U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-W- LLC

DATE: MAY 22, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a real estate development, commercial rental, and export services company, 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 Vermont Service Center denied the petition on multiple grounds. The Director concluded that the Petitioner did not establish that: (1) the Beneficiary was employed abroad for one continuous year in the three preceding its initial new office petition; (2) the Beneficiary acted in a managerial or executive capacity abroad; or (3) the Beneficiary would act in a managerial or executive capacity in the United States.

On appeal, the Petitioner asserts that the Beneficiary was employed for one continuous year abroad and points to submitted foreign employer payroll documentation. Further, the Petitioner contends that the Director abused her discretion in determining that the Beneficiary did not act in a managerial or executive capacity abroad. The Petitioner also states that the Director erred by not considering the Beneficiary's eligibility as an executive launching a new office in the United States.

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 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.

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period January 5, 2017, until January 4, 2018. 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.

§ 214.2(l)(3)(v)(B). In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.*

A petitioner seeking to extend an L-1A petition that involved a new office[2] 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 first issue to be addressed is whether the Petitioner has established that the Beneficiary would act in an executive capacity under the extended petition. The Petitioner does not claim that the Beneficiary would be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary would be employed in an executive capacity.

The statute defines an "executive capacity" as an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

When examining the executive capacity of a given beneficiary, we will review the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in an executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, 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.

[2] As noted, a "new office" petition was filed by the Petitioner on behalf of the Beneficiary and approved for the period January 5, 2017, to January 4, 2018. In the current Form I-129 filed on June 19, 2017, also denoted as a new office petition, the Beneficiary's requested period of employment is from January 5, 2017, to January 4, 2020. Since a new office petition relevant to the Petitioner and Beneficiary was already approved for one year, the two additional years requested by the Petitioner in the current petition are, in effect, a new office extension.

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 the Beneficiary would be tasked with establishing "a new office in the United States and developing the Company's U.S. real estate development and export businesses." The Petitioner indicated that the Beneficiary would hire and oversee new employees, make land investment and development decisions, and investigate the medical device market in the United States.

The Petitioner explained that the Beneficiary would devote 25% of his time to "making and implementing decisions regarding business strategy, business development, and policy," including selecting the company's investment projects. The Petitioner stated that the Beneficiary would spend 20% of his time "negotiating all contracts" and another 20% "overseeing [the Petitioner's] export services branch." In addition, it indicated that the Beneficiary would be responsible 20% of the time for "overseeing [the Petitioner's] property development branch," including developing ideas to generate income. It also explained that the Beneficiary would devote 10% of his time to overseeing the recruitment of all positions within the organization, including vice presidents of finance and operations. Lastly, the Petitioner stated that the Beneficiary would spend 5% of his time "coordinating public relations."

The Petitioner has not submitted a sufficiently detailed duty description that describes his day-to-day executive-level duties or credibly establishes that he would devote his time primarily to qualifying tasks. The Beneficiary's duty description includes several generic duties that could apply to any executive acting in any business or industry and they do not provide insight into the actual nature of his role. The Petitioner provided insufficient examples and little supporting documentation to demonstrate the Beneficiary's performance of qualifying duties, such as decisions he made regarding business strategy, contracts he negotiated, public relations he coordinated, and specific tasks he performed while overseeing the projected export services and property development branches. 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). Also, we note that the Petitioner's statements and the submitted evidence demonstrate that the export services and property development branches did not exist when the petition was filed.

To the extent that the Beneficiary submits detail and documentation regarding the Beneficiary's daily duties, this evidence is reflective of his involvement in non-qualifying operational tasks. First,

we acknowledge that the Petitioner likely purchased a commercial office property in Massachusetts. However, the Petitioner submits documentation indicating the Beneficiary has been involved in numerous non-qualifying operational level duties related to the maintenance of this commercial property, such as arranging and paying for fire prevention, heating and air conditioning (HVAC), landscaping, and snow removal services. The Petitioner also provided a letter from the Beneficiary dated after the petition was filed, that reflects his response to a tenant regarding their potential early termination of a lease. The Petitioner acknowledges that it has no employees beyond the Beneficiary. As such, the evidence demonstrates that the Beneficiary has not been primarily relieved from performing non-qualifying duties as of the date of the filing of the petition. In contrast, the Petitioner provides few examples and little documentation to substantiate the Beneficiary's day-to-day executive level tasks, beyond a singular decision to purchase a commercial property, which does not shed light on the duties he would perform under the extended petition.

