do not enhance our understanding of the Beneficiary's daily activities or clarify the Petitioner's ambiguous references to an "internal climate," "the company's culture," and "strategy and vision" within the context of an import, export, and investment operation. The Petitioner also changed the title of one of the subsections from "About directing the management [and] discretionary decisions" to "About directing the management" and removed prior references to a "CFO," stating that the Beneficiary would oversee "department managers" rather than a "CFO and department managers," as was stated in the original job description; it did not, however, provide an explanation for these changes.

The Petitioner also discussed its purchase of an existing restaurant business shortly prior to filing this petition. The Petitioner stated that although it continues to engage in import, export, and investment activities, it made changes to its original business plan, which resulted in the hiring of additional employees to meet the needs of its "expanded business." The Beneficiary's job duties, however, did not reflect these changes. In fact, the Petitioner provided remarkably similar job duty breakdowns to

describe the Beneficiary's position prior and subsequent to the purchase of a restaurant; the job descriptions did not distinguish between the Petitioner's varying phases of operation.

As evident from the provisions of the "new office" regulations, it is assumed that the beneficiary of a new office petition is not likely to focus primarily on executive job duties during a petitioner's initial phase of operation. As such, we question the reliability of a job description that was used to describe the Beneficiary's job duties during two entirely different phases of the Petitioner's operation. The fact that the Petitioner did not provide a job duty breakdown reflecting the Petitioner's specific stage of development under an extended petition indicates that the job description is overly broad and does not identify actual tasks that correspond to a specific operational phase.

In the denial decision, the Director restated the job duty breakdown offered in response to the RFE and correctly determined that the Petitioner offered a deficient job description that lacked specific information about the Beneficiary's daily job duties. The Director therefore concluded that the Petitioner did not establish that the Beneficiary would primarily perform tasks of an executive nature.

On appeal, the Petitioner contends that the Beneficiary is "the central unit that directs all business, investment and personnel" and makes decisions about company policies and investment projects. The Petitioner also provides an additional job duty breakdown with time allocations to support its claim that the Beneficiary would be employed in an executive capacity. Specifically, the Petitioner stated that 75% of the Beneficiary's time would be distributed as follows:

- 10% establishing company operations and supervising managerial staff;
- 10% exercising discretionary authority;
- 10% reporting to a board of directors and establishing policies and objectives that pertain to the company's management and investment plans;
- 10% overseeing the Petitioner's three departments – import-export department, finance department, and restaurant department – along with the performance of the company's CFO;
- 15% executing "strategic plans," and making discretionary decisions regarding "business strategies and overall direction of the company";
- 10% meeting with department heads to discuss budgets, production schedules, costs, logistics, personnel, and sales and marketing; and
- 10% establishing strategies for raising profits and market share based on current market conditions.

Despite the Director's finding that the prior job descriptions lacked sufficient detail about the Beneficiary's typical daily tasks, the new job description does not adequately address the noted deficiency and broadly focuses on the Beneficiary's discretionary authority in all business matters; it does not, however, provide adequate insight into the Beneficiary's proposed daily actions within the scope of an import, export, and investment business. As previously indicated, a detailed job description is a critical element of the Petitioner's eligibility. *See* 8 C.F.R. § 214.2(l)(3)(ii). Here, the Petitioner does not state precisely how the Beneficiary would establish company operations, execute "strategic plans," or formulate business strategies to raise profits. The Petitioner also neglects to explain the extent of the

Beneficiary's involvement in the restaurant, which existed prior to the Petitioner's purchase and was fully staffed. Aside from making the decision to purchase the restaurant, it is unclear which daily tasks, if any, the Beneficiary would perform with respect to the restaurant's daily operation. 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). In the present matter, the Petitioner has repeatedly offered job descriptions that are vague and include job duties that can broadly apply to any individual with a top-level position, regardless of the organization or industry in which that organization operates.

While the Beneficiary may have discretionary authority over the Petitioner's financial and business concerns, the Petitioner has provided job descriptions that offer only general information and do not establish that the Beneficiary would primarily perform executive-level tasks as part of his daily or weekly routine.

