U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K- INC.

DATE: OCT. 3, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a logistics company that also exports modified vehicles, seeks to continue the Beneficiary's temporary employment as its chief executive officer 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 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 Director then reopened the proceeding on the Petitioner's motion, and denied the petition a second time based on the same basic grounds.

The matter is now before us on appeal. On appeal, the Petitioner asserts that the Director erred by misinterpreting the Petitioner's assertions, and not giving the Petitioner an opportunity to address the resulting concerns.

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 managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). In addition, the beneficiary must seek to enter the United States temporarily to

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period from September 1, 2017 to August 31, 2018. 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.

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 new operation and evidence of the numbers and types of positions held; evidence of its 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).

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 initially claimed that it would employ the Beneficiary in an executive capacity. In the first denial notice, the Director found that "it appears that only two (2) employees are performing the administrative day-to-day tasks" of the business. The Director also questioned the apparently low salaries paid to some of the Petitioner's employees. As a result, the Director found that the Petitioner had not established how many people it employs full-time. On motion, the Petitioner submitted payroll documentation to show that the low annual salary figures resulted from late-year hiring rather than from a low rate of pay or part-time employment.

The Petitioner stated, in response to an earlier request for evidence, that it "believes that the Beneficiary has met the requirement for a functional manager if not found to be an executive." In the second denial notice, the Director interpreted this comment as a claim that the Beneficiary is both an executive and a manager. The Director also observed that a petitioner cannot establish eligibility by meeting some of the requirements for an executive capacity and some of the requirements for a managerial capacity. The Director found that the Petitioner did not establish that the Beneficiary's position meets all the requirements of both types of capacity.

On appeal from the second denial, the Petitioner states that the Director erred because the company "did not claim the beneficiary's position [to be] a hybrid 'executive/manager.'" Rather, the Petitioner asserts, it has consistently claimed that the Beneficiary's position is executive, and that if the Beneficiary "is not found to be an executive for the organization, the beneficiary has met the requirement for the Function Manager, meaning 'executive' for the 'function.'" The Petitioner asserts that managerial-level duties, such as "management of subordinates," are "incidental to the duties of an executive."

The Petitioner cites the regulatory definition of "executive capacity," which indicates that an executive "[d]irects the management of the organization or a major component or function of the organization." 8 C.F.R. § 214.2(l)(1)(ii)(C)(*1*). This same language appears in section 101(a)(44)(B)(i) of the Act. The Petitioner states: "By including 'Function' in its claim, Petitioner wanted to ensure that Beneficiary be approved for an executive for the function, in case the [U.S. Citizenship and

Immigration Services (USCIS)] found the organizational structure not big enough to support an executive of the organization."

Contrary to the Petitioner's use of the phrase, a "function manager" is a type of manager, not an executive. Section 101(a)(44)(A)(ii) of the Act, which pertains to managers rather than executives, requires that a manager "supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization." In this way, the statute establishes a substantive difference between a personnel manager and a function manager. An executive may direct the management of a function, rather than direct the management of the entire organization, but the statute does not otherwise substantively distinguish a "function executive" from other types of executives. The requirements for an executive capacity remain the same whether the executive directs the management of the entire organization, or a major component, or a function of that organization.

With regard to the Petitioner's explanation for its use of the term "function manager," if the Petitioner's entire "organizational structure [were] not big enough to support an executive of the organization," then it would necessarily follow that no subdivision or function of that organization would be "big enough" to require an "'executive' for the 'function.'"

Because the Petitioner has specified that it considers the Beneficiary's position to be executive rather than managerial, we will limit our analysis to the requirements of 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 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 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 statutory definition of the term "executive capacity" focuses on a person's elevated position. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of an organization or major component or function thereof. Section 101(a)(44)(B) of the Act. To show that a beneficiary will "direct the management" of an organization or a major component or function of that organization, a petitioner must show how the organization, major component, or function is managed and demonstrate that the beneficiary primarily focuses on its broad goals and policies, rather than the day-to-day operations of such. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the organization, major component, or function 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.*

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

As the highest-ranking officer of the petitioning organization, it appears that the Beneficiary establishes the company's goals and policies and has wide latitude in discretionary decision-making. The issue in dispute is whether the Beneficiary's duties are *primarily* of an executive nature. To resolve this issue, we must examine the nature of those duties, and determine whether the company has sufficient staff to relieve the Beneficiary from having to perform primarily non-qualifying tasks.

