U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-B- INC.

DATE: OCT. 10, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a framing e-commerce business, seeks to temporarily employ the Beneficiary as its chief financial officer (CFO) 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 Vermont Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity.

On appeal, the Petitioner disputes the Director's findings, claiming that the Beneficiary will be employed in an executive capacity.

Upon *de novo* review, we find that the Petitioner has not overcome the basis for denial. Therefore, 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. EXECUTIVE CAPACITY IN THE UNITED STATES

Although the Petitioner previously claimed that the Beneficiary would be employed in a managerial capacity, it did not pursue this claim on appeal and instead now claims that the Beneficiary would be

employed in an executive capacity. Therefore, we will only address this claim in our decision and will not consider whether the Beneficiary would be employed in a managerial capacity.[1]

"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). The Petitioner must also 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.

The Petitioner must provide a job description that clearly describes 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 the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the 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, its staffing levels, and its organizational structure.

A. Supporting Evidence

The petition form was filed in September 2017 and indicates that the Petitioner had 14 employees at the time of filing and proffered a wage of $50,000 annually to the Beneficiary. In a supporting statement, the Petitioner indicated that the Beneficiary would earn "commission on sales" in addition to his proposed annual salary; however, it did not explain how the commissions would be assessed or state whether the Beneficiary would be directly responsible for selling merchandise in order to earn the commission.

[1] The term "function manager" applies generally when a beneficiary is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. Here, although the Petitioner previously stated that the Beneficiary would assume the role of a function manager, it did not specifically identify an essential function that the Beneficiary would manage, claiming only that the Beneficiary would "directly control and manage" a finance department, which it did not identify in any of its submitted organizational charts.

The Petitioner also provided a business plan, which discussed strategies for promoting the e-commerce business and included an organizational chart illustrating the Petitioner's staffing hierarchy. The chart depicted a president/CEO at the top of the hierarchy, followed by the Beneficiary at the next tier overseeing five subordinates – a general manager, a "procution"[2] manager, a sales and marketing manager, a logistics manager, and an IT and e-commerce manager – each of whom was shown as overseeing one to three subordinates.

In its supporting statement the Petitioner included a job description, which grouped the Beneficiary's activities into three categories – responsibilities, tasks, and risk management. The responsibilities category largely focused on the Beneficiary's leadership role with respect to the company's finances, noting that the Beneficiary will formulate the Petitioner's financial objectives, create its budgets, make financial forecasts, and recommend actions that are consistent with its financial performance and business opportunities. The Petitioner claimed that the Beneficiary would assume a "hands-on lead position" in creating and implementing a "comprehensive job cost system"; however, it did not define the phrase "job cost system" or explain how this phrase applies within the scope of an e-commerce business. The Petitioner also claimed that the Beneficiary would introduce "new programs/strategies and regulatory action," but it did not elaborate on the types of programs or strategies the Beneficiary would introduce, nor did it explain how "regulatory action" is relevant to its e-commerce operation. In addition, the Petitioner claimed that the Beneficiary would maintain "strong relationships with senior executives," but it did not specify the positions it deemed as "senior executives."

The category titled "Tasks" was comprised of another set of broadly stated activities, which focused on the Beneficiary's discretionary authority with respect to the company's finances and resources. Namely, the Petitioner stated that the Beneficiary would perform the following:

- Develop strategies to promote revenue growth and profitability and promote the company on a local and national scale;
- Oversee efficiency and resource management to ensure quality products;
- Identify opportunities for mergers and acquisitions;
- Approve operational policies and procedures;
- Review activity reports and financial statements and present budgets to the board;
- Revise plans and objectives;
- Retain contractors, outsource services, and evaluate "performance of executives";
- Serve as the company representative at "legislative sessions, committee meetings[,] and formal functions"; and
- Direct "planning and policy[-]making committees."

Again, we note that the Petitioner's organizational chart does not show that the Beneficiary would oversee executive subordinates; therefore, it is unclear that evaluating the performance of executives

[2] Although the reference to "procution" manager appears to be the result of a typographical error, it is unclear what position the Petitioner intended to identify.

would be a routine part of Beneficiary's proposed position. Also, it is unclear that mergers and acquisitions, legislative sessions, or policy-making committees are relevant within the context of an e-commerce framing business.

The third and final list itemizes eight additional activities in the risk management category. The Petitioner vaguely stated that this category would require the Beneficiary to "[u]nderstand and mitigate key elements of the company's risk profile," monitor legal issues within the company and the industry at large, ensure legal compliance, develop "reliable control systems" and maintain insurance coverage, ensure proper record-keeping, report "risk issues to the audit committee of the board of directors," and "maintain relations" and follow up with auditors. The Petitioner did not reference any risks that are specific to the type of e-commerce business it operations, nor did it identify an "audit committee" anywhere within its organizational hierarchy.

Further, the Petitioner stated that the Beneficiary would supervise a controller, a tax manager, a human resources manager, and an investor relations officer. We note, however, that none of these positions were included in the above described organizational chart. Likewise, the Petitioner's claim that the Beneficiary will have "the assistance and subordination" of employees in the administration, finance, and all other of its departments is not consistent with the original organizational chart, which did not identify an administration or finance department. The Petitioner must resolve these inconsistencies 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).

