U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-M-S- CORP.

DATE: NOV. 23, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a purchasing agent for a foreign subsidiary that distributes equipment used in the petroleum industry, seeks to temporarily employ the Beneficiary as its general manager under the L-1A nonimmigrant classification for intracompany transferees. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the California Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred by considering the petition under the requirements for a managerial capacity, rather than an executive capacity. The Petitioner also disputes the Director's finding that the Beneficiary's job description lacked necessary detail.

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

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner does not claim that it will employ the Beneficiary in a managerial capacity. Therefore, we restrict our analysis to whether the Petitioner will employ the Beneficiary 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). 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.

When examining the claimed executive capacity of a given beneficiary, we will look to 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 a managerial or 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 and its staffing levels.

A. Duties

The Petitioner initially provided the following information about the Beneficiary's intended role:

> [The Beneficiary's] mandate would be to coordinate and manage strategies of the component companies, expanding distributorship arrangements where possible, and devising risk mitigation strategies. He will continue to exercise a wide degree of discretionary decision making in his new position. . . .

> [The Beneficiary's] first responsibility will be to obtain information from all employees regarding the current procurement, distribution and payment arrangements. He will then explore means of improvement . . . and assessing the need for additional staff to expedite procurement, movement and collections. He will work with the International Procurement Division of [the foreign affiliate], particularly with regard to Customs matters. He will then present his findings and recommendations to the [foreign entity's] Executive Council and implement approved changes. These activities will be for the most part sequential, and we cannot estimate the amount of time that will be devoted to each of them.

The quoted passage explained the Beneficiary's basic responsibilities, but did not describe the specific tasks that he would perform in order to meet those responsibilities.

In a request for evidence (RFE), the Director stated that the Petitioner had not sufficiently described the Beneficiary's intended duties in the United States. The Director asked the Petitioner to explain how the Beneficiary's intended position would meet the requirements of a managerial capacity. In response, the president of the petitioning entity stated:

> [W]e do not understand your request for evidence that the beneficiary will be employed in a managerial position in the US: in our last letter we clearly indicated that "his primary function will be executive rather than managerial." We unfortunately used the title of General Manager, but we clearly described his function as an executive, with a mandate to restructure the component companies: i.e., direct the management of the supply chain component companies, establish the goals and policies of the reorganization, and exercise wide latitude in defining the reorganization subject only to final approval by the Executive Council (of the Board). . . . I will continue to oversee day to day operations and relieve [the Beneficiary] of purely administrative responsibilities.

The description of the Beneficiary's "mandate" in the RFE response largely repeats the language from the statutory definition of "executive capacity." Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *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); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The Director denied the petition, finding that the Petitioner did "not provide sufficient information about how the Beneficiary manages, supervises, functions . . . and makes decisions on the activities [over] which he would have authority."

On appeal, the Petitioner asserts that its "initial petition was never analyzed in the decision," or quoted apart from "a misleading extract from the introduction to the job description which was intended as nothing more than a statement of [the Beneficiary's] general mandate." The Petitioner then quotes four paragraphs from its initial statement, asserting that the statement "went to some

length to explain exactly what his executive duties would be." Following the quotation, the Petitioner states: "we are at a loss to explain the conclusion that the 'beneficiary's job duties cannot be determined from the information submitted.'"

The first of the four quoted paragraphs concerned the multinational organization's "need for a strategic plan to assess the risk of doing business in Venezuela" in the face of volatile financial conditions. The second paragraph described the petitioning U.S. company and its role in the larger organization. Neither of these paragraphs mentioned the Beneficiary's position or duties.

The third and fourth quoted paragraphs included some information about the Beneficiary's intended role; excerpts appeared earlier in this decision. Those passages listed the Beneficiary's basic responsibilities, but did not describe the specific tasks that he would perform in order to meet those responsibilities. For example, the Petitioner stated that the Beneficiary "will . . . explore means of improvement" and "work with the [foreign company's] International Procurement Division," but did not explain what this work would entail. Specifics are an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 8.