A three-page job description indicated that the Beneficiary would spend about 10% of his time on each of ten responsibilities, summarized below:

- Representing the Petitioner when meeting with executives of other companies; giving guidance to subordinates in signing more detailed contracts
- Restructuring and reorganizing the company
- Determining development direction and strategic planning
- Budgeting
- Controlling the company's finances and accounting
- Making decisions regarding human resources
- Defining operational procedures and directing each department's operations
- Establishing rules and policies
- Setting goals and targets
- Evaluating the performance of subordinates

The Petitioner indicated that the Beneficiary devotes several hours per week to each of the above responsibilities, but it is not evident that some of the listed items represent significant, ongoing demands on the Beneficiary's time. For example, the Petitioner executed contracts with other

companies to provide certain services, but these are long-term contracts that do not appear to entail continuing negotiation.[2]

Likewise, the Beneficiary may have "[s]et up the initial organization of the company," but the company is not particularly large or complex in its organization. The record does not show that the company has undergone significant restructuring following the initial approval of the new office petition, and the Petitioner has not established that a company of its size requires a significant amount of reorganization going forward.

Regarding human resources responsibilities, the Petitioner stated that it is the Beneficiary's responsibility to:

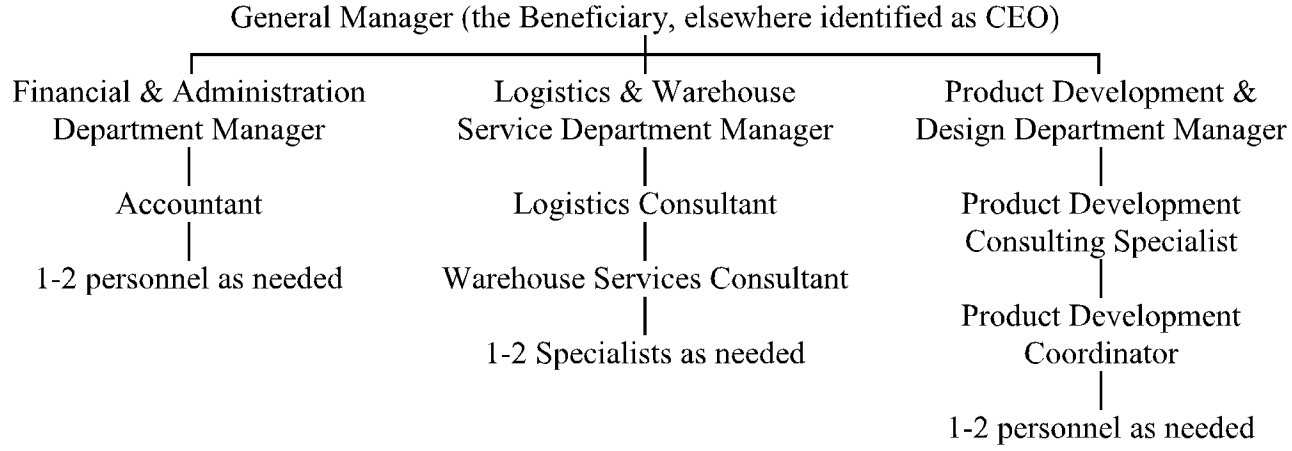
a) Set up the company's employee hiring standard and policy, including the requirements for education, language, knowledge, and experience.
b) Determine the employee's compensation method, standard and policies regarding employee's salary and benefits.

The company had nine employees at the time of filing, and was slightly larger at the time of the appeal. The Petitioner has not shown that establishing hiring and compensation policies will continue to occupy "about 10% of [the Beneficiary's] working time."

In short, the Petitioner has described a routine of high-level decision making that, on its face, is consistent with executive authority, but the Petitioner has not established that this is an accurate or realistic depiction of the Beneficiary's day-to-day activities with the company.

B. Staffing and Nature of the Business

At the time of filing, the Petitioner had nine U.S. employees, including the Beneficiary. An organizational chart showed the following structure at the time of filing:



[2] As we will discuss below, many of these contracts involve making commitments to a customer and then hiring subcontractors to fulfill those commitments, with little discussion of the Petitioner's active role in those arrangements.

The listed job titles account for all nine claimed employees, suggesting that the additional "as needed" personnel are short-term contractors rather than employees. The chart did not reveal the titles of these "as needed" workers.

The company's structure has changed somewhat over the course of the proceeding. A petitioner must meet all eligibility requirements at the time of filing, continuing through the adjudication of the petition. See 8 C.F.R. § 103.2(a). We begin by examining the structure of the company at the time of filing. If the Beneficiary was not primarily an executive at the time of filing, then the petition cannot be approved and we need not examine the effect of subsequent structural changes.

Job descriptions for the Beneficiary's subordinates indicated that the three department managers would have authority over their respective departments, but left questions about their duties and those of their subordinates. For example, the Petitioner indicated that the logistics and warehouse service department manager would "[l]ead the team in providing various logistics and warehouse services to customers"; this wording implies that the manager would participate in "providing . . . services," which is an operational task.

