U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF NRE-USA LLC

DATE: MAY 17, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which markets and sells [redacted] equipment manufactured by its foreign parent company, seeks to continue the Beneficiary's temporary employment as its technical director under the L-1A nonimmigrant classification for intracompany transferees. 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 record did not establish, as required, that: (1) the Beneficiary has been employed abroad in a capacity that was managerial, executive, or involved specialized knowledge; and (2) the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. On appeal, the Petitioner states that the Director erred by relying on inapplicable requirements and by applying too strict a standard of proof.

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. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that: (1) the Beneficiary has been employed abroad in an executive capacity; and (2) the Petitioner will employ the Beneficiary in an executive capacity. The Petitioner does not claim that the Beneficiary has been

employed abroad in a managerial capacity, or a capacity involving specialize knowledge, or that it seeks to employ the Beneficiary in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary has been, and will be, employed in an executive capacity.

We note that, on appeal, the Petitioner asserts that the Director erred by applying some of the requirements for a managerial capacity. The Director found that the Beneficiary does not qualify as a "function manager" (whose authority derives from managing an essential function), but the Director also acknowledged that the Petitioner "asserted multiple times . . . that the beneficiary held an executive position abroad and at the US entity." Noting the Petitioner's assertion that the Beneficiary's subordinates are professionals, the Director stated that this information "relates when the beneficiary is [seeking] a managerial position, and is not related to the executive qualification." Therefore, the Director demonstrably did not disregard the Petitioner's assertions that the Beneficiary has been, and seeks to be, employed as an executive.

"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 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, 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.

We note that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa petition for classification as a multinational executive. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for us 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-executive operations of the company. *See e.g.,*

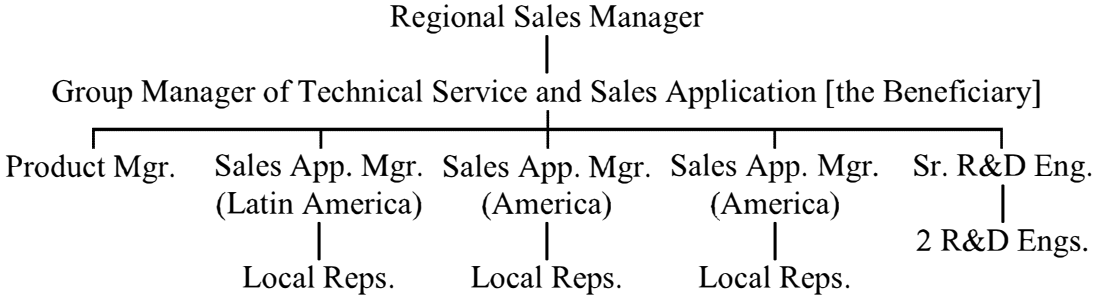
Family Inc., 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when discrepancies in the record raise doubts as to whether the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

A. Foreign Employment in an Executive Capacity

The Director's discussion of the Beneficiary's claimed executive capacity abroad focused on the company's staffing, and so we begin our discussion with that issue.

The Beneficiary's title at the Petitioner's foreign parent company was "Group Manager of Technical Service and Sales Application." The Petitioner stated that the Beneficiary's "primary responsibility centered upon overseeing and guiding the technical component of the major function of sales (i.e., business development) for the Continental America region."

An organizational chart for the foreign entity's "top-level executives" showed 5 vice presidents and 12 directors. The chart did not show the Beneficiary's name or any Technical Service and Sales Application Group. A second organizational start showed the structure of the foreign company's International Marketing and Sales Division (one of the 12 directorships in the first chart). The America Department is one of seven departments in that division (four of them regional). This is the structure of the America Department:



The Petitioner did not document the employment of the unspecified number of sales representatives said to be under the sales application managers' authority.

