U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-E-V-, INC.

DATE: NOV. 30, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a three-employee manufacturer and retailer of eyeglasses,[1] seeks to temporarily employ the Beneficiary as its chief executive officer 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 would be employed in the United States in a managerial or executive capacity under the petition.[2]

On appeal, the Petitioner asserts that the Beneficiary will perform duties in an executive capacity and will not be engaged in day-to-day manufacturing or sales duties.[3]

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

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[1] The California government website indicates that the Petitioner is "FTB SUSPENDED." *See* https://businesssearch.sos.ca.gov (last visited Nov. 8, 2017). In any future filings, the Petitioner must provide evidence establishing that it is active and operating in California.

[2] The Petitioner asserts that this is an extension of a petition approved in November 2010 with a validity period from November 4, 2010, to November 3, 2011. However, "a petition extension may be filed only if the validity of the original petition has not expired." 8 C.F.R. § 214.2(l)(14). The petition in this matter was filed on February 8, 2017. Accordingly, this is not a petition extension.

[3] As the Petitioner does not claim that the Beneficiary will perform duties in a managerial capacity, we will restrict our analysis to the Beneficiary's claimed executive capacity.

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.*

An individual L-1A petition filed on Form I-129, Petition for a Nonimmigrant Worker, must include evidence that the petitioner will employ the beneficiary in a managerial or executive capacity, including a detailed description of the services to be performed. 8 C.F.R. § 214.2(l)(3)(ii).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Petitioner was incorporated in June 2010 to support the petitioning organization's website and to process orders of eyeglasses manufactured by the foreign entity. In late 2016, the foreign entity determined that the U.S. office should expand by setting up a complete optical laboratory and assigned the Beneficiary to execute the expansion plan.

The Director determined that the Beneficiary's intended duties are not consistent with duties typically performed by a manager or executive and that the Petitioner's organizational structure showed the Beneficiary would be assisting with the Petitioner's day-to-day non-supervisory duties.

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.

We will address both the Petitioner's description of the Beneficiary's intended duties as well as the Petitioner's staffing to determine whether the Petitioner has established this eligibility requirement. We note that when reviewing staffing levels as a factor in determining whether an individual is acting in a managerial or executive capacity, we must 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.

A. Duties

When examining the executive capacity of a beneficiary, we will look first to a petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definition of executive capacity has two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). 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, e.g., Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

On the Form I-129, the Petitioner stated that the Beneficiary will spend: 25 percent of his time on management duties, including hiring, firing, and managing staff, and managing inventory of frames and lenses; 35 percent of his time on product diversification and opening new accounts with major optical brands; and 40 percent of his time setting up the lab and expanding the Petitioner by implementing the business plan, including selecting and purchasing commercial property and fixed assets. In a separate document, the Petitioner noted that when the Beneficiary's immigration petition is approved, he will be responsible for "top management duties e.g. hiring, development, planning and implementation."

In response to the Director's request for evidence (RFE), the Petitioner repeated this allocation of the Beneficiary's duties and provided examples of the Beneficiary's intended duties.

On appeal, the Petitioner states that the Beneficiary "will direct, not only the expansion of this new business component, but all business operations while he is within the US." The Petitioner adds that this duty will involve: 25 percent of his time selecting a location and entering into a long-term lease agreement or purchasing a location and selecting the appropriate financing; and 20 percent of his time selecting the most cost efficient equipment and software for the lab, overseeing the installation of these fixtures, choosing the employees or consultants to set up and calibrate the equipment and computers, and then hiring and training employees to perform the manufacturing. The Petitioner claims that the Beneficiary will set up the policies and procedures for the employees to follow and will not engage in tasks necessary to produce the end product.

This description of duties essentially indicates that the Beneficiary will spend 45 percent of this time performing the tasks necessary to set up an optical laboratory, including researching potential locations, leasing or purchasing property, and hiring and training employees to perform the manufacturing duties. These are operational tasks. This is not a "new office" petition where the regulations recognize that a designated manager or executive responsible for setting up operations may be engaged in a variety of activities not normally performed by employees at the executive or managerial level within the first year of operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). Further, the requirement that the Beneficiary recruit and hire additional employees to carry out day-to-day operations to relieve the Beneficiary from performing operational duties demonstrates that the Petitioner did not have sufficient staff to do so when the petition was filed. 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).

