U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-, INC.

DATE: NOV. 20, 2019

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, which describes its business as a seller of spare parts for trucks and other vehicles and a provider of transport services, seeks to continue the Beneficiary's temporary employment as its president under the L-1A nonimmigrant classification for intracompany transferees.[1] 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 initially approved the petition, but subsequently revoked the approval on the grounds that the record did not establish, as required: (1) that the foreign entity was doing business at the time the instant petition was filed; or (2) that the Beneficiary has been or will be employed in a qualifying executive capacity in the United States. The Director also made a finding of fraud without further specifics.

The matter is now before us on appeal. The Petitioner asserts that the foreign entity was doing business and the Beneficiary was employed in an executive capacity in the United States at the time the instant petition was filed. The Petitioner also asserts that the finding of fraud was arbitrary and capricious, and has no basis in the record.

Upon *de novo* review of the record, including the materials submitted in support of the appeal, we will withdraw the Director's finding that the foreign entity was not doing business at the time this petition was filed. We will also withdraw the Director's finding of fraud, for which no analysis or legal rationale was provided in the revocation decision. However, we will affirm the Director's finding that the record does not establish that the Beneficiary is employed in a qualifying executive capacity in the United States. Accordingly, we will dismiss the appeal.

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1 The record indicates that the Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for a validity period from January 19, 2016, until December 16, 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.

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 U.S. operation and evidence of the numbers and types of positions held; evidence of the U.S. operation's 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.

Under U.S. Citizenship and Immigration Services regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, a director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

II. ANALYSIS

The petition was filed in November 2016 and approved on December 1, 2016. In the notice of intent to revoke (NOIR), however, issued in June 2018, the Director advised the Petitioner that there were multiple grounds for revocation. The Director stated that the record did not establish that there was a qualifying relationship between the U.S. and foreign entities and that they were both doing business at the time the petition was filed, as required for these entities to meet the definition of "qualifying organizations" at 8 C.F.R. § 214.2(l)(1)(ii)(G), or that the Beneficiary was and will continue to be employed in a managerial or executive capacity, as defined in section 101(a)(15)(L)(A) and (B) of the Act. The Director suggested that specific items of documentation be submitted to overcome the grounds for revocation. Based on the Petitioner's response to the NOIR the Director found that some of the grounds for revocation had been overcome, but that the Petitioner had still not established that the foreign entity was doing business at the time the instant petition was filed or that the Beneficiary had been or will be employed in a qualifying executive capacity in the United States. The Director also made a finding of fraud, apparently linked to the first ground for revocation, but did not otherwise explain the basis for this finding.

On appeal the Petitioner has submitted additional evidence which overcomes the Director's finding that the foreign entity was not doing business at the time the petition was filed. Since the Director's fraud finding was linked to this issue, though not further explained in the NOIR or in the decision,

we will withdraw the fraud finding as well. The issue still before us, therefore, is whether the Petitioner has established that the Beneficiary will be employed in an executive capacity in the United States.[2]

"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.

In the petition the Beneficiary's duties in the United States were described as follows:

> [A]s President of the U.S. Affiliate Company the Beneficiary will be in charge of establishing the goals and policies of the company, will hire and fire employees, evaluate the work performance of the employees, set the employees' salaries and, in general, will oversee all business activity of the U.S. Affiliate Company as its President.

The petition was accompanied by a letter from the Petitioner's administrator stating that the U.S. operation had six employees, including the Beneficiary who spent approximately 80% of his time on executive duties and the remainder on administrative duties. The administrator repeated the job description in the petition verbatim and stated that the Beneficiary's job duties had "remained the same since the inception of the L-1 visa." No further evidence of job duties and staffing was provided in support of the extension petition, which was nevertheless approved.

In response to the NOIR the Petitioner submitted a statement from its president asserting that the U.S. entity had six employees and some independent truck drivers at the time the petition was filed in November 2016, that he let the employees go when he returned to Venezuela in December 2016

[2] The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity.

with the intention of rehiring them upon his return to the United States in January 2017, but that he could not return[3] and that the Petitioner continued to operate with independent truck drivers during 2017. The Petitioner claimed that the Beneficiary's job duties with the U.S. entity met the four criteria for "executive capacity" at the time of filing in that:

- 20% of his time was spent directing the management of the corporation's business operations, which involved supervising and controlling the work of two professional and/or supervisory employees – the administrator and the operations manager – and included weekly meetings with those employees to ensure that the policies, procedures, sales goals, and objectives set by the president were being achieved.

- 10% of his time was spent establishing corporate goals and policies, including "Administrative Department" guidelines for invoicing and collecting payments for the sales of products and services and "Operations Department" guidelines to maximize operational efficiency.

- 40% of his time was spent on activities involving the exercise of wide latitude in discretionary decision-making – including 5% in establishing the monthly budget by analyzing monthly costs, 10% coordinating activities between the Administration and Operations Departments, 20% establishing and developing new markets for the sale of the Petitioner's products and services, including meetings and negotiations with chief executives of potential customers, and 5% analyzing revenues and costs to determine the highest feasible prices for the Petitioner's products and services.

- As president of the U.S. entity the Beneficiary reported to the Venezuelan affiliate's board of directors and received only general supervision from that body.

According to the Beneficiary's statement, therefore, 70% of his time was spent performing "executive capacity" job duties. The Beneficiary stated that the remaining 30% of his time involved day to day activities of the business.