The Petitioner submitted two documents as examples of the Beneficiary's claimed executive duties abroad. The Petitioner stated that a "Regional Monthly Resume" from March 2013 showed the Beneficiary's "executive role in establishing sales and performance goals, analyzing successes and failures, and establishing an organization-wide plan of action." That document showed sales targets and evaluated the company's performance relative to those goals. There is no indication that the Beneficiary set the targets or led the evaluations. The Beneficiary is the second of five listed "participants," with the first being the regional sales manager and the last three being the three sales application managers.

The Petitioner asserted that a "Monthly Work Plan" from April 2013 showed the Beneficiary's "executive responsibilities for [the foreign entity's] business model, sales goals, and managerial

staffing." The plan listed five tasks, assigned jointly to the Beneficiary and to the regional sales manager:

1. Key projects follow up
2. New business model practices
3. Organize internal ressource [*sic*] to mitigate the function differences of the P&C product to the market
4. Recruit account manager for North America
5. Daily management

The foreign entity did not demonstrate that the Beneficiary had executive authority over a major component or function of the organization. The Petitioner referred to "the major function of sales (i.e., business development) for the Continental America region." Sales and business development may be major functions of the organization as a whole, but the Petitioner did not show that the Beneficiary had authority over those overall functions. Rather, his authority was limited to "the technical component of . . . sales" within a particular territory in which the Petitioner acknowledges it has not yet done a substantial volume of business.

The Petitioner has not shown that the Technical Service and Sales Application Group is a major component of the foreign organization. Rather, it is part of one of seven subdivisions of the International Marketing and Sales Division, which in turn is one of 12 departments. Furthermore, the Beneficiary reported to the regional sales manager for the Americas, who shared the Beneficiary's responsibilities listed on the work plan, indicating that the Beneficiary did not direct the management of the subdivision.

The Petitioner asserted that the work plan showed the Beneficiary's "executive responsibility to oversee the implementation [of] the organization's 'new business model.'" By definition, an executive *establishes* goals and policies. The record provides no further information about the "new business model," and it does not appear that the model originated with the Beneficiary, because his immediate superior shared the responsibility for overseeing its implementation.

The foreign entity later stated that the Beneficiary "directed the US team jointly with the regional sales manager," but the organizational charts consistently showed the regional sales manager as being superior to the Beneficiary in the hierarchy.

The Director denied the petition, stating that the Petitioner did not establish that the Beneficiary's subordinates were managers rather than "team leads of non-professional employees." On appeal, the Petitioner states: "Whether those managers did or did not manage teams is immaterial to the four prongs of the definition of executive capacity." The Petitioner, however, had specified that the sales application managers' duties included "managing the sales team" and "monitoring of sales representatives." The lack of information and evidence about those sales representatives is, therefore, directly material to the petition and its outcome.

The Director also found that the Petitioner had not shown that the Beneficiary's subordinates relieved him from having to primarily perform non-qualifying tasks. We will therefore consider the Beneficiary's duties, as described by the Petitioner and its foreign parent company.

The Beneficiary's foreign employer listed the Beneficiary's duties abroad, with the approximate percentage of time devoted to each broad category:

1) Provide technical oversight for [the company's] business development efforts in America Continental region, lead technical tendering team, prepare work schedules, and assign task[s] to the technical team members. Provide and communicate weekly, monthly, yearly and ad-hoc performance reviews of the technical team members under his supervision. (30%)
    - Find good opportunities, lead the tendering process and win significant projects.
    - Perform the internal training [on] a regular[] basis for the technical service and sales team [on the] America[n] continent.
    - Coordinate with project manager for the work allocation of service engineers during the project implementation.
2) Provide technical support to promotional activities including conferences, user meetings, seminars, local exhibitions & on-site demonstration. He is responsible for selecting the most suitable technical team members based on their capabilities and availabilities. Schedule their tasks and review their performances in those events. (25%)
    - Collaborate with marketing department to define the key promotion points during the IEEE[1] T&D[2] Exhibition and other marketing activities.
    - Organize the digital substation demonstration seminar with utilities in America region.
    - Work as member of the IEEE PSRC[3] standard working group and manage the task force inside of the company.
3) Support America market strategy definitions, perform technology evaluation continuously, and provide technical guidance for [the company's] R&D[4] activities. Define product R&D new features, monitoring and control the development cycle. Coordinate with Sales and Marketing directors on behalf of the America market needs. (15%)
    - Manage and summarize the regional requirements and customer feedbacks, collaborate with R&D institute for the product improvement and solution adjustment.
    - Organize the product quality meeting based on different product lines.
4) D[ir]ect technical resources for the development effort between America Region and China. (15%)
    - Establish relations with foreign consultant companies and collect technical information for the Chinese team.

