U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-I-A-P-, INC.

DATE: MAY 29, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, currently operating as a dollar store retailer, seeks to continue the Beneficiary's employment as its chief executive officer under the L-1A nonimmigrant classification for intracompany transferees.[1] *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the California Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner claims that the Beneficiary will be employed in an executive capacity and that he is supported by a staff of approximately 50 U.S. and foreign employees, who relieve the Beneficiary from having to primarily engage in the performance of daily operational and administrative tasks.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). In addition, the beneficiary must seek to enter the United States temporarily to

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf. That petition was approved for the period November 1, 2016, until October 31, 2017. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation one year within the date of approval of the petition to support an executive or managerial position.

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).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

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

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

Based on the statutory definition of executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). The Petitioner must also prove that the Beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner must provide a job description that clearly describes the duties to be performed by the Beneficiary and indicate whether such duties are in an executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the Beneficiary's actual duties and role in a business.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business, its staffing levels, and its organizational structure.

A. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we take into account the reasonable needs of the organization, in light of its overall purpose and stage of development. *See* section 101(a)(44)(C) of the Act.

The petition was filed on October 25, 2017 claiming two employees. The Petitioner provided supporting evidence, including an organizational chart that depicted the Beneficiary at the top-most tier of the organization overseeing two employees – an "administration" position and a sales person – in the "Unilever Distribution Marketing" department. The chart also depicted an "Auto Sales" department showing that a staff is "to be determined." The Petitioner also provided payroll summaries showing its compensation of two employees during the first week of October 2017.

In a request for evidence (RFE), the Director observed that the Petitioner's current staff of two employees varied greatly from the original hiring projections that were submitted in support of the prior L-1A petition. The Director questioned whether the Petitioner's current organizational hierarchy would be sufficient to elevate the Beneficiary's position beyond that of a first-line supervisor and instructed the Petitioner to provide, in part, an organizational chart, quarterly wage reports for the four quarters preceding the RFE, the company's payroll summary, and Forms W-2 and W-3 showing wages paid to employees in the past year.

In response, the Petitioner explained that it experienced unforeseen delays causing it to first open a dollar store operation instead of a car dealership, as originally planned. The Petitioner further explained that the current retail operation would evolve to become a wholesale distributor, in addition to retail, within eight months of opening the retail store. The Petitioner stated that it currently employs the Beneficiary as CEO, his spouse as "Manager/Supervisor/Administration," and one employee as "Sales Officer 2." It claimed that a small staff is in the company's best interests and asserted that the Beneficiary does not have to supervise a specific number of employees in order establish that he will be employed in an executive capacity.

The Petitioner did not provide quarterly wage reports, as instructed in the RFE; instead, it provided an employee earnings summary with year-to-date earnings and hours worked along with a 2017 "W-2 Preview" for each of its three employees. We note that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The provided document shows that the Beneficiary's spouse worked 120 hours and the sales person worked 110.5 hours in 2017. Assessing this information within the scheme of a 40-hour work week, it appears these employees were not working on a full-time basis. It is also unclear whether either was working for the Petitioner at the time of filing. The Petitioner's payroll summary does not specify the time period during which either employee worked his or her hours. It is therefore unclear who, other than the Beneficiary, the Petitioner employed at the time of filing.

In the denial decision, the Director made note of the relatively few hours worked by the Beneficiary's two subordinates and questioned how the Petitioner would support the Beneficiary in

an executive position, given its limited support staff. The Director concluded that the lack of a support staff would preclude the Beneficiary from being able to devote his time primarily to tasks of a managerial or executive nature.

On appeal, the Petitioner contends that the Beneficiary hired two staff members to support his position. However, the Petitioner has not provided relevant, probative, and credible evidence to support either this claim or the claim made in the petition, where the Petitioner indicated that it had two employees total at the time of filing. As previously noted, the Petitioner provided a payroll summary that indicates the total time worked for each of three employees, but does not specify the time period during which the employees worked their respective hours. As such, we are unable to determine precisely whom the Petitioner employed, other than the Beneficiary, at the time of filing.

To establish that a petitioner staffed the new operation in the previous year, a petitioner must submit a description of staffing, including the number of employees, their positions, and evidence of the wages paid to these employees. 8 C.F.R. § 214.2(l)(14)(ii)(D). Here, although the Petitioner contends that the Beneficiary's two-person staff is sufficient to take over its daily operations, it has not provided information about the Beneficiary's subordinate's job duties at the time of filing. This information is critical for the purpose of allowing us to gain a meaningful understanding of how the Petitioner's organization is run and who was performing its operational and administrative tasks at the time of filing. If, as the Petitioner claims, the Beneficiary is relieved from having to perform primarily non-executive functions, the burden is on the Petitioner to establish who is performing these duties in his place.

