U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF U-M-A-, L.C.

DATE: NOV. 28, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an air ambulance aviation company, seeks temporarily employ the Beneficiary as its commercial director and business development head, under the L-1A nonimmigrant classification for intracompany transferees. *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 the Beneficiary has been employed abroad in a managerial or executive capacity.

On appeal, the Petitioner submits additional evidence and asserts that the preponderance of the evidence demonstrates that the Beneficiary is employed in an executive capacity with her foreign employer.

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 Act defines the term "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 thereof; 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.

II. FOREIGN EMPLOYMENT IN AN EXECUTIVE CAPACITY

When examining the executive capacity of the Beneficiary, we will review the Petitioner's description of the job duties.[1] The Petitioner's description of the job duties must clearly describe the duties 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 also examine the claimed executive capacity of a beneficiary, including 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.

A. Duties

The Petitioner indicated that the Beneficiary's foreign employer provides special air transportation services for passengers in Mexico. In support letter provided with the petition, the Petitioner stated that the Beneficiary is responsible for "overall marketing and sales, including overseeing key strategic relationships, contract negotiations, new business development, and corporate initiatives, and that she, develops, leads, and manages all commercial activities of the business.

In response to the Director's request for evidence (RFE), the Petitioner expanded on the Beneficiary's stated duties, indicating that 30% of her time was devoted to supervising "international sales and marketing communications, [and] business partnership development." The Petitioner further stated that the Beneficiary was tasked with "relationship management and contracting," meeting with clients, and conducting presentations for case managers to explain the company's services. The Petitioner also explained that 30% of the Beneficiary's time was focused on the long and short term goals of the foreign employer, "including making decisions about the development of cooperative agreements and alliances." Lastly, the Petitioner stated that the Beneficiary devotes 15% of her time to "strategic human resources and commercial employee matters," including meetings with the executive personnel of the foreign employer such as the chief executive officer, the vice president of business development, and the manager of the call center.

In denying the petition, the Director concluded that the Beneficiary's duty descriptions were overly vague and did not convey her actual day-to-day tasks. The Director emphasized that the Petitioner did not provide documentary evidence to substantiate the Beneficiary's performance of executive-level duties.

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

[1] The Petitioner does not claim that the Beneficiary has been employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary has been employed in an executive capacity.

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.*

On appeal, the Petitioner submits a three-day hourly breakdown of the Beneficiary's duties and commercial plans and policies it asserted were drafted by the Beneficiary. The Petitioner contends that this documentation demonstrates the Beneficiary's primary performance of executive-level tasks. However, to the contrary, the evidence submitted on appeal reflects that the Beneficiary is substantially involved in the day-to-day operational tasks of the business. For instance, the Beneficiary's hourly duty description includes several tasks reflective of her focus on day-to-day operational duties rather than broad goals and policies, such as conducting general training to the company's call center, designing mailings, making phone calls to clients, designing a contract for a client, handling credit authorization of clients, emailing clients asking questions about services, and re-assigning clients to customer service.

Likewise, a document titled '[redacted] indicates that the Beneficiary is responsible for performing several duties and responsibilities consistent with a sales representative, including regularly visiting with clients, distributing sales materials to flight crews, organizing educational courses for doctors and other clients, creating a client database, making a list of trusted air ambulance providers, "pushing flights in the low season," making promotional material, and developing a new website. Further, the Petitioner provides another document authored by the Beneficiary titled '[redacted] This document also reflects several non-qualifying operational duties, including "assisting as an exhibitor [at the] [redacted] "reviewing possibility to contract a local sales representative in [redacted] and [redacted] readdressing assistance services with existing national clients, making "technical sheets on airplanes," giving educational courses to customer service, booking attendance at trade conferences, developing sales materials for flight crews, and creating client and prospect lists.

Furthermore, the Petitioner provides an example of performance metrics on which the Beneficiary's performance was assessed in 2015. This document also includes evidence of a number of non-qualifying operational tasks. For instance, the evaluation metrics make reference to the Beneficiary "growing the client base," looking for new clients and being "certified by them," her "needing support from top-management," and her "managing special projects that require close follow-up." The metrics indicate that the Beneficiary is assessed based on her sales efforts, suggesting that she is more likely acting as a sales representative, rather than as an executive. This is further corroborated

[2] The petition was filed on August 11, 2016.

by a compensation plan provided by the Petitioner indicating that the Beneficiary is compensated, at least in part, based on the number of flights she books with clients.