[1] Institute of Electrical and Electronics Engineers.
[2] Transmission and Distribution.
[3] Power System Relaying and Control Committee.
[4] Research and Development.

5) Provide technical leadership for [the company's] project delivery and customer services activities. Participate [in] the hiring and firing decision[s] for the technical team members. (15%)
    - Performance review of the technical team for America Region.
    - Participate in the selection of new sales and service engineer for America Region.

The record substantiates some, but not all, of the above assertions. For instance, the Petitioner did submit documentation to corroborate the Beneficiary's membership in the IEEE PSRC standard working group, or to establish the requirements for that membership. (If membership was not limited to executives, then evidence of the Beneficiary's membership would not be evidence of an executive capacity.)

When asked to provide further details, the foreign entity stated that the Beneficiary "manages the essential business function of project acquisition" and "manages the organization's essential marketing function." Management of an essential function is a trait of a manager, rather than an executive. Elsewhere in this proceeding, the Petitioner has acknowledged the distinction between a manager and an executive, and that the requirements of the two should not be conflated.

The Petitioner did not show how the above duties amount to executive authority over a major component or function of the organization. As noted previously, marketing and project acquisition, on the whole, may be major functions of the organization, but the Petitioner did not show that the Beneficiary had authority over those overall functions. Rather, his authority was limited to "the technical component" of marketing in one of several sales territories.

For the reasons explained above, the Petitioner has not shown that the Beneficiary's position abroad met all the requirements of an executive capacity.

B. U.S. Employment in an Executive Capacity

As with the Beneficiary's position abroad, the Director's discussion of the Beneficiary's U.S. position centered on the company's staffing.

The Petitioner stated that the Beneficiary "planned the establishment of the R&D lab at the [petitioning U.S. entity]." The petitioner does not appear to have any R&D laboratory in the United States. The Beneficiary was one of three U.S. employees at the time of filing.

Apart from the Beneficiary, another U.S. employee is the Petitioner's president/chief executive officer/general manager. The record indicates that this individual was also performing the duties of the senior sales manager while the latter position was vacant, but he remained the president of the company and therefore would not truly have been subject to the Beneficiary's authority. He is also the foreign entity's vice president of international marketing and sales. With respect to the title "senior sales manager," that title implies a high-ranking position with authority over a subordinate sales staff, but the Petitioner has no other sales positions.

The Petitioner's organizational chart also referred to an "Administrator/Accountant." A job description on the Petitioner's letterhead, however, listed the position title as "Admin & Account Clerk," requiring "[b]asic accounting knowledge" rather than the full qualifications of an accountant. The job offer letter issued to this individual used the title "Administrative Assistant." The duties are primarily clerical and do not involve research and development of the Petitioner's products.

The Petitioner also indicated that it intended to transfer a technical specialist currently employed in China. That position would also report to the technical director. But at the time of filing, the Petitioner had only one position that was truly subordinate to the Beneficiary. The Petitioner must meet all eligibility requirements at the time of filing, continuing through the adjudication of the petition. *See* 8 C.F.R. § 103.2(b)(1).

The Petitioner also initially stated that it "became a qualified supplier for . . . the largest power utility in Canada," and that "the project is now under commissioning and will be in service soon." The Petitioner did not specify staffing arrangements for the Canadian project. Documents in the file indicate that the Petitioner engaged a subcontractor for that project.

In terms of the company's stage of development, the Petitioner asserted that it "is still a new player in the mature power industry in North America and Mexico." We note that the petitioning U.S. entity came into existence seven years before the petition's June 2018 filing date.