The roles of the Petitioner's employees depends, to a large extent, on the nature of the Petitioner's business activity. The record, however, lacks clarity and consistency on this crucial point. The Petitioner stated that the Beneficiary "establish[ed] a multi-business operation, including bringing U.S. products to China, Logistics, warehouse, and vehicle modification, and consultation services." On the petition form, the Petitioner described itself simply as an "International Business."

Much of the record deals with logistics: the Petitioner registered a fictitious business name that includes the word "Trucking"; the company owns a tractor-trailer; and there are records such as invoices relating to cargo transport. The Petitioner also has a contract to "provide warehouse space and services" and "arrange[] for shipping and delivery." A separate contract, however, indicated that the Petitioner "will provide transportation vehicles and various [unspecified] supporting services," while another entity would operate and maintain the vehicles. This appears to indicate that, while the Petitioner owns a truck, contractors drive it.[3]

The Petitioner also exports luxury vehicles to China after arranging for their modification by a third party. The nature of the Petitioner's role in the modification process is difficult to discern. The Petitioner has a product development department, and invoices for "new product development" list the specifications for individual vehicle modifications. But none of the employees in the department actually modify the vehicles; that work is contracted out, and so are the marketing and sales of the vehicles.[4] The department has a manager to direct "the product development process"; a consultant to "[c]oordinate key new design product development projects"; and a coordinator to "[f]acilitate the

[3] We note that, while the appeal was pending, the U.S. Department of Transportation revoked the Petitioner's common carrier certificate (USDOT number [redacted]) on [redacted] 2019. *See* https://li-public.fmcsa.dot.gov/LIVIEW/pkg_carrquery.prc_carrlist?n_dotno=[redacted]&s_prefix=MC&n_docketno=[redacted] (last visited Sept. 17, 2019). This information does not change the outcome of our appellate adjudication, but it is relevant to the broader issue of the nature of the petitioning entity's business activity.

[4] The agreement with the vehicle modification company indicates that the company is also "responsible for the medical team." The unexplained reference to a "medical team" raises further questions.

instruction [*sic*] of products from one destination to another," but evidently no designer. Because the Petitioner did not indicate that anyone in the product development department is responsible for designing or performing the modifications, it is difficult to determine what the department's employees actually do apart from coordinating with subcontractors who perform all tasks related to marketing, modification, sales, and delivery.[5]

We note that the city of [redacted] California, requires a separate "business license for each type of business" that a company conducts; a "company operating a second business at a primary business address must obtain a business license and/or registration for both businesses."[6] In this case, the Petitioner's municipal business licenses and certificate of registration indicate that the Petitioner's business is "wholesale distribution of ice cream machinery," and on its own income tax return, the Petitioner identified itself as a "wholesale distributor."

The Petitioner's only licensed business activity is "wholesale distribution of ice cream machinery," but the record does not specify to what extent, if any, the Petitioner actually engages in that activity. The record contains a number of contracts and invoices, but none of them appear to relate to ice cream machinery. In 2017, the Petitioner secured a two-year lease for "an industrial unit" for "[w]arehouse and distribution of cars." The Petitioner executed that lease more than a month before it obtained the business license pertaining to ice cream machinery, indicating that the Petitioner was already expecting to conduct other types of business before it applied for that license.

On its 2017 income tax return, the Petitioner claimed to have spent $352,099 on "cost of goods sold," but the nature of those goods is not clear from the record. The Petitioner submitted several invoices from 2018, but these do not show what inventory the Petitioner purchased and sold in 2017.

None of the submitted job descriptions contain any direct reference to the only business activity for which the Petitioner holds a local business license. The business activity described on the Petitioner's tax returns does not match the activity shown on invoices and contracts. This discrepancy between government filings and invoiced activity is of particular concern in the context of a petition for an immigration benefit, which is, itself, a government filing. We cannot draw reliable conclusions about the Beneficiary's role with the company without a complete and consistent picture of the Petitioner's actual, routine business activities and its lawful authority to conduct them.

The Petitioner has claimed a multi-layered organization, with department managers who oversee front-line employees. But because the record is not consistent about the company's actual business activity, and the company delegates much of its contracted work to subcontractors, the Petitioner has not provided a sufficient picture of what its employees actually do.

Given the incomplete and conflicting information regarding the company's activities and the Beneficiary's day-to-day activities with the company, we cannot find that the Petitioner has met its burden of proof to establish that the Beneficiary will be employed in an executive capacity under the extended petition.

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[5] If the Petitioner's employees do perform significant design and development functions, then the job descriptions that omit those tasks are not accurate and therefore have diminished weight as evidence.

[6] Source: https:/[redacted] (last visited Sept. 17, 2019).

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 K- Inc.*, ID# 5752014 (AAO Oct. 3, 2019)