Whether the Beneficiary is an executive employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the Petitioner does not document what proportion of the Beneficiary's duties are executive functions and what proportion is non-qualifying. The Petitioner lists the Beneficiary's duties as including both executive tasks and administrative or operational tasks, but does not quantify the time the Beneficiary spends on these different duties. This lack of documentation is important, since as we have discussed, the evidence related to the Beneficiary's duties submitted on appeal reflects numerous non-qualifying operational 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).

The fact that the Beneficiary manages or directs 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) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over the foreign employer's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that her actual duties are primarily executive in nature.

B. Staffing

The Petitioner stated in response to the RFE that the Beneficiary "directly supervises two individuals, both of whom have a University degree" and noted that she "has two administrative assistants to allow her to focus on executive decision-making duties." However, the Petitioner did not submit an organizational chart or specify the nature of these positions and the duties of these asserted subordinates. On appeal, the Petitioner provides an organizational chart reflecting that the Beneficiary supervises two customer service employees, who are identified elsewhere on the record as a manager of customer service and a senior customer service representative. The Petitioner appears to indicate that the senior customer service representative reports to the manager of customer service.

First, the Petitioner has not submitted sufficient duty descriptions for the Beneficiary's asserted subordinates or supporting documentation to substantiate that they have been acting in professional or managerial roles subordinate to the Beneficiary. In fact, the duties of the claimed manager of customer service suggest that this employee is responsible for communicating with the supervisor of the dispatch and operations center, a position that is not shown to exist in the company's submitted organizational chart. Likewise, the duties of this asserted manager indicate that he supervises and trains customer service representatives and ensures "24/7" coverage through a call center; however, additional subordinate sales representatives are not reflected in the foreign employer organizational chart, nor is the referenced call center. Further, there is little evidence to indicate that the manager

of customer service is responsible for supervising multiple customer services representatives as asserted in his duties. The Beneficiary's duties make no mention of her supervision of the claimed subordinates and the submitted commercial plans drafted by her reflect that she is delegating few of the operational tasks of the business to subordinates. Indeed, the "commercial focus" documents make reference to several employees by first name, but none of these names are consistent her asserted subordinates.[3] The Petitioner must resolve these inconsistencies and 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 total, the Petitioner has not submitted sufficient evidence to substantiate that she supervises managerial or professional subordinates that primarily relieve her from performing the non-qualifying operational tasks prominently included in her duties and documentation provided on the record. In fact, the Petitioner does not provide any evidence reflecting that her claimed subordinates relieve her from the performance of operational tasks or evidence of the Beneficiary delegating duties to these employees. This lack of evidence is particularly notable since the Petitioner asserts that the Beneficiary has been acting in her executive capacity as far back as 2009. The Petitioner's organizational chart reflects that she acts parallel to several other first line managers, including a medical director of operations, a chief pilot, an administrative director, a general manager, and a medical director. The Petitioner emphasizes the Beneficiary's coordination with these employees. As such, the evidence appears to indicate that the Beneficiary acts as a first line manager, rather than an executive-level employee acting in an elevated position within a complex organizational hierarchy overseeing subordinate managerial employees.

On appeal, the Petitioner also emphasizes the Beneficiary's involvement on the board of directors of an outside industry organization, the ' asserting that this demonstrates her executive-level capacity. Although her involvement in this organization may be reflective of her expertise in the industry, we do not find it probative towards establishing her executive capacity with the foreign employer. The Petitioner submits a letter dated in 2014 indicating that the Beneficiary requested involvement in this board. As such, the submitted evidence leaves question as to whether her participation in this board is representative of her executive level position within the foreign employer. Her participation in the outside industry board does not overcome the substantial evidence that we have already addressed herein indicating that the Beneficiary devotes a substantial amount of her time to non-qualifying operational tasks and the lack of evidence from the Petitioner to substantiate that the Beneficiary is primarily relieved from these tasks by subordinate managers and operational employees.