The Petitioner provided an organizational chart showing six employees, including the Beneficiary as president, an administrator and an operations manager subordinate to the president, and three transportation drivers subordinate to the operations manager. The Petitioner asserted that the "non-executive day to day activities of the [business] were mostly handled by its Administrator and Operations Manager together with their subordinates," thereby "allow[ing] the Beneficiary to mainly perform executive duties."

In his statement the Beneficiary described both the administrator and the operations manager as "professional and supervisory" employees, provided job descriptions of the two positions, and

[3] U.S. Customs and Border Protection (CBP) records indicate that the Beneficiary did return to the United States on March 6, 2017.

alluded to the academic credentials of the respective employees. The duties of the administrator were described as:

- Overseeing the achievement of the policies and procedures of the Administration Department as established by the president;
- Preparing the monthly budget as established by the president;
- Overseeing the preparation of the employees' payroll and payroll taxes; and
- Overseeing the preparation of all written documentation relating to the sales of products and services;

The duties of the operations manager were described as:

- Overseeing the achievement of the policies and procedures of the Operations Department as established by the president;
- Overseeing the transportation of the customer's products to their destinations; and
- Supervising and evaluating the corporation's long haul transportation drivers.

In her decision revoking the approval of the petition the Director found that there were unresolved documentary discrepancies concerning the purported salaries and actual wages paid to the Petitioner's president and other employees, and that the evidence of record was insufficient to show that the Petitioner had a subordinate level of employees to relieve the Beneficiary from performing non-qualifying day to day operations of the business. The Director concluded that the record did not establish that the Beneficiary has been or will be employed in a qualifying executive capacity in the United States.

On appeal the Petitioner addresses the salary and wages paid discrepancies discussed in the Director's revocation decision, and we are satisfied by the Petitioner's submission that they do not provide grounds for revocation. However, the Petitioner does not address the Director's more important finding that the Beneficiary's job duties, considered in conjunction with the Petitioner's overall staffing and the duties of the two directly subordinate employees, do not demonstrate that the Beneficiary has been or will be employed in a primarily executive capacity, as claimed in the petition. Thus, the Petitioner provides no basis for us to overturn the Director's finding on this issue.

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 employees for a beneficiary to direct and the beneficiary 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 (s)he has an executive title or because (s)he "directs" 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 this case, the Petitioner describes many of the Beneficiary's so-called executive duties in vague and general terms that do not convey much information about what they actually entail and how they would take up 70% of an average work day, as asserted. For example, the Petitioner claims that the Beneficiary will spend 10% of his time on establishing corporate goals and policies for the administrative and operations departments, and another 10% of his time coordinating the activities of those two departments. Considering the administrator has no subordinate employees, it does not appear that an administrative department even exists. Even if it did, the Petitioner does not explain why establishing and coordinating goals and policies for the administration and operation of its business is such an ongoing process that it would take up 20% of the Beneficiary's time into the indefinite future. The Petitioner claims that the Beneficiary would spend another 20% of his time establishing and developing new markets, but provides few details about what activities that would entail aside from meetings and negotiations with potential customers. The lack of detail is pervasive in the Petitioner's description of the Beneficiary's job duties, and casts doubt on its claim that the Beneficiary will be performing primarily high-level executive functions as president of a trucking company with five employees.

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the evidence, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of a petitioner's business, the employment and remuneration of employees, and any other evidence contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy and artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. In considering the foregoing factors, we note once again that the Petitioner is a truck parts and transport provider with just five employees subordinate to the Beneficiary. Of those five employees, one is an administrator, one an operations manager, and three are transportation drivers performing the daily operational tasks of the business. Despite his title of president, therefore, the Beneficiary does not occupy an elevated position within a complex organizational hierarchy.

While the Petitioner describes the administrator as a "supervisory" position, with three of the four job duties described as "overseeing" various functions, the record does not support that claim. The fact is that the administrator has no subordinate employees to oversee. It is reasonable to conclude, therefore, that the administrator directly performs, rather than oversees, the preparation of employee payroll and payroll taxes, as well the preparation of written documentation of product sales and services. As for the "achievement of policies and procedures . . . as established by the president," this would appear to be little more than doing things the way the president wants them done. Thus, the administrator does not appear to have a job requiring high-level executive oversight by the Beneficiary. In contrast to the administrator, the operations manager does have some managerial responsibilities, including the supervision of the truck drivers and overseeing the process of transporting goods to customers. But these are straightforward tasks in the trucking business, and

limited in scale considering the Petitioner's modest volume of business.[4] Once again, these factors do not indicate that the operations manager requires high-level executive oversight by the Beneficiary.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the only factor in denying a visa to a multinational manager or executive. Section 101(a)(44)(C) of the Act. The Beneficiary's duties must be the critical factor. However, if USCIS fails to believe the factual claims stated in the petition are true, then USCIS may reject those assertions. *See, e.g.*, section 204(b) of the Act; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, as discussed above, the Petitioner's description of the Beneficiary's duties and its organizational structure are not credible. As such, the Petitioner has not established that the Beneficiary will be employed in an executive capacity.

III. CONCLUSION

The Petitioner has not established that the Beneficiary will be employed in the United States in an executive capacity. The appeal will be dismissed for the above stated reason. In visa proceedings it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of C-, Inc.*, ID# 3676032 (AAO Nov. 20, 2019)

[4] Moreover, although the record indicates that the Petitioner's employees were all on the payroll before the petition was filed in late 2016, it is not clear that they were all full-time employees at that time.