U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-, INC.

DATE: OCT. 9, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a food importer and wholesaler, 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 Vermont Service Center denied the petition, concluding that the record did not establish that the Petitioner will employ the Beneficiary in the United States in an executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner contends that the Director erred in drawing "illogical and absurd" conclusions from the evidence of record, and in faulting the Petitioner for not submitting evidence that the Director had never requested.

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 continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period October 7, 2016 until August 7, 2017. 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.

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. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in an executive capacity. The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed 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 listed the Beneficiary's responsibilities:

- Exercise ultimate executive duties of planning, developing, and establishing policies and objectives of the company in accordance with its board directives and corporation charter
- Review activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans with current conditions
- Evaluate performance of executive and managerial personnel for compliance with established policies and objectives of the companies and contributions to attaining objectives
- Develop long-range goals and objectives of the company
- Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives
- Stay abreast of demands in the grocery industry, anticipating the ever-changing needs of potential clients will be key to company growth
- Perform any other functions required to foster and promote business operations

The Director requested more details, stating that the above job description was "vague and broad," and appeared to include non-qualifying operational tasks. In response, the Petitioner submitted new lists of the Beneficiary's daily and weekly duties and "expected executive decisions." Many of the listed daily items related to reviewing reports; approving proposals, products and delivery routes; and meeting with subordinates. Additional weekly items included meetings with clients; negotiating with suppliers and supermarkets; and evaluating staff efficiency. The Petitioner stated that the Beneficiary's "expected executive decisions" would involve sales strategies; staffing; finances; and whether to act on subordinates' recommendations.

A third job description appears to derive from a generic template; it referred to a "board" and to lower-level "executives" that the company does not have, and indicated that the Beneficiary oversees "the company's . . . investments" without specifying what those investments are. It also stated that the Beneficiary represented the company as a "public speaker," with no evidence that the Beneficiary has actually performed in that capacity. Entirely hypothetical responsibilities are not substantive components of a job description.

In the denial notice, the Director found that the Petitioner had not sufficiently clarified or documented its assertions regarding the Beneficiary's duties and authority. The Director stated that the Petitioner did not document any performance evaluations that the Beneficiary is said to perform.

On appeal, the Petitioner states that the Director misread the Beneficiary's job description in a way that appeared to diminish his discretionary authority (indicating that the Beneficiary *sought* approval, rather than *issued* approval, for various projects). The Petitioner appears to be correct on this point, but the denial does not rest on this one issue.

The Petitioner asserts that the Director had not requested any specific documentation relating to the Beneficiary's authority, and "never explained what evidence . . . would suffice as evidence of

[executive] decisions." The Petitioner also asserts that executive decisions "are not documented in any formal way," and therefore the Petitioner's assertions should have sufficed.

The type of documentation arising from an executive's actions will vary according to the nature of those decisions, and from employer to employer. It would be impractical to identify specific documents in a request for evidence. The burden of proof rests on the Petitioner, who cannot sidestep this obligation simply by asserting that the Beneficiary's obligations are not readily amenable to documentation.

Furthermore, the Petitioner has not explained why it submitted three very different job descriptions for the Beneficiary, as detailed above. These discrepancies are not a minor consideration.

The Petitioner has not established that the Beneficiary's duties will be primarily those of an executive.

B. Staffing

If staffing levels are used 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. However, it is appropriate for us to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *See, e.g., Family Inc.*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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's 2017 organizational chart named a head of logistics, who supervised one driver/loader, and a head of sales, who supervised a salesperson. Subsequent submissions show that the Petitioner later hired more employees in various positions, but the Petitioner must meet eligibility requirements at the time of filing. *See* 8 C.F.R. § 103.2(b)(1). Job descriptions in the business plan indicated that the head of logistics and head of sales would each perform a

combination of managerial, supervisory, and operational functions. The descriptions did not specify the time devoted to specific tasks.

In a later statement, the Petitioner asserted it had delegated several managerial functions to employees at the Petitioner's foreign affiliate, including an accountant, economist, and several department heads and managers. The Petitioner, however, did not elaborate or document the work performed in this manner. Job descriptions for the foreign employees did not differentiate between duties performed on behalf of the foreign employer and those performed on behalf of the petitioning U.S. company.

The Petitioner's supplemental submission also included new job descriptions for the Beneficiary and several subordinates. These job descriptions appear to derive from generic templates that do not take the Petitioner's structure and staffing into account. The description for the head of the sales department, for instance, included "[m]eeting with the sales managers" and "[w]orking with members of the board," but the accompanying organizational chart did not show any sales managers and the company does not appear to have a board of directors; the Beneficiary described himself as the sole and ultimate authority who "will not receive any supervision from anyone else."

The Director denied the petition based, in part, on inconsistent information concerning the company's staffing. Noting the Petitioner's assertion that the Beneficiary meets with the Petitioner's logistics department, the Director found that the Petitioner had not established that the company has a logistics department.

On appeal, the Petitioner asserts that, because of delays relating to the issuance of the Beneficiary's L-1A nonimmigrant visa, the Beneficiary had less than a full year to establish the company's operations before it was time to apply for the extension. The Petitioner asserts that the Director "should have extrapolated the important milestones" that the Petitioner would have attained if the Beneficiary had been able to work for a full year prior to the filing date.

The Petitioner does not cite any legal provision that allows extrapolation in this manner, and even if such a provision existed, the Petitioner has not shown that the Beneficiary was primarily performing executive tasks 12 months after his initial entry in L-1 status.

Also, the staffing that the Petitioner described in response to the Director's request for evidence is significantly different from the Petitioner's existing or planned structure described at the time of filing. Several of the described positions did not yet exist at the time of filing. For example, the Petitioner provides information about its warehouse manager, but the Petitioner did not lease its warehouse space until after it filed the petition. The Petitioner's initial business plan did not identify warehouse staff, either among current employees or on its projected hiring for the next five years. A petitioner must establish eligibility at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). Even if this revised staffing established eligibility, we cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

With respect to the claimed delegation of U.S. business functions to foreign employees, the Petitioner notes that the Beneficiary signed the letter containing that claim. The Petitioner contends that, because the Beneficiary is the top authority at both companies, "his certification . . . should have sufficed to establish the employment of such individuals." The Petitioner asserts that the Director never requested additional evidence regarding these foreign employees, and therefore cannot reasonably fault the Petitioner for not submitting that evidence.

The claim of foreign outsourcing did not surface until after the Director issued the request for evidence (RFE), and therefore that request could not have addressed a future claim by the Petitioner. Likewise, the Director was under no obligation to issue a succession of RFEs to attend to the Petitioner's changing claims. More than once on appeal, the Petitioner protests not having had an opportunity to submit evidence, but the appeal itself includes no new evidence. Also, it is significant that the Beneficiary's initial submission did not indicate that foreign employees handled many of the company's administrative and operational tasks. The lack of consistency between the initial submission (including a business plan with five-year projections) and subsequent additions to the record lead us to question whether the Beneficiary will be working in an executive capacity.

Due to the discrepancies and deficiencies described above, the Petitioner has not established that the company was sufficiently staffed at the time of filing to relieve the Beneficiary from primarily performing non-executive tasks.

III. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of E-, Inc.*, ID# 1659057 (AAO Oct. 9, 2018)