U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-C-USA, INC.

DATE: MAY 22, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a clothing retailer and wholesaler, seeks to continue the Beneficiary's temporary employment as its managing director 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 record did not establish, as required, that: (1) the Beneficiary would be employed in a managerial or executive capacity under the extended petition; and (2) that the Beneficiary's foreign employer continues to do business as a qualifying organization abroad.

On appeal, the Petitioner asserts that it established by a preponderance of the evidence that the foreign entity continues to do business and that the Beneficiary will perform primarily executive duties under the extended petition.[2]

Upon *de novo* review, we will withdraw the Director's finding that the Petitioner did not establish that the foreign entity continues to do business as a qualifying organization in China.[3] However, as the Petitioner has not overcome the remaining ground for denial, we will dismiss the appeal.

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period October 13, 2015, until September 1, 2016. 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 record of proceeding also contains a motion to reopen with supporting evidence, which was originally submitted concurrently with this appeal, returned to the Petitioner, accepted as properly filed on May 3, 2017, and ultimately dismissed by the Director as untimely filed. Our *de novo* review of the record included a review of the evidence submitted in support of the Petitioner's motion.

[3] The record now contains additional evidence of the foreign entity's ongoing business activities sufficient to show that the company is still doing business as defined in the regulations. *See* 8 C.F.R. § 214.2(l)(i)(ii)(H).

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.*

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). This evidence must demonstrate that the beneficiary will be employed in a managerial or executive capacity, as defined at sections 101(a)(44)(A) and (B) of the Act, under the extended petition.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner established that the Beneficiary will be employed in an executive capacity. The Petitioner did not claim that the Beneficiary would be employed in a managerial capacity; therefore, our analysis will address only the Petitioner's claim that the Beneficiary's proposed position would be in an executive capacity.

The term "executive capacity" is defined 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 look to the petitioner's description of the job duties. *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

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 at 1533.

The Petitioner provided the following statement of the Beneficiary's duties as managing director at the time of filing:

30%	Directing design and production from . . . the foreign affiliate Chinese company
20%	Overseeing national sales with the sales director and negotiating major wholesale contracts
15%	Directing marketing activities including representation at the major trade shows
10%	Budget and finance activities; arranging Bank lines of credit and other forms of finance; preparing budgets; analyzing sales forecasts and projections
10%	Preparing major sales presentations in coordination with the National Sales Director and General Manager
15%	Overseeing the production of the [redacted] custom private label account with the General Manager and identifying and overseeing development of new private label accounts.

The Petitioner further stated that the Beneficiary establishes goals, policies, business plans, and procedures; communicates daily with senior staff and sets wholesale and retail pricing; enters into and negotiates contracts and business agreements; oversees the design work done in China in accordance with U.S. fashion trends; and, in his role as the foreign affiliate's CEO, directs the production and design of products produced in China for distribution in the United States.

In response to the Director's request for evidence, the Petitioner submitted the following list of duties the Beneficiary will perform under the extended petition:[4]

5%	Continue to direct the retail operation and make decisions on hiring additional staffing according to business demand.
10%	Continue to work with [the general manager and sales director] to build the [Petitioner's] brand on a national basis. Regular travel to the major trade shows and exhibits for ladies' gowns.
5%	Direct the importation of product from the foreign affiliate.

[4] The Petitioner added the percentages that appear here in a statement submitted on motion.

10%	Work closely with [the general manager] to service the exacting demands for high end fashion gowns . . . review opportunities to develop different market segments which are price sensitive.
5%	Make decisions on whether to expand to a second retail location. . .
5%	Implement a new business plan . . .
10%	Focus his efforts in building the national presence for [the Petitioner's] brand
10%	Make decisions regarding major accounts and will analyze the profitability of the different market sectors . . .
5%	Hire additional management staff either on an incentive basis or salary depending on the growth of the business.
20%	Overall responsibility for design, finance and major operational decisions.

Finally, the record contains a statement from the Beneficiary, who explains that he founded the foreign affiliate "for the purpose of manufacturing ladies' gowns which I design." He emphasizes that as the principal designer and founder of both the Petitioner and foreign entity he has "ultimate decision making authority over financial and operational decisions." The Beneficiary indicates that he has delegated managerial duties to the general manager and focuses on making executive decisions related to the development of the business, which leaves him with "no time for work in day to day operations."