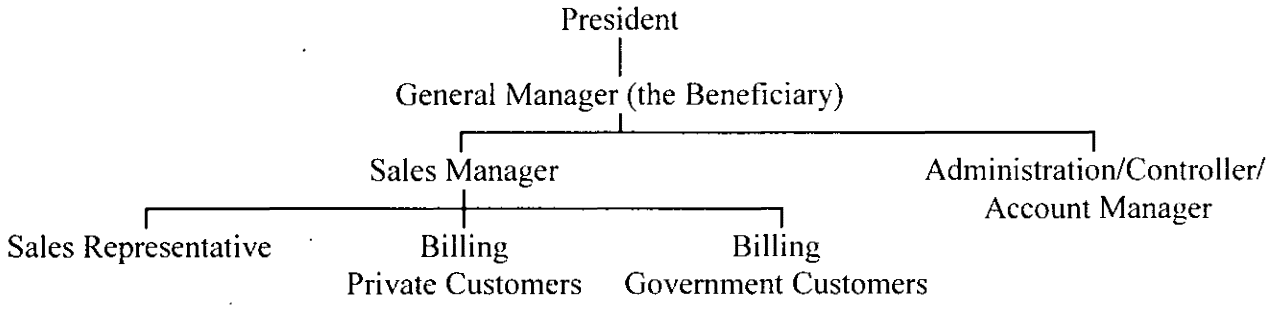
The Petitioner asserts that the Director mistakenly considered the petition in light of the requirements for a managerial capacity, rather than an executive capacity, and that the Director "inexplicably excised" the Petitioner's reference to executive capacity. The RFE did focus on managerial rather than executive capacity, and the Petitioner raised an objection at that time. The Petitioner has not shown that the Director's pre-denial references to managerial capacity prejudiced the outcome of the petition. In the denial notice, the Director acknowledged and quoted the Petitioner's assertion that it sought to classify the Beneficiary "as an executive."

The Petitioner's assertion that the Beneficiary will be in charge of meeting high-level company goals is not sufficient to establish that the Beneficiary would work in a primarily executive capacity.

B. Staffing

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 a 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 they have an executive title or because they "direct" the enterprise as an owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The Petitioner claimed six U.S. employees at the time of filing. An organizational chart showed the following structure:



The Petitioner asserted that it "exercises operating control over [an affiliate in Curaçao] through a contractual agreement (Exhibit '8')." A separate organizational chart listed four employees at the entity in Curaçao:

- Operation Manager
- Finance Manager
- Administration
- Administrative Analyst

Exhibit 8 is an "Invoicing and Administrative Services Agreement," indicating that the Petitioner provides the following services to the foreign company:

- Issue purchase orders to suppliers and pay their invoices
- Issue invoices to customers and collect payment
- Arrange for transportation, insurance, and storage

The agreement did not indicate that the Petitioner "exercises operating control over" the other entity, or has any authority over the employees in Curaçao. Rather, the foreign company pays the Petitioner to perform certain administrative and logistics functions on its behalf. Clause 2 of the agreement specified that the Petitioner "has no power to bind CLIENT [i.e., the foreign company] without its express written consent." Clause 10 indicated that the document is "an agreement between independent contractors and does not create a contract of employment, agency or any dependent relationship of any kind." Clause 11d reads: "This Agreement sets forth the entire agreement of the parties relative to SERVICES to be provided to CLIENT and no prior agreement or understanding, oral or written, between the parties shall be of any force or effect." Therefore, the agreement at Exhibit 8 does not support the Petitioner's claim that the Beneficiary supervises subordinates at the Curaçao company.

The organizational chart indicates that the Beneficiary would have authority over two U.S. subordinates with managerial titles. These titles, however, do not inherently establish that the positions qualify as managerial.

In the RFE, the Director requested more information about the Petitioner's employees, including a "summary of duties" for "all employees." The Petitioner did not address this request in its response.

In denying the petition, the Director acknowledged the Petitioner's submission of an organizational chart, but found that the Petitioner did not provide job descriptions to show what the claimed subordinates actually do. The Director concluded that the Petitioner did not show that it "currently employs individuals that would relieve the beneficiary from non-qualifying duties."

On appeal, the Petitioner does not directly address this finding or submit evidence to address the Director's concerns regarding the company's staffing. The Petitioner states, more generally, that "the evidence supporting the initial petition established that the companies have an organizational hierarchy that would support an executive position." The Petitioner, however, did not provide sufficient evidence about the subordinate work force, even after the Director specifically asked for that information in the RFE. It cannot suffice for the Petitioner to assert, without elaboration, that managers would work under the Beneficiary's authority.

The Petitioner has not established the existence of a management structure at the U.S. company that the Beneficiary would direct. The Petitioner also has not shown what duties the Beneficiary's subordinates would perform to relieve the Beneficiary of responsibility for non-qualifying tasks.

III. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of V-M-S- Corp.*, ID# 1700096 (AAO Nov. 23, 2018)