U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-D-A-B- LLC

DATE: MAY 22, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a designer and manufacturer of drapes and blinds, seeks to temporarily employ the Beneficiary as a manager and director of operations 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 that the Beneficiary would be employed in a managerial or executive capacity. The Director also determined that the Petitioner did not demonstrate that the Beneficiary acted in an executive capacity with the foreign employer.

On appeal, the Petitioner asserts that the Director erred by focusing on whether the Beneficiary qualifies as a manager in the United States and emphasizes that she qualifies as an executive. In addition, the Petitioner contends that the Beneficiary oversaw several drapery and blind stores abroad, each with its own store director, managers, and operational employees, thereby qualifying her as an executive.

Upon *de novo* review, we will dismiss the appeal as the Petitioner did not establish that the Beneficiary will act in a managerial or executive capacity in the United States. We will, however, withdraw the Director's decision with respect to the Beneficiary's foreign employment in a managerial or executive capacity.[1]

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

[1] The Petitioner provides a sufficiently detailed description of the Beneficiary's foreign duties, payroll documentation, and other supporting evidence indicating that the Beneficiary oversaw store locations with subordinate directors supervising operational level employees. The Petitioner demonstrated that the Beneficiary more likely than not acted as a personnel manager supervising subordinate managers while overseeing several drape and blind stores in Canada.

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.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner has established that the Beneficiary would act in an executive capacity. 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, 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, its staffing levels, and its organizational structure.

A. Duties

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 it operates a retail store opened in 2015 selling "draperies, blinds, and fabrics" and also providing installation, interior design consultation, and made-to-measure products. The Petitioner indicated that the Beneficiary would be tasked with developing and overseeing "the global financial policy," directing "strategic corporate financial planning" and "short and long-term financial forecasts." The Petitioner explained that the Beneficiary would "participate in and lead the investment decisions of the company" and "oversee accounting promotions, production, and product development." It further stated that the Beneficiary was responsible for "overseeing the operations," "approving purchase orders," "supervising negotiation with vendors and distributors," and "working with the marketing department to oversee planning and execution of marketing and promotions initiatives." It stated that the Beneficiary was further tasked with "overseeing product development" and "settling customer's financial complaints." It also indicated that the Beneficiary would formulate "Human Resources policies and procedures" and oversee "the management and personnel structures of the company," including hiring, firing, and performance evaluation.

The Petitioner stated that the company's employees "are learning the respective pieces of the business necessary to perform their duties," indicating that they needed someone with executive experience from the foreign employer to provide oversight and strategic direction. The Petitioner explained that the Beneficiary would "set high-level goals" for the company, "lead the company forward in a strategic manner," and "give unique insight into the systems and processes." The Petitioner indicated that the Beneficiary would provide "strategic decision making regarding the location, setup, marketing, staffing, and internal policies and procedures" of the U.S.-based store. It further noted that the Beneficiary would draft a "5-year business plan," negotiate and contract with vendors," and set "high-level policies." On appeal, the Petitioner asserts that it has submitted "abundantly detailed" duties specific to the Beneficiary's proposed employment in the United States.

The Petitioner has not submitted a sufficiently detailed duty description that describes the Beneficiary's day-to-day executive-level duties or that credibly establishes that she would devote her time primarily to qualifying tasks. 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). 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 her role. The Petitioner provided insufficient examples and little supporting documentation to demonstrate the Beneficiary's performance of qualifying duties, such financial policies she set, short and long term financial forecasts she formulated, accounting procedures she put in place, marketing, production, and product development she oversaw, vendors and distributors she negotiated with, human resources policies and procedures she put in place, strategic direction she provided, or systems and policies she modified. This lack of detail and documentation is particularly noteworthy since the Beneficiary is asserted to have previously worked in her proposed executive capacity in the United States from August 2015 to March 2017.

Further, in the Form I-129, the Petitioner indicates that it only had two employees subordinate to the Beneficiary as of the date the petition was filed; as such, it does not appear credible that the Beneficiary would devote 35% of her time to formulating human resource policies and procedures. Likewise, the Petitioner states that the Beneficiary would spend time "working with the marketing department to oversee planning and execution of marketing and promotions initiatives." However, submitted organizational charts do not indicate that the Petitioner has a marketing department. The Petitioner also submits order forms for print advertising with local publishers, such as one for a six month print advertisement. This does not indicate that the Beneficiary is overseeing planning and execution within the marketing department, as claimed, but reflects she is performing day-to-day operational duties generally related to marketing the company's goods and services.

In addition, the Petitioner states that the Beneficiary will focus on investigating and initiating the opening of another store. However, a submitted business plan projects that this will not take place for four to five more years. Given this, it appears unlikely that the Beneficiary would devote a significant portion of her time to expansion related duties and the Petitioner provides no supporting documentation to substantiate these activities. In addition, the Petitioner submitted an email from May 2017, dated only approximately two months prior to the petition, indicating her involvement with a drape order. Otherwise, the Petitioner provided little evidence substantiating the Beneficiary's regular delegation of non-qualifying tasks to her subordinates. In sum, the Petitioner has not sufficiently documented that the Beneficiary will be primarily devoted to executive-level duties.