The Petitioner indicates that the Beneficiary will spend 32 percent of his time on "management" duties. However, the duties described include qualifying and non-qualifying duties. For example, the Petitioner asserts that the Beneficiary will spend 10 percent of his time coordinating development of a marketing plan to advertise to existing and potential clients and 7 percent of his time establishing policies and business practices for inventory management, and making decisions with regard to existing and new product lines. These duties also include establishing marketing and sales goals (8 percent) and establishing lab safety policies (7 percent). The Petitioner provides minimal information regarding the specific tasks the Beneficiary will perform relating to the marketing,

inventory, and product areas. Accordingly, the Petitioner has not established whether the Beneficiary's duties related to these functions are actually executive in nature rather than non-qualifying. The actual duties themselves will 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).

The Petitioner also states that the Beneficiary will be involved in product diversification which includes: spending 13 percent of his time deciding which eye frame manufacturers the Petitioner will carry; and once the product line and machinery are set up, spending 10 percent of his time identifying sources and suppliers and negotiating for glass, lens, frames, and other raw materials. These tasks appear to be procurement duties which require the Beneficiary to perform the necessary research to identify suppliers and perform the basic operational tasks necessary to begin the Petitioner's expansion. The fact that the Beneficiary will direct the Petitioner's expansion does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or 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. 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, the position as described is insufficient to establish that his actual duties will be primarily executive in nature.

B. Staffing

Beyond the required description of the job duties, we review the totality of the record when examining 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.

The Petitioner's organizational chart shows the Beneficiary in the proposed position of chief executive officer and depicts a marketing director directly subordinate to his position. The chart also identifies a merchandiser and a dispatch manager in positions subordinate to the marketing director. In a separate document, the Petitioner identifies the marketing director as a "manager," and lists the two additional employees as responsible for processing orders received from the website. The Petitioner indicates that it plans to add 10 to 11 employees within 15 months of beginning the expansion. We note again, however, that this is not a "new office" petition, as the Petitioner has been operating since 2011. Petitioners that do not meet the definition of a new office must establish that they can support a beneficiary in a managerial or executive capacity as of the date the petition is filed.

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.* The Petitioner has not established that the Beneficiary's subordinates manage the organization, rather than perform the operational and administrative tasks necessary to run the business. When the petition was filed, the Petitioner did not demonstrate that the Beneficiary will direct the management of the organization or will otherwise perform in an executive capacity.

The Petitioner employed three individuals when the petition was filed in this matter. The description of duties for the marketing director, who has also been identified as a "manager," shows that more likely than not this individual will be responsible for the operational and administrative duties of the Petitioner's current operations. Similarly, the individuals in the positions of merchandiser and dispatch manager, who are also described as processing orders received from the website, perform the daily operational tasks. The record does not establish that any of these three individuals are primarily managers or supervisors. Accordingly, the Petitioner does not have a subordinate level of "managerial" employees for the Beneficiary to direct. The Petitioner's plans to hire additional employees to support the Beneficiary and its expansion do not establish the Beneficiary's executive capacity when the petition was filed.

Section 101(a)(44)(C) of the Act requires that U.S. Citizenship and Immigration Services must take into account the reasonable needs of the organization in light of the overall purpose and stage of development of the organization if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity. To establish that the reasonable needs of the organization justify a beneficiary's job duties, a petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. The Petitioner has not explained how the reasonable needs of the petitioning enterprise justify the Beneficiary's performance of non-executive duties. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Furthermore, the reasonable needs of the Petitioner will not supersede the requirement that the Beneficiary must be "primarily" employed in a managerial or executive capacity, spending the majority of his or her time on non-qualifying duties. *See* sections 101(a)(44)(A) and (B) of the Act.

III. QUALIFYING RELATIONSHIP

The Director did not address the issue of the Petitioner's qualifying relationship with the Beneficiary's foreign employer. However, the record here does not include any evidence corroborating the Petitioner's statements that the Beneficiary owns 50 percent of the foreign entity

and owns 100 percent of the Petitioner. Rather, the initial record included copies of the Petitioner's federal tax returns for 2013, 2014, and 2015. Each of these tax returns on Schedule G identifies as the Petitioner's 100 percent owner. In response to the Director's RFE, the Petitioner submitted a copy of the 2015 Form 1120 which now identifies the Beneficiary as the Petitioner's 100 percent owner on Schedule G. The Petitioner does not offer evidence that an amended Form 1120 has been filed with the Internal Revenue Service. As the record does not include stock certificates, a stock ledger, or other evidence of the Beneficiary's consideration paid for his purported interest in the Petitioner, we find that the record does not establish a qualifying relationship between the Petitioner and the Beneficiary's foreign employer. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial or executive capacity and that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer.

ORDER: The appeal is dismissed.

Cite as *Matter of A-E-V-, Inc.*, ID# 738998 (AAO Nov. 30, 2017)

[4] The record includes three different spelling of the Petitioner's "manager's" last name. His last name appears as and