The Petitioner stated that, apart from the minimal U.S. staff, the Beneficiary "manages the business development team in China, which is managed by three Technical Service and Sales Application Managers for the North American Region." As stated above, the Petitioner provided documentation of three graduate degrees, but otherwise did not document the size, structure, or duties of the Beneficiary's subordinate staff abroad.

The Petitioner also stated that the Beneficiary manages and directs "the appropriate research and development departments at [the foreign parent company]." The organizational chart shows three R&D engineers in the Beneficiary's group, but the record does not establish that these three employees represent the entire, or principal, R&D capacity of a company with 3000 employees, nor does the record explain why the Petitioner would concentrate its R&D workforce within a regional sales division. Therefore, the Petitioner has not shown that the Beneficiary has executive-level authority over the foreign entity's R&D function.

The Petitioner claimed to have established that the Beneficiary "directed and managed the Technical Service and Sales function of [the foreign entity] in an executive capacity." The Petitioner, however, did not show that "the Technical Service and Sales function" resided entirely within one of several regional subdivisions of the International Marketing and Sales Division, or that the group under the Beneficiary's authority amounted to a major component or function of the organization.

Later, the Petitioner submitted an expanded organizational chart showing additional hiring in the United States and at a Canadian branch office. The Petitioner stated that the company "established an office in [redacted] which it has staffed with professional subordinates of [the Beneficiary] to deliver the products and services of the company." The Petitioner submitted some documentation about the

project, but did not establish the extent of the company's activity in Canada at the time of filing. It is significant that the initial job description did not mention the Canadian project.

The Petitioner submitted copies of Canadian work permits issued to three of the foreign entity's employees. Two of these permits were issued shortly before the petition's filing date. The record does not indicate what these employees were doing at the time of filing. In the face of this omission, it is significant that the Petitioner did not include any employees in Canada on the first version of its organizational chart. As noted previously, at the time of filing, the Petitioner stated "the project . . . will be in service soon," apparently indicating that work was not yet underway.

The Director found that the Petitioner had not established "an organizational structure sufficient to elevate the beneficiary to an executive position." The Director acknowledged the Petitioner's claim that workers abroad support the Beneficiary's work in the United States, but found this assertion to be vague and poorly corroborated.

On appeal, the Petitioner asserts: "There is no requirement that the organizational structure have a certain number of hierarchical layers . . . . [The Director] should have focused on the evidence that establishes the Beneficiary's subordinates relieve him of non-qualifying duties." As we will discuss below, the Petitioner provided inconsistent information about the Beneficiary's duties. Furthermore, the Petitioner did not explain how the activity of technicians and engineers in Canada, installing and operating equipment built and sold by a company in China, supports the Petitioner in the United States and warrants a U.S.-based executive position.

The Petitioner asserts that the Director unfairly required the Petitioner to show that the Beneficiary's subordinates qualify as managers. The Petitioner maintains that the Director went beyond the statutory and regulatory definition of an executive capacity.

The Petitioner initially provided the following list of the Beneficiary's duties and the approximate time devoted to each:

- Envision North America market strategy definition, perform technology evaluation continuously, and provide technical direction to [the foreign entity's] R&D activities. (20%)
- Direct the operation of the R&D lab of [the foreign entity] as relates to [the Petitioner's] projects; coordinate technical resources for the development effort between [the companies in the] USA and China. (20%)
- Establish the most suitable technical team members based on their capabilities and availabilities, both in the U.S. and in China, as relevant to [the Petitioner's] projects. Schedule their tasks and review their performances in those events. (10%)
- Participate in the hiring and firing decisions affecting technical team members, both in the U.S. and in China. (10%)
- Oversee (manage and direct) activities directly related to business development, such as customer visits, marketing activities, and professional conferences. (25%)
- Determine technical orientation and sales targets for business development efforts. (15%)

- Manage technical support for promotional activities including conferences, user meetings, seminars, local exhibitions & on-site demonstrations. (15%)
- Provide technical leadership for [the Petitioner's] project delivery and customer services activities. (10%)

The above percentages add up to 125% and therefore cannot be accurate.

