U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-T- PVT. LTD.

DATE: OCT. 3, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology (IT) firm, seeks to temporarily employ the Beneficiary as its senior vice president 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: (1) the Beneficiary has been employed abroad in a managerial or executive capacity; and (2) the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. On appeal, the Petitioner submits additional evidence and asserts that the Director erred by drawing unwarranted conclusions regarding the nature of the company.

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 found that the Petitioner did not establish that the Beneficiary has been and will be employed in a managerial or executive capacity. The Petitioner asserts that the Beneficiary's past and intended future employment are both executive in nature. Therefore, we restrict our analysis to whether the Petitioner will employ the Beneficiary in an executive capacity. Because this finding is dispositive, we will reserve the issue of the Beneficiary's prior employment abroad.

"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 submitted a three-page description of the Beneficiary's intended duties in the United States, correlated with the elements from the definition of executive capacity. Examples follow, some of them summarized for brevity and clarity:

1. **Directs the management of the organization or a major component or function of the organization**

- Manage North America Sales Team, Inside Sales Team in USA and India, and Pre-Sales Teams in USA and India
- Develop annual sales quotas

- Recruit, train, and evaluate employees

2. Establishes the goals and policies of the organization, component, or function

- Act as Practice head for Java, Open source, QA and BI practices
- Manage profit and loss at practice level
- Build and implement Account Mining Strategy
- Manage cross-cultural teams across the globe

3. Exercises wide latitude in discretionary decision-making

- Plan staffing levels
- Approval authority for hiring and firing

4. Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization

- Overall receives very limited or minimal supervision from executive leadership
- Hire and groom second level leaders

The Petitioner added that the Beneficiary will also "assist in the planning of the expansion of [the Petitioner's] operations in the United States with the establishment of new branch offices."

Some of the individual duties do not correspond well to the heading under which the Petitioner placed them. For instance, the Petitioner listed "[e]stablishes sales objectives" under item 1 above, and "defining organization goals, roadmap, processes and policies" under item 4, although both would appear to relate more to item 2 because they involve establishing goals and policies.

Other duties are vaguely worded, such as "Contributes to team effort by accomplishing related results as needed." Another item more resembles a self-description found on a résumé than a description of future job duties: "A strategist and implementer with recognized proficiency in spearheading business to accomplish corporate plans and goals successfully."

Still others appear to describe operational tasks rather than executive-level responsibilities. Examples include:

- Own and hit/exceed annual sales targets within assigned territory and accounts
- [C]ustomizing software-related issue of clients
- Provide first-line technical support
- Prepare software order forms

One of the Beneficiary's stated tasks is "implementing marketing strategies," but the Petitioner identified no marketing staff that would relieve the Beneficiary from personally performing marketing duties (as distinct from sales).

The Director informed the Petitioner that the Beneficiary's job description was deficient. In response, the Petitioner submitted an expanded version of the description which added clarifying explanations to many of the original elements. The Petitioner, however, did not add such clarifications to some of

the elements of particular concern such as "accomplishing related results as needed," "[p]repare software order forms," and "hit/exceed annual sales targets within assigned territory and accounts." As a result, the revisions do not address or answer key questions raised by the first version of the job description.

The Petitioner expanded the item for "implementing marketing strategies," but the added information did not show who, other than the Beneficiary, would perform the related tasks. Instead, the Petitioner simply copied three items that already appeared elsewhere in the job description, such as "Build and implement account mining strategy."

The added information does not always clearly relate to the line items to which the information has been added. For example, the initial job description included "Serving as a Single Point of Contact or a partner, interface for Client." One of the additions reads: "Run a [*sic*] weekly and monthly review and strategy meetings with direct reports to strategize and implement the decisions."

The Director denied the petition, stating that many of the Beneficiary's intended "duties do not appear to be consistent with . . . a managerial or executive position." The Director also raised concerns about the company's staffing, to be addressed further below.

On appeal, the Petitioner states that it "provided a detailed explanation of the duties the Beneficiary will be performing." As noted above, the added details left several issues unresolved.

The Petitioner submits a letter from an associate dean at the University of [redacted], who repeats or paraphrases large portions of the job description and concludes that the Beneficiary "will function in an Executive position for the company."

U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding a foreign national's eligibility. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.* USCIS may even give less weight to an opinion that is not corroborated or is in any way questionable. *Id.* In this instance, the author of the letter claims no personal familiarity with the petitioning company or with the Beneficiary's role therein.

The job description submitted by the Petitioner is deficient not because it lacks detail, but because, despite its length, the job description does not provide a consistent or coherent picture of the actual duties that the Beneficiary would perform in the United States, and it contains a number of duties better suited to front-line sales workers than to an executive.