Further, the Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in denying a visa petition for classification as an intracompany manager or executive. *See* section 101(a)(44)(C) of the Act. The Petitioner refers to several unpublished decisions to dissuade us from overemphasizing its staffing size. However, the Petitioner has not established that the facts of this petition are analogous to those in the unpublished decisions, nor has it established that unpublished decisions are binding in the way of precedent case law. *See* 8 C.F.R. § 103.3(c). It is also appropriate 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 or a company that does not conduct business in a regular and continuous manner. *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). Furthermore, the Petitioner's reasonable needs will not supersede the requirement that the Beneficiary must be "primarily" employed in an executive capacity, rather than spending the majority of his time on operational duties. *See* sections 101(a)(44)(B) of the Act.

The Petitioner also claims that the Beneficiary relies, in part, on the support staff of the foreign entity. In *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), we held that U.S. Citizenship and Immigration Services (USCIS) must take into account overseas employees who "support the day-to-day operational needs of the Petitioner." However, in this matter there is no corroborating evidence that employees of the parent company support the Petitioner's business

activity in the United States. We note that the Petitioner did not previously raise this claim, nor did its previously submitted organizational chart depict any employees, other than those based in the United States, as part of the Petitioner's organizational hierarchy at the time of filing. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

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

In the present matter, the Petitioner has not provided evidence to show that at the time of filing its organizational complexity included a managerial tier through whom the Beneficiary can be said to direct the management of the organization and focus on its goals and policies. Moreover, the Petitioner has not established that a support staff consisting of one employee would have been sufficient to relieve the Beneficiary from having to devote his time primarily to the organization's non-executive functions at the time this petition was filed.

B. Duties

Next, we will discuss the duties to be performed by the Beneficiary. We note that the actual duties themselves 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).

In its initial cover letter, the Petitioner stated that the Beneficiary is a professional accountant and tax practitioner. It reviewed the actions the Beneficiary took over the course of the prior year, including opening a retail operation. The Petitioner stressed the need for the Beneficiary to remain in his position for the purpose of creating the auto sales "wing" of its U.S. operation. The Petitioner also included a vague job description, indicating that 65% of the Beneficiary's time would be allocated to "Essential Management Functions," which will include the following:

- Developing the company's business plan and strategies for unknown "projects";
- Overseeing "all operations and business activities";
- Enforcing compliance with laws and "business ethics" and making "high quality" investment decisions;

- Providing strategy for "new business initiatives";
- Designing and using "good organizational, communication, and consensus-building skills";
- Forging business relationships and serve as "point of contact for high level networks";
- Contemplating problems as presented by subordinates and implementing solutions; and
- Maintaining "a deep knowledge" of the markets and industry that are relevant to the Petitioner.

The Petitioner did not clarify who it anticipated would be its business partners, nor did it discuss which laws and "business ethics" are relevant to its business or state how this would factor into the Beneficiary's daily activities. Likewise, the Petitioner did not explain what actions would be involved in designing organizational or "consensus-building" skills, describe the types of problems it anticipated in the course of its business, or state how the Beneficiary would provide solutions to those problems without actively engaging in the Petitioner's operational or administrative functions. The Petitioner also did not explain what is meant by "deep knowledge," nor did it specify how the Beneficiary would acquire this knowledge.

The remainder of the job description was equally broad, stating that the Beneficiary would devote 5% of his time to "Miscellaneous" management duties and 30% to "Additional Management Responsibilities," which would include setting up an accounting structure and system, managing suppliers and vendors, overseeing budgets and purchases, managing sales and marketing, working with team members and analyzing employee performances, selecting products based on subordinates' research, and hiring and firing personnel. The Petitioner did not explain who would actually perform the underlying operational tasks associated with marketing or making arrangements with suppliers and vendors, nor did it specify which "team members" the Beneficiary would work with or whose performance he would assess, given that the Petitioner's staff was comprised of no more than two employees, including the Beneficiary, at the time of filing.

In the RFE, the Petitioner was notified that the original job description was not sufficient and was asked to provide more specific information describing the Beneficiary's proposed position.