We agree with the Director's determination that the Petitioner has not provided sufficient insight into the specific tasks the Beneficiary will perform as part of his day-to-day routine. The descriptions convey the Beneficiary's discretionary decision-making authority and oversight over the operations as a whole, but are too broad to give a sense of the types of duties he primarily performs on a daily basis. Further, many of the duties indicate that the Beneficiary either works closely with or delegates certain non-executive tasks to a subordinate general manager and sales director. As discussed further below, the record does not adequately document the Petitioner's engagement of these two individuals at the time of filing, which undermines the Petitioner's claim that the Beneficiary actually delegates these non-qualifying tasks to subordinates.

The Petitioner emphasizes that all of the Beneficiary's stated duties will be at an executive level, and objects to the Director's finding that duties such as traveling to major trade shows and directing import activities are not qualifying tasks. However, duties that are so broad that they do not convey information about the Beneficiary's day-to-day tasks are insufficient to meet the Petitioner's burden of proof, even if the broadly stated activities indicate that the Beneficiary has the appropriate level of authority over the company's operations. The Petitioner did not describe the specific tasks the Beneficiary performs to "service the exacting demands for high end fashion gowns," to "focus his efforts" in building a national presence, or to "build the brand." The Petitioner indicates that the Beneficiary will direct importing, budget and finance activities, but the company does not employ staff who would assist with the any of these activities so it is unclear that his associated duties would be executive in nature.

Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The

Petitioner has not provided any detail or explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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).

Further, although the Petitioner indicated that the Beneficiary will "direct design" activities, his own statement indicates that he is the person who designs the company's gowns, a responsibility that is not conveyed in either of the position descriptions provided. The Petitioner does not employ any design staff. The foreign entity's organizational chart depicts a design department with three employees that include two workers identified as "flower pattern," and one identified as "paper pattern," with no further descriptions of their roles. If the Beneficiary is in fact the primary designer, then it is unclear why the Petitioner did not state this and identify how much time he spends on this non-executive function.

The fact that the Beneficiary will direct a business as its senior employee does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(44)(A) of the Act. Even though 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, a broad overview of his responsibilities is insufficient to establish that his actual duties would be primarily executive in nature as of the date of filing.

B. Staffing and Organizational Structure

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

The Petitioner, which operates a retail store that also serves as a wholesale showroom, stated that it had five employees at the time of filing on August 31, 2016. The Petitioner's organizational chart depicted the Beneficiary as the managing director and identified his direct subordinates as a national sales director and a general manager The organizational chart also included a store manager who reports to the general manager, and two sales representatives who work in the store.

The Petitioner submitted a payroll register for the period December 14, 2015, through August 7, 2016. This evidence corroborated the employment of the Beneficiary, the three store employees, and another individual, who did not appear on the organizational chart.[5] The payroll register also identified as a 1099 employee (paid on contract or commission), and showed that he had received only one payment in the amount of $1,223.36 in January 2016.

[5] In response to the RFE, in March 2017, the Petitioner identified as a "wholesale manager" responsible for supervising wholesale accounts, coordinating trade shows, and "sales marketing." However, an employee payroll summary submitted at that time showed that her employment was terminated on August 26, 2016, prior to the filing of this petition.

The Petitioner did not provide evidence of payments to [redacted] In a letter in support of the petition, the Petitioner stated that she, along with the Beneficiary, "manages and oversees accounts," and noted that she served as a management consultant to the Petitioner during the initial phase of start-up operations. The Petitioner explained that [redacted] owns her own business, which also imports gowns from the foreign entity for a private label called [redacted] The Petitioner specifically stated that it expected [redacted] to accept a salaried position with the Petitioner during "the next three year period," and noted that she would "directly focus on the management of the [redacted] account which is anticipated to be the major source of revenue for the wholesale business."

In the RFE, the Director noted the lack of evidence that the Petitioner actually employed the claimed managerial employees [redacted] at the time of filing, and requested additional information regarding the company's organizational structure, staffing levels, wages and salaries paid, and duties performed by subordinate employees.