In addition, the Petitioner provides an internet print-out reflecting "project manager salaries in Mexico" and states that the Beneficiary's higher salary in comparison to these positions is reflective of her executive-level role. However, as noted, we examine the Beneficiary's stated duties and their claimed executive capacity, including the company's organizational structure, the

[3] The commercial focus documents make reference to and but not the Beneficiary's asserted subordinates reflected in the organizational chart, and

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. As such, even if we were to accept that the Beneficiary earns more than a typical executive acting in a similar capacity, this would not overcome the substantial other evidence directly relevant to her role indicating that she is not acting in a qualifying executive capacity, including evidence of her significant focus on operational tasks and her lack of managerial subordinates. In fact, it is noteworthy that the Petitioner has compared the Beneficiary's salary to other "project managers," a title suggestive of an operational position, not an executive-level role.

For these reasons, the Petitioner has not established that the Beneficiary is employed abroad in a managerial capacity.

III. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

Beyond the decision of the Director, we will also analyze whether the Petitioner demonstrated with sufficient evidence that the Beneficiary would act in an executive capacity in the United States. For similar reasons as those stated in the previous section, the Petitioner has not demonstrated that the Beneficiary will act in an executive capacity in the United States.

The Petitioner stated that the Beneficiary would continue to monitor activities in Mexico while assigned to her new capacity in the United States, traveling every three months to Mexico to "attend meetings or supervise important client visits." The Petitioner indicated that the Beneficiary would devote 35% of her time to these tasks. Further, the Petitioner stated that the Beneficiary would spend 65% of her time on her new role in the United States, including "decision-making based on trends and expectations for the future," "identifying profitable commercial opportunities to grow revenue," "attending to local industry conferences," "implement[ing] a strategic commercial business plan," "championing and leading each new commercial project of the US branch," administering "our CRM and project Management system," "reviewing statistical reports," conducting regular reviews with "high executive clients" and making sure their needs are being met, "sharing technical knowledge between the operational teams," and "reviewing and authoring specific company operations policies and SOPs."

The Beneficiary's proposed duties in the United States reflect substantial non-qualifying operational tasks, such as devoting substantial time to client sales visits, administering a project management system, coordinating customer service, and dealing with daily technical aspects. Beyond this, the Petitioner provides few details related to the executive-level tasks the Beneficiary will perform and how these will make up a majority of her time. Indeed, the Petitioner submits a document drafted by the Beneficiary titled [redacted][4] which again reflects duties more consistent with a sales representative or manager, rather than an executive, including making sales visits to clients, attending industry conferences, ensuring membership in industry organizations, compiling lists of

[4] We note that this time would be consistent with the Beneficiary's requested period of employment in the United States.

trusted providers, "printing new folders," amongst several other operational level tasks. This document indicates that the Beneficiary will be involved in nearly every aspect of the company's commercial operations and that she will delegate few operational tasks to subordinates. Further, the Petitioner states that the Beneficiary will continue to devote 35% of her time to her foreign responsibilities, which as we have discussed, also include many non-qualifying operational tasks.

Once again, whether the Beneficiary will be an executive employee turns on whether the Petitioner has sustained its burden of proving that the duties are "primarily" executive. *See* sections 101(a)(44)(A) and (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 lists the Beneficiary's duties as including both executive tasks and administrative or operational tasks, but does not quantify the time the Beneficiary spends on these different duties. This lack of documentation is important, since as we have discussed, the evidence related to the Beneficiary's duties submitted on appeal reflects numerous non-qualifying operational tasks. 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).

Again, the fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity. Although 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, the position descriptions alone are insufficient to establish that her actual duties would be primarily executive in nature.

The Petitioner submitted insufficient evidence regarding the organizational structure of the Petitioner and the Beneficiary's subordinates in the United States. The Petitioner stated in the Beneficiary's U.S. duties that she would oversee the managers of the commercial team (including the "VP of Business Development and Manager of Customer Service"), the medical team (the Medical Director and Chief Flight Nurse), the operations team, safety committee, and general manager. However, as noted, the Petitioner did not provide an organizational chart specific to its U.S. operations or other supporting evidence to substantiate the existence of these employees, such as their duties, evidence of them performing their duties, or tax documentation reflecting them on the payroll. Therefore, we conclude that the Petitioner has not submitted sufficient evidence to establish that the Beneficiary will more likely than not oversee a group of subordinate managers in her proposed capacity in the United States and that she will be sufficiently relieved from performing the non-qualifying duties reflected in her duty description and the supporting documentation.

As such, the record does not establish that the Beneficiary would act in an executive capacity in the United States.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary is employed abroad and will be employed in the United States in a primarily executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of U-M-A-, L.C.*, ID# 771003 (AAO Nov. 28, 2017)