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.

At the time of filing, the Petitioner claimed that it had 24 employees and no net annual income. It provided an organizational chart depicting an organization that virtually operated as two distinct businesses – a restaurant and a buyer and distributor of chemicals – at the time of filing. The chart shows the Beneficiary at the top of the organizational hierarchy directly overseeing the company's CFO, manager of the import and export trade department, restaurant manager, and financial department that is headed by the CFO. The chart shows the restaurant manager overseeing the restaurant staff and its operations, the import and export trade manager overseeing a sales person, and the CFO overseeing an assistant. The Petitioner also provided quarterly tax returns and wage reports, which show that it underwent a staffing increase during the second quarter in 2017 when it finalized the purchase of a restaurant operation.

In its RFE response, the Petitioner provided an updated organizational chart reflecting additional restaurant employees. The Petitioner also provided a separate employee list, which contained salaries and job descriptions for "high level employees," and an employee "status" chart, which listed each employee and identified the employees who were hired in May and June 2017. The latter chart shows that of the 31 employees listed, only seven were employed by the Petitioner prior to its restaurant purchase, thus indicating that the restaurant employees comprised more than 75% of the Petitioner's staff.

In denying the petition, the Director concluded that the Petitioner did not establish that its organizational structure will support the Beneficiary in an executive position. On appeal, the Petitioner resubmits its organizational chart, provides evidence of wages paid to its employees prior

and subsequent to the filing of the petition, and offers a copy of its July 2016 business plan addressing the Petitioner's marketing strategy, sales forecasts, and personnel projections.

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, although the Petitioner heavily emphasizes its considerable staffing increase, the record shows that this increase is largely due to the fully staffed restaurant it purchased shortly prior to filing the petition. As previously noted, beyond exercising his discretionary authority in deciding to invest in a restaurant business, the Beneficiary's role with respect to that investment project is unclear; the Petitioner has not established that the Beneficiary would assume an active role in running the restaurant or that directing the management with respect to the restaurant operation would be a routine part of his daily agenda. Although the record indicates that the Petitioner continues to operate an import and export trade business, as it had prior to purchasing a restaurant, it does not appear that the organizational complexity of that business has risen to a level that can support the Beneficiary in a position where his duties would be primarily of an executive nature.

According to the personnel projections in the Petitioner's business plan, by the end of 2016, the Petitioner sought to hire the following: a marketing manager, a finance manager, two to five sales and marketing clerks, an administration manager, one to three assistants, one to two accountants and bookkeepers, a warehouse/logistics manager, an inventory clerk, and one to three warehouse workers. The organizational chart submitted at the time of filing indicates that the Petitioner fell far short of these hiring projections; it shows that at the time of filing the Petitioner had no warehouse employees, employed the CFO and an assistant as its only finance employees, and had only one sales employee. It is unclear who was carrying out the warehouse and logistics duties of the organization at the time of filing, given that the Petitioner had not actually hired a warehouse staff as projected in the business plan. We further note that the import and export trade department employed only a manager and a subordinate sales representative. It is unclear that these two individuals would be able to carry out the sales and marketing functions of the organization, particularly in light of the department manager's formal job description, which does not include any sales or marketing duties.

Lastly, we question the managerial position title assigned to the import and export trade department manager in light of the disparate salaries of this manager and his claimed subordinate; based on the

2017 third quarterly tax return, the sales representative's salary exceeded that of his superior by approximately $1,100. There is no explanation in the record for this incongruity in salaries, which creates doubt as to the authenticity of the employee job descriptions and gives us reason to question the organizational complexity depicted in the Petitioner's organizational chart.

Although the Petitioner provided evidence that it continues to engage in the purchase and sales of chemical products, we cannot conclude that its organizational structure will elevate the Beneficiary to an executive position, as there does not appear to be a sufficient managerial tier through which the Beneficiary can be said to "direct the management" of the organization.

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 under an extended petition. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.

Cite as *Matter of H- Inc.*, ID# 1213221 (AAO May 15, 2018)