In response, the Petitioner explained that [redacted] as national sales director, works directly with senior executives of national chains and department stores. The Petitioner stated that, consistent with his position as a senior sales executive, his compensation arrangement is entirely incentive-based. In support of this claim, the Petitioner submitted an undated "Sales Rep Agreement" with [redacted] authorizing him as a "non-exclusive independent representative" authorized to sell and promote the company's products in the West Coast in exchange for a commission of 3% to 10% dependent on the sales amount.

The Petitioner also submitted an un-signed, un-dated statement attributed to [redacted] which indicates that his duties include attending several trade shows per year with the Petitioner's team,[6] and traveling to 13 western states to visit boutiques that may be interested in the Petitioner's line of products. The Petitioner submitted e-mail receipts for two flights booked by [redacted] (to [redacted] and [redacted], but did not provide evidence of any further payments to him after January 2016. The Petitioner has not established that he was providing services for the company at the time of filing or that he has been managing its national sales accounts.

With respect to [redacted] employment, the Petitioner explained that she "helped the Beneficiary start the business . . . and initially received compensation in the form of goods in kind," but "is now compensated with a base salary of $5000 per month plus incentive compensation." The Petitioner stated that [redacted] manages sales and general operations, and reports to the Beneficiary for major financial matters and business strategy.

The Petitioner submitted a "Director Agreement" dated September 5, 2015, which indicates that it appointed [redacted] as "executive operation officer and management representative." The

[6] The statement identifies this team as [redacted] (the store manager), and [redacted]. As noted, [redacted] left the company before the petition was filed. [redacted] according to the employee summary submitted in response to the RFE, terminated her employment on September 10, 2016, ten days after the petition was filed.

agreement indicates that the Petitioner would compensate her with merchandise for her boutique during the first year, and pay her a salary of $5000 per month beginning in August 2016. The Petitioner also submitted an unsigned, undated statement attributed to [redacted] This statement indicates that her duties include researching new designs for each season, managing the buying and manufacturing of new designs in consultation with the Beneficiary, conducting monthly sales meetings and providing training to new employees, overseeing employee scheduling and payroll, setting sales goals, managing all social media, and working at all trade shows. According to this statement, [redacted] was on payroll "from the end of August 2016."

As evidence of the claimed "goods in kind" compensation paid to [redacted] the Petitioner submitted copies of three invoices showing approximately $58,000 of merchandise sold to [redacted] between November 2015 and August 2016. The Petitioner did not submit supporting bank statements, its general ledger, or other evidence in support of its claim that [redacted] did not pay and was not expected to pay for this merchandise in exchange for her services.

Regarding its payments to [redacted] the Petitioner submitted copies of two [redacted] paystubs showing her receipt of 1099 payments of $2500 per pay period. Neither document identifies the Petitioner's name or a date.[7] The "Employee Summary" submitted in response to the RFE identifies [redacted] as a full-time employee hired on December 1, 2015, but the Petitioner did not explain why she was not included on the employee payroll list submitted at the time of filing. The latter employee summary shows that the Petitioner paid [redacted] $22,500 in 2016; however the Petitioner did not provide a copy of an IRS Form 1099 issued to her.

Overall, we find this evidence insufficient to establish that the Petitioner employed [redacted] as its general manager when the petition was filed on August 31, 2016. If [redacted] was on the company's payroll at the end of August, then it is unclear why the Petitioner stated in a letter dated August 29, 2016, that it anticipated hiring her "in the next three years" after the extension is approved. As noted, the Petitioner did not adequately document that she received merchandise as compensation for her services prior to August 2016 and the payroll evidence the Petitioner provided is insufficient to establish when the Petitioner began paying her a salary, wage or other fees.

Further, even if we found that the Petitioner had started compensating [redacted] for her services as of the date of filing, the record does not contain consistent information about the nature of her duties in support of the Petitioner's claim that it employs her in a managerial role. At the time of filing, the Petitioner implied that she would assist the Beneficiary with overseeing accounts and would spend most of her time on the [redacted] private label. The statement attributed to [redacted] indicates that she performs many additional duties, including design research, social media account management, overseeing employee scheduling and payroll, conducting sales meetings, trade show activities, among others. In addition, the Petitioner acknowledges that [redacted] owns her own, similar business and has not explained how she would undertake a full-time managerial role with an unrelated company.