Whether a beneficiary is an executive employee turns on whether the petitioner has sustained its burden of proving that their duties are "primarily" executive. *See* section 101(a)(44)(B) of the Act. Here, the Petitioner does not document what proportion of the Beneficiary's duties would be executive functions and what proportion would be non-qualifying. The Petitioner submits evidence indicating the Beneficiary's substantial involvement in operational level tasks that do not fall directly under executive duties as defined in the statute, but does not quantify the time he spends on these duties. For this reason, we cannot determine whether the Beneficiary is primarily performing the duties of an executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Even though the Beneficiary holds a senior position within the organization, the fact that he will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(44)(B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. *Id.* The Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making; however, the position descriptions alone are insufficient to establish that his actual duties would be primarily executive in nature.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, 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 denying the petition, the Director emphasized that the Petitioner submitted evidence only relevant to launching a new office and pointed to the fact that it had no employees as of the filing of the petition. The Director determined that it was likely that the Beneficiary was primarily engaged in non-qualifying operational duties. On appeal, the Petitioner contends that the Director erred when she did not adjudicate the matter as a new office petition. The Petitioner acknowledges that it is not

doing business and that it has no employees beyond the Beneficiary. It further asserts that it was still eligible for a new office petition as of the date of the filing of the petition and states that the Director should have considered its projections and business plans. The Petitioner also claims that the operational duties of the business are being performed by independent contractors and indicates that the Director did not properly articulate why the Beneficiary did not qualify as an executive.

As a preliminary matter, the Petitioner is not eligible for a second year as a new office. As noted, the Petitioner asserts that as of the filing of the petition, in June 2017, it was eligible to file another new office petition on behalf of the Beneficiary. However, as discussed previously, the Beneficiary was already approved pursuant to a new office petition from January 5, 2017, until January 4, 2018. The fact that the Petitioner filed a petition for a three year period of employment, during the new office period, does not entitle it to a second year as a new office. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If a business does not have the necessary staffing to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible for an extension.

The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). As such, the relevant organizational chart to analyze is that existing upon the filing of the petition. The evidence reflects that the Petitioner had no employees subordinate to the Beneficiary at the time of filing. Further, the Petitioner submitted evidence reflecting the Beneficiary's substantial involvement in non-qualifying operational level duties specific to the maintenance of a commercial property. There is no evidence that the Beneficiary is delegating these duties to subordinates and its future hiring plans are not relevant to establishing his executive capacity as of the date the petition was filed.

Furthermore, the Petitioner asserts on appeal that the Beneficiary is relieved from performing non-qualifying duties by subordinate independent contractors. However, the Petitioner has not adequately described or documented this assertion. For instance, the Petitioner has not specifically identified these independent contractors, their duties, or indicated how they relieve the Beneficiary from primarily performing non-qualifying tasks. We acknowledge that the Petitioner has submitted evidence indicating that the Beneficiary signed agreements with various contractors to perform services on its commercial property, such as fire prevention and sprinkler, HVAC, snow removal, and landscaping contractors. However, the record indicates that the Beneficiary is directly involved in ordering and arranging these services as his name is included on the invoices and checks paid to these contractors. These duties are not consistent with an executive as defined by the regulations, including directing subordinate management and setting goals and policies for the organization, but reflective of an operational level employee providing property management services.

Therefore, the evidence does not indicate that, as of the filing of the petition, the Beneficiary was relieved from performing non-qualifying operational tasks and that he primarily spent his time

focusing on executive level duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in an executive capacity. *See, e.g.*, section 101(a)(44)(B) of the Act (requiring that one "primarily" perform the enumerated executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

As noted, the Petitioner asserts that the Beneficiary qualifies as an executive. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and they must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

As discussed, the Petitioner has no employees that would allow the Beneficiary to primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the business. Submitted documentation indicates that the Beneficiary was engaged in a wide range of non-qualifying activities and it has not documented that the Beneficiary has been relieved of these tasks. Likewise, the Petitioner does not credibly describe and document the Beneficiary's day-to-day executive level duties. For these reasons, the Petitioner has not established that the Beneficiary would act in an executive capacity as of the date of the petition's filing. Again, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the intended U.S. operation one year within the date of approval of the petition to support an executive position. There is no provision in USCIS regulations allowing for an extension of this one-year period. If the business does not have the necessary staffing to relieve the Beneficiary from performing operational and administrative tasks, the Petitioner is ineligible for an extension. For these reasons, the appeal must be dismissed.