The Petitioner stated that it requires the Beneficiary's "continuing executive discretion . . . to negotiate and approve technical proposals and contracts . . . , and then to direct the R&D team in China to execute appropriate technical solutions to fulfill the contracts." The Petitioner discussed various contracts that the Petitioner negotiated with power companies in North America, and stated: "These successful transactions were due largely to [the Beneficiary's] exceptional skillset and organization of resources from different departments of the company in building high quality proposals."

The Petitioner submitted copies of various documents as "evidence of [the Beneficiary's] executive duties at [the petitioning company]." Examples include:

- A "Subcontract Agreement for Installation Construction" quoted an email message from the Beneficiary, indicating that the Petitioner accepted the subcontractor's price despite misgivings about one "very high" number;
- A "Process Bus Questionnaire" answering anticipated questions about some of the foreign entity's technology;
- An equipment refurbishment proposal, with no attribution;
- A proposal submitted to a client with a cover letter from a vice president of the Petitioner's foreign parent company. The cover letter identified the Beneficiary as the point of contact who was "authorized to make representations on behalf of Proposer." The Beneficiary also signed an executive summary; and
- A non-disclosure agreement relating to the same project. The Petitioner claims the Beneficiary executed this agreement, but his name does not appear in the document and the Petitioner is not a party to the agreement. (The parties are the client and a third company that would provide services in conjunction with the Petitioner.)

Some of the submitted documents do not contain the Beneficiary's name or show his role in their preparation, and therefore they are not evidence of his claimed executive duties. Other documents establish that the Beneficiary was authorized to negotiate and enter into agreements on the Petitioner's behalf, but this authority is not inherently limited to individuals who work primarily in an executive capacity.

The Director requested additional details about the Beneficiary's claimed executive capacity in the United States. In response, the Petitioner submitted information about the project in Canada. A new job description mentioned "oversight of the project team . . . in [redacted]," but this description was significantly revised from the version submitted with the petition. The new version showed the following categories and time percentages:

1. Establishment of company value, mission, strategy, and objectives. (10%)

2. Operation management of the organization. (15%)
3. Oversee (manage and direct) activities related to business development including key customer visiting, promotional activities, technical seminars, conference[s] & exhibitions. (30%)
4. Oversee (direct and monitor) planning, implementation, execution and evaluation of projects, including arrangement of the tasks and performance review of project execution team. (25%)
5. Human resources planning and management, including recruit, interview and select staffs [*sic*], and hiring and firing decision-making of the organization. (10%)
6. Determine technical orientation and perform technology evaluation with guidance of [the company's] R&D activities. (10%)

This new version overlapped with the prior version but there are significant differences as well. The new version, for example, did not indicate that the Beneficiary continued to have significant oversight over employees in China. Instead, in the elaboration on item 6, it indicated: "The Technical Director manages all of [the Petitioner's] technical activities in order to convey the necessary technical development information to the appropriate research and development departments at [the Chinese company]." The Petitioner acknowledged that the foreign entity had transferred one of its employees to the United States and three to Canada. The Petitioner did not show that the Beneficiary continued to have authority over the remaining employees in China.

The Petitioner showed that the Beneficiary contacted existing and potential clients to discuss various projects, but the Petitioner did not show that this activity was at the executive level, rather than lower-level marketing activity intended to solicit business or resolve customer service issues. At the time of filing, the Beneficiary had no subordinate employees to relieve him from those tasks.

The Beneficiary has some degree of discretion over the petitioning entity, but has not shown that the Beneficiary establishes the entity's goals and policies while receiving only general supervision or direction from higher officials at the organization. The Petitioner's work instead appears to amount to implementing goals and policies established by his superiors, including the company's president.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary has been, and will be, employed in an executive capacity abroad and under the extended petition.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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 NRE-USA LLC*, ID# 3257672 (AAO May 17, 2019)