Even though the Beneficiary holds a senior position within the organization, the fact that she 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 her 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 a managerial or executive capacity, we take 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.

In support of the petition in July 2017, the Petitioner submitted an organizational chart indicating that the company employed two individuals, an assistant general manager and an "installer/general work" employee. The chart also indicated the Petitioner was "seeking to hire ASAP" another "installer/general work" employee, a "salesperson SAH consultant," and a "showroom assistant/customer service" employee. Lastly, the organizational chart projected that a technical support employee would begin working for the company in August 2018. The Petitioner stated in an

accompanying support letter that it employed an assistant general manager, an installer/general worker, and a technical support employee, but also indicated that it employed only two "fulltime" employees.

In response to the Director's request for evidence (RFE), the Petitioner submitted an organizational chart reflecting that the Beneficiary oversaw an assistant general manager and a different installer/general work employee than that listed in the previously provided organizational chart. The chart also showed several employees that would soon start employment with the company or that the Petitioner projected it would hire further in the future, including another installer/general worker beginning employment in September 2017, a "sales person/shop at home consultant" starting employment in August 2017, a technical support employee beginning employment in October 2017, and a showroom assistant/customer service representative. On appeal, the Petitioner contends that it has sufficient employees subordinate to the Beneficiary to support her in an executive capacity, including a subordinate manager and two operational employees.

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 the one that existed on the date the petition was filed. The evidence indicates that the staffing of the Petitioner was not sufficient to support the Beneficiary in an executive capacity at the time the petition was filed. As noted, the Petitioner stated that it only had two full-time employees, beyond the Beneficiary, at the time the petition was filed. In addition, the Petitioner submitted Florida Employer's Quarterly Reports for the second and third quarters of 2017, corresponding with the filing of the petition in July 2017, reflecting that the company only had two employees during these quarters. For the third quarter of 2017, this included the stated assistant general manager and one installer/general work employee. However, the record reveals numerous non-qualifying operational duties, including handling installations, interior design services, measurements, manufacturing of drapes and blinds, in-house consultations, ordering of inventory, delivery, client interviews, cashier duties, sales duties, amongst other operational tasks. It appears unlikely that an assistant general manager and one installer/general employee would be sufficient to perform this extensive list of operational functions without the Beneficiary's substantial involvement.

Therefore, without clarification and sufficient supporting evidence as to which employees perform the numerous non-qualifying operational duties of the business, it appears likely that the Beneficiary will be primarily engaged in these duties. Furthermore, the Petitioner's hiring plans projected that it would hire several operational employees just after the filing of the petition, including another installer/general worker in September 2017, a sales person/shop at home consultant in August 2017, and a technical support employee in October 2017. This leaves question as to who was performing these non-qualifying installation, sales, and technical support duties when this petition was filed.

The Petitioner further provides duties for the Beneficiary's claimed subordinate manager, the assistant general manager, indicating that she opens and closes the store, takes all phone calls, addresses all customer issues, prepares all in-store paperwork, places all orders, receives all orders,

follows up with suppliers, books all installations, greets customers in the store, handles all accounts payable, amongst other duties. First, it seems unlikely that one employee is performing all of these functions without the involvement of the Beneficiary. Second, the assistant general manager is not shown to have any subordinates in the provided organizational charts.

The Petitioner stated in a RFE response letter that the Beneficiary's two subordinates were "still learning the business" and it emphasized the Beneficiary's ten years of experience in "designing window styles with custom shades and fabrics." The also record includes significant documentation of blog posts and other social media activities specific to the business; however, it is not clear who is performing these duties other than the Beneficiary. These social media activities are indicative of performance of the function, not setting overall marketing policy, a significant duty asserted for the Beneficiary. The Petitioner provided little evidence substantiating that the Beneficiary would be primarily delegating non-qualifying duties to her two subordinates.

As such, the evidence does not indicate that, the Beneficiary will be removed from performing non-qualifying operational tasks and that she will primarily spend her 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).

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.*

The Petitioner has not sufficiently demonstrated that the Beneficiary will have a subordinate level of managerial employees to direct, allowing her to primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. The evidence indicates that the Petitioner will be engaged in a wide range of operational activities for which it appears to not have sufficient employees. Likewise, the Petitioner does not clearly and credibly describe and document the Beneficiary's proposed day-to-day executive duties and her stated duties do not appear credible in light of the company's staffing and level of operations. For these reasons, the Petitioner has not established that the Beneficiary will act in an executive capacity.

III. CONCLUSION

The appeal must be dismissed because the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of S-D-A-B- LLC*, ID# 1236303 (AAO May 22, 2018)