III. THE BENEFICIARY'S FOREIGN EMPLOYMENT

The Director also denied the petition concluding that the Petitioner did not establish the Beneficiary was employed abroad for one continuous year in a managerial or executive capacity. In denying the petition, the Director pointed to the Beneficiary's substantial time in the United States, or 272 days, during the three years prior to the filing the its initial new office petition. With respect to the Beneficiary's asserted executive capacity abroad, the Director determined that his duties were overly vague and noted discrepancies in the submitted foreign organizational chart.

On appeal, the Petitioner acknowledges the Beneficiary's presence in the United States for a substantial period during the three years preceding its initial new office petition, but asserts that he was acting as a

foreign executive while in the United States. In addition, the Petitioner contends that the Director did not explain why the Beneficiary's foreign duties are vague. It also asserts that the Director abused her discretion by concluding without explanation that it "appeared" his subordinates were not managers.

Following a review of the evidence, we concur with the Director's decision that the Petitioner has not established that the Beneficiary was employed for one continuous year abroad in a managerial or executive capacity. The Petitioner provides no supporting documentation to substantiate that the Beneficiary was performing executive level duties abroad while in the United States. In fact, the Petitioner provides a foreign "Letter of Appointment" indicating that the Beneficiary was appointed to establish the U.S. company in March 2014. The letter further states that the Beneficiary would be "fully responsible" for this task and reflected that subordinates were taking over his role as vice general manager abroad. Likewise, the Petitioner submits several foreign employer project documents and contracts dating from 2014 to 2016 including the Beneficiary's name. However, these documents refer to the Beneficiary as "project manager," not by his claimed executive title. The Petitioner must resolve these discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, although the Petitioner provides several foreign bid documents and contracts bearing the Beneficiary's name, the nature of the Beneficiary's involvement in these matters is not specifically described or documented. As such, we disagree with the Petitioner's assertion that the Beneficiary's foreign duties were properly described and established. We do not find that the Director acted arbitrarily in concluding that the Beneficiary's foreign duties were overly vague. For the reasons discussed above, we find that the Petitioner has not demonstrated the Beneficiary was continuously employed abroad in a managerial or executive capacity for one year during the three years prior to its initial new office petition.

IV. ADDITIONAL GROUNDS FOR DENIAL

We will also enter additional grounds for denial. The submitted evidence does not demonstrate that the Petitioner has a qualifying relationship with the Beneficiary's former foreign employer. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). The Petitioner states in the Form I-129 that it is wholly owned by the U.S. company [redacted] and provides a supporting operating agreement and other documentation supporting this assertion. The Petitioner further indicated that [redacted] is 97% owned by the foreign employer thereby establishing a qualifying relationship between it and the foreign employer. The Petitioner also submitted supporting documentation relevant to [redacted] including 2015 and 2016 IRS Forms 1120 U.S. Corporate Income Tax Returns indicating that this entity was earning income and paying wages. However, the Petitioner provided no such documentation specific to its operations. When the Director inquired as to the relevancy of [redacted] in the request for evidence (RFE), the Petitioner responded with documentation indicating that [redacted] had been dissolved, stated that this company had been "incorporated by accident," and asserted that "the existence of [redacted] is irrelevant to the ownership and control relationship between the U.S. and foreign entities."

It is not clear to us how a corporation could be incorporated by accident. Further, the existence of [redacted] is very relevant to whether a qualifying relationship exists in this matter, as the Petitioner asserts it is wholly owned by this entity. As such, the dissolution of this entity leaves substantial question as to the Petitioner's ownership. The Petitioner submits no supporting documentation to demonstrate its ownership following the apparent dissolution of its sole owner. For these reasons, the Petitioner has not established that it has a qualifying relationship with the foreign employer.

Further, the Petitioner acknowledges on appeal that it is not doing business and it provides no supporting documentation to substantiate that it is doing business. A petitioner must demonstrate that it is engaged in the "regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States." 8 C.F.R. § 214.2(l)(1)(ii)(H).

For these additional reasons, the petition cannot be approved.

V. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that: (1) the Beneficiary would be employed in an executive capacity in the United States under the extended petition, (2) the Beneficiary was employed abroad for one continuous year out of the three preceding the date of its initial new office petition, (3) the Beneficiary acted in a managerial or executive capacity abroad, (4) it has a qualifying relationship with the Beneficiary's foreign employer, and (5) it is doing business as required by the regulations.

ORDER: The appeal is dismissed.

Cite as *Matter of K-W- LLC*, ID# 1182698 (AAO May 22, 2018)