B. Staffing

The Petitioner described its business as "Software Application Development, Consultation, and Staff Augmentation," but the Petitioner's organizational chart indicates that its U.S. employees are primarily

working in sales and human resources. The chart does not indicate that the Petitioner employs any information technology workers, such as software developers, in the United States.[1]

The Petitioner stated that the Beneficiary will "directly oversee the seven (7) offshore teams, the Sales Team, the Pre-Sales Team, and Delivery." Statements elsewhere in the same letter suggest that the "offshore teams" are "practice groups [comprising] over 278 employees," most of them IT workers. A proposed organizational chart showed the following hierarchy (terms in **bold** identify departments rather than individual employee titles):

President
└Senior Vice President [the Beneficiary]
  ├HR and Support
  ├**Offshore Teams** (All leads)
  ├**Sales**
  │ ├Senior Director
  │ │ └2 Sales Executives [1 current, 1 vacant]
  │ └3 Directors
  └**Delivery**
    └Account Manager
      ├15 Inside Sales
      ├Project Manager
      ├Consultant
      └U.S. Hiring
        └3 Recruitment

The Director asked the Petitioner to submit information and evidence regarding the Beneficiary's intended U.S. subordinates, including a "summary of duties" for "all employees" under the Beneficiary's authority. In response, the Petitioner submitted three employment agreements and job descriptions for two positions (sales director and account manager).

The submitted information indicates that the Beneficiary would be the first-line supervisor of sales staff. The job description for the sales director position is about a page long, but the listed responsibilities essentially amount to sales and customer service duties such as identifying leads, cold calling potential customers, and closing sales. Employment agreements for two of the sales directors show that each sales director is a sales agent, paid on commission. The only activity directly described under "Duties" in the employment agreement is: "Employee shall solicit sales of the [Petitioner's] information technology services." Each sales director also has quotas of two permanent placements and two new staffing placements per quarter. Three of the sales directors have no identified subordinates, and therefore they are personally responsible for meeting the sales and placement quotas. The organizational chart indicated that the senior director supervises a sales executive, but the

[1] We note that, close to the time of this petition's filing, the Petitioner filed other petitions seeking H-1B status for "computer programmer analysts." *See, e.g.*, [redacted] and [redacted]. The beneficiaries of those petitions did not appear on the Petitioner's proposed U.S. organizational chart in the present case.

Petitioner did not document the duties of the sales executive or submit the senior director's employment agreement.

The organizational chart indicated that the account manager would have over 20 subordinates, mostly "Inside Sales" and "Recruitment" workers abroad. The employment agreement for the employee identified as the account manager showed the title as "Senior Delivery Manager." That employment agreement did not mention any subordinates or list their supervision amongst the position's duties. Instead, those duties include "actively promoting software services to new customers" and "responsibility for the complete software design, development, installation and training to meet the customer's specific requirements."

In the denial notice, the Director found that the Petitioner had not shown that the U.S. entity had sufficient staff to warrant a primarily executive position. On appeal, the Petitioner submitted job descriptions for all the U.S. positions. Because the Petitioner did not submit these materials when the Director requested a "summary of duties" for "all employees," the Director was not able to take them into account.

The newly submitted job descriptions overlap to some extent with the Beneficiary's previously claimed duties, raising questions about where the responsibilities actually reside. For example, the human resources partner's duties include "Oversee[] and delegate all Human Resources related tasks," "Oversee Recruitment program," "Provide training to entire company on all company policies and procedures," and consult with "hiring managers." Previously, however, the Petitioner indicated that the Beneficiary himself "Maintains national sales staff by recruiting, selecting, orienting, and training employees."

The newly submitted job description for the project manager includes elements such as "Comfortable with public speaking" and "Effectively apply methodology and enforce consistent project standards," but makes no mention of supervising over 20 subordinates on two continents, or any specifics about the nature of the Petitioner's business. As is the case with parts of the Beneficiary's own job description, the project manager's job description more resembles a generic template than a breakdown of one employee's specific duties and responsibilities.

When considering how much weight to give to the inconsistent job descriptions in the record, it also bears noting that many of the Petitioner's U.S. employees, at different levels of the claimed hierarchy, reside far from the Petitioner's office in [redacted] Ohio. The individual identified as the account manager is in Texas; one of his direct subordinates is in New York. Payroll documents for other employees show addresses in Washington and Massachusetts. The Petitioner states that there is no requirement for all employees to be onsite, but in such a case the offsite employees must demonstrably be able to perform their duties remotely, and performing the duties described (rather than, for instance, working as contract labor for clients or other third parties). For a company that describes itself as providing "staff augmentation," this is a significant concern.

Given the significant questions about the positions at the Petitioner's U.S. office, it is significant that the Petitioner has provided even less documentation about its staffing in India, where the majority of the Beneficiary's claimed subordinates work. The Petitioner submitted payroll documents for a

handful of claimed direct subordinates, but the Petitioner has not adequately established that authority over these hundreds of employees would move from established local control in India to the Petitioner's office in Ohio (or some unnamed alternative site in the United States).

The Petitioner also provides information about new positions, created after a reorganization in late 2017. As noted above, post-filing changes cannot establish eligibility when the petition was not already approvable at the time of filing. Therefore, we need not discuss the newly created positions here.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it will employ the Beneficiary in an executive capacity in the United States.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons. In visa petition 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 E-T- Pvt. Ltd.*, ID# 1196288 (AAO Oct. 3, 2019)