In response, the Petitioner listed the same job duties and enumerated various actions he took prior to filing the petition in order to advance the business operation going forward. The Petitioner focused on the steps the Beneficiary took (e.g., securing a dealership license and learning the requirements for operating a dealership business) in order to start an auto sales operation in the near future. It also focused on the Beneficiary's discretionary authority, pointing to his decision to open a dollar store before starting operation of an auto dealership, as originally planned. With regard to duties under an extended petition, the Petitioner stated that the Beneficiary would:

- Continue to develop business strategy by moving forward with the dealership registration and developing a "wholesale unit";
- Continue to interact with government agencies, such as the Minnesota Department of Agriculture to receive approval to sell certain categories of grocers and Department of Motor Vehicles to obtain a dealership license;

- Continue to guide the business by "[b]eing part of the business blue print and developing parts of the business plan, including the wholesale and dealership components;
- Interact with suppliers and vendors to ensure efficiency and savings;
- Recruit and train new employees "to fill various positions during the extended petition."

The Petitioner also restated the statutory definition of "executive capacity," asserting that the definition does not require the Beneficiary to supervise a specific number or type of employees.

In the denial decision, the Director concluded that the Petitioner provided a deficient job description that was overly vague and did not establish that the Beneficiary would perform primarily executive job duties. We agree with the Director's finding.

The fact that the Beneficiary will 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. Section 101(A)(44)(B) of the Act. While 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, meeting these two statutory requirements is not sufficient to establish that the Beneficiary would perform primarily executive job duties. Specific information about the Beneficiary's actual duties is critical; 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). Here, the Petitioner listed only a few specific job duties, such as interacting with vendors and suppliers and recruiting and training new employees. However, the Petitioner did not establish that these duties are executive in nature.

The remainder of the job description consists of broad statements that do not establish that the proposed employment would be in an executive capacity. For instance, the Petitioner stated that the Beneficiary would continue to develop the business plan, which involves opening an auto dealership and adding a wholesale unit to its retail operation. However, the Petitioner did not specify the actions the Beneficiary would undertake in order to meet these business objectives, nor did it establish that taking the necessary steps to set up a new business operation involves primarily executive-level tasks. Although it is generally understood that a developing business in its initial phase of operation may not require or have the ability to support an employee who primarily performs executive-level job duties, the regulations only allow the "new office" operation one year from the date of approval of the petition to support an executive position. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). Beyond that initial one-year time frame, 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)(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).

Here, the Petitioner stated that the Beneficiary would continue to carry out functions that are consistent with setting up a new operation, including obtaining the necessary licenses that are required to operate a wholesale food operation and auto dealership, respectively. Such duties would not be deemed as those of someone who is employed in an executive capacity. Despite the Petitioner's immediate organizational needs to have the Beneficiary continue to carry out operational tasks in order to get the business fully functional, the Petitioner does not appear to have progressed to a phase in its development where it has the capacity to relieve the Beneficiary from having to perform its operational and administrative tasks. Therefore, we cannot conclude that the Beneficiary would be employed in an executive capacity under an extended petition.

III. FULL-TIME EMPLOYMENT ABROAD

Further, while not addressed in the Director's decision, we will briefly identify an additional ground of ineligibility to inform the Petitioner that this issue should be addressed in future proceedings. It is unclear whether the Beneficiary's employment abroad with the Petitioner's affiliate was on a full-time basis. In order to meet the filing requirements for an individual petition, the Petitioner is required to establish that the Beneficiary has at least one continuous year of full-time employment abroad with its foreign affiliate. *See* 8 C.F.R. § 214.2(l)(3)(iii).

In the present matter, the Petitioner's supporting documents include the Beneficiary's résumé, which indicates that during his employment with the foreign affiliate, from January 2012 "to date," the Beneficiary simultaneously assumed the position of "chairman/CEO" of the from March 1, 2012 "to date," i.e., presumably up through the time he commenced his U.S. employment with the Petitioner. The fact that the Beneficiary assumed multiple positions during overlapping time periods leads us to question whether his employment with the foreign affiliate was on a full-time basis.

IV. CORPORATE STATUS

As a final matter, we are unable, through reference to a website maintained by the State of Minnesota, to determine that the Petitioner is in good standing and authorized to do business in Minnesota. Based on Minnesota state records, the Petitioner's corporate status was shown as "Inactive," due to administrative dissolution as of March 14, 2017.[2] The Petitioner's dissolution raises questions about whether it continues to exist as an importing employer, whether it maintains a qualifying relationship with the Beneficiary's foreign employer, and whether it is authorized to conduct business in a regular and systematic manner. *See* section 214(c)(1) of the Act; *see also* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (l)(3). While not a basis for the dismissal of this appeal, the Petitioner will need to address this deficiency in any future filing where it purports to be the employing entity.

[2] *See* https: (last visited May 10, 2018).

V. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary will be employed in the United States in an executive capacity under an extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of H-I-A-P-, Inc.*, ID# 1253967 (AAO May 29, 2018)