[7] Also, we note that the payroll register submitted at the time of filing indicates that the Petitioner was using [redacted] for payroll processing, not [redacted] as of mid-August 2016.

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.*

For the reasons discussed, the Petitioner has not established that the Beneficiary delegates non-executive duties to a subordinate managerial staff. Although the Petitioner indicates that it has sufficient lower-level staff to allow the Beneficiary to primarily focus on the broad policies and goals of the organization, and to remove him from significant involvement in the day-to-day operations of the company, the record does not support that claim.

As noted, the Petitioner has not sufficiently documented its employment of its sales director and general manager. In response to the RFE, the Petitioner stated that its other staff include a store manager, a wholesale manager, and two salespersons. The Petitioner's payroll records indicate that the store manager left the company just after the petition was filed and the wholesale manager was terminated prior to the filing of the petition, so it is unclear why it included them among its staff. It appears that the Petitioner did hire two additional staff in 2016 , but the Petitioner did not mention them in any of its statements or indicate what positions they hold. Although they are identified on the payroll records as full-time employees, earned only $1,325 in 2016 after being hired in early September, and earned $1,848 for approximately 9 weeks of work.

We have also considered the Petitioner's claim that the Beneficiary continues to direct the work of employees located at the Chinese affiliate, specifically those responsible for the design, production, and logistics activities related to the U.S market. The Petitioner submitted an organizational chart for the foreign entity, but has not provided position descriptions for the foreign employees or explained the nature of the duties they perform in support of the U.S. company. The organizational chart does not depict a logistics or export department or production staff. While the Beneficiary may continue to have general oversight of the foreign entity and the organization as a whole as the sole owner of both companies, the Petitioner has not sufficiently established that the foreign staff assist the Petitioner with its day-to-day operations or remove the Beneficiary from involvement in non-executive duties.

The Petitioner cites to *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), and asserts that the Director erred by focusing on the size of the Beneficiary's subordinate staff and the small size of the U.S. company. As required by section 101(a)(44)(C) of the Act, if staffing levels

are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, it is appropriate for USCIS 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-managerial or non-executive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

The Petitioner operates a retail and wholesale clothing business. The Petitioner has not adequately documented the employment of its claimed "senior managerial" staff for the reasons. The Petitioner has consistently documented its employment of retail sales representatives, but the record shows that its retail manager and wholesale manager both left the company around the time of filing. The Beneficiary is purportedly responsible for overseeing financial, administrative and logistics matters, but does not have subordinate staff to assist him with these functions, nor does it employ purchasing staff and it is unclear who sources inventory from the parent company and other suppliers.[8] In addition, the Beneficiary states that he designs the gowns sold by the company, a non-executive duty that was not included in the Petitioner's description of his duties. In light of these facts, there are a number of non-executive functions which are not or cannot be delegated to subordinate staff.

We have interpret the statute to prohibit discrimination against small or medium-size businesses. However, we have also consistently interpreted that Act to require petitioners to establish that the beneficiary's position "primarily" consists of executive duties, and that it has sufficient personnel to relieve a beneficiary from performing operational and administrative tasks. The reasonable needs of a petitioner will not supersede the requirement that a beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008).

Based on the nature of the company and its documented staffing levels, the Petitioner has not shown that it requires the Beneficiary to *primarily* perform the higher level planning, policy-making and business development duties attributed to him. Rather, it appears that he would more likely than not be required to perform a variety of non-executive duties necessary for the day-to-day operations of the company. Accordingly, the Petitioner has not established that he will be employed in an executive capacity.

III. CONCLUSION

The appeal will be dismissed because the Petitioner did not establish that it will employ the Beneficiary in an executive capacity.

[8] The Petitioner identifies its Chinese affiliate as its major supplier, but the submitted customs documents show that the Petitioner has been importing inventory from Lebanon and Turkey.

ORDER: The appeal is dismissed.

Cite as *Matter of M-C-USA, Inc.*, ID# 620851 (AAO May 22, 2018)