The Director determined that the record lacked an adequate job description and therefore issued a request for evidence (RFE) instructing the Petitioner to list the Beneficiary's actual job duties and provide a percentage breakdown showing the time distributions among the listed duties. The Director also asked the Petitioner to provide its organizational chart and employee wage evidence, including quarterly wage reports for the 2017 second and third quarters, copies of the Petitioner's payroll summary, employment contracts, and IRS Forms W-2, W-3, and 1099-MISC.

In response, the Petitioner provided three payroll statements from November 2017 and four employment contracts, all showing an employment start date of November 1, 2017, which is more than five weeks after this petition was filed. The Petitioner did not provide payroll summaries showing whom it employed at the time of filing, nor did it provide the requested quarterly wage reports or IRS documents for the relevant time period. We note that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Although the Petitioner provided an organizational chart as requested, the new chart depicted a hierarchy that was substantially similar to the original chart. The key difference between the two charts was the Beneficiary's placement with respect to the company's president/CEO; the original chart depicts the Beneficiary as the president/CEO's subordinate, whereas the more recently submitted chart indicates that the Beneficiary and the president/CEO at the same – top-most – level within the hierarchy and does not indicate that the Beneficiary would be subordinate to anyone.

Most importantly, neither organizational chart included an administration or finance department, nor did either chart identify a controller, a tax manager, a human resources manager, or an investor relations officer, which were all referenced in the original job description.

The Petitioner's response also includes several competing job descriptions. In one job description, the Beneficiary's time was distributed among four categories, which allocated 44% of his time to administration and finance, 33% to supervising senior executives, 17% to supply chain management, and 6% to "[c]ompletion of all previous works." The Petitioner provided a second job description in which it stated that the Beneficiary would perform functions that relate to administration and finance, execution of the role of CFO (and that of CEO, when necessary), ensuring project completion, communicating with senior executives, and overseeing supply chain management and the marketing strategy. More specifically, the Petitioner stated that the Beneficiary would attend "frequent training and development sessions" to stay informed of tax "and other requirements," motivate employees by maintaining a "thorough knowledge" of the framing process, understand supply chain by "studying and visiting supply markets and by meeting with the suppliers and vendors," and attend "advanced training and developing courses and conferences with industry marketing leaders" to learn current marketing and sales practices. In a third job description, the Petitioner reiterated the actions that were listed in the "Responsibilities" and "Tasks" categories in the original job description. The Petitioner did not assign a percentage of time to specific tasks, as instructed in the RFE. Again, we note that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In the denial decision, the Director determined that the Petitioner provided deficient job descriptions that offered vague and limited information about the Beneficiary's specific job duties within the size and scope of the petitioning entity. The Director also found that the Petitioner does not have the staffing to relieve the Beneficiary from having to primarily perform non-managerial or non-executive job duties.

On appeal, the Petitioner contends that the Beneficiary would be employed in an executive capacity and that he would control "all the management functions" and be in charge of approving "all financial disbursements." The Petitioner claims that the Beneficiary will analyze budgets, financial trends, and forecasts, develop and maintain "a comprehensive job cost system," direct and oversee the finance and accounting functions, introduce new programs and regulations, and advise the board of directors on financial implications and work with them to identify solutions and enhance the company's financial performance.

B. Analysis

We find that the Petitioner as not established that the Beneficiary would allocate his time primarily to the performance of executive job 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 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.*

In the present matter, although the Petitioner listed five managerial position titles subordinate to the Beneficiary, it did not provide requested payroll evidence or relevant wage documents to show whom it employed at the time of filing; instead, it provided three November 2017 payroll summaries and four employment contracts which went into effect only after this petition was filed. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must also 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). Without evidence showing that at the time of filing the Petitioner's staff included a tier of managers, it is unclear how the Beneficiary would be able to "direct the management" of the organization.

The Petitioner also did not establish that the Beneficiary would primarily focus on establishing its goals and policies. Despite repeatedly claiming that the Beneficiary has broad discretionary authority over its finances, the Petitioner has not established precisely what job duties the Beneficiary would carry out in his position as CFO. Instead of complying with the RFE, which asked for a detailed list of the Beneficiary's proposed job duties and the amount time he would allocate to each duty, the Petitioner provided multiple deficient job descriptions, which broadly focused on the Beneficiary's discretionary authority and referred to functions, such as identifying mergers and acquisition opportunities and representing the Petitioner in "legislative sessions" and "committee meetings," whose relevance is unclear given the nature of the Petitioner's business and the scope of its operation. Likewise, the Petitioner also did not clarify how "legislative sessions" and "committee meetings" fit within the context of an e-commerce framing business. If we find reason to believe that an assertion stated in the petition is not true, we may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, in the category titled "Tasks," the Petitioner indicated that the Beneficiary would develop strategies to promote the business, oversee resource management, and approve operational policies and procedures. However, these vague phrases do not explain the actual underlying tasks that the Beneficiary would carry out on a daily basis, despite the fact that all three activities were categorized as "tasks." Aside from establishing that the Beneficiary has discretion over operational and policy matters, it is unclear precisely what the Beneficiary would actually be doing.

We further note that the Beneficiary's management of the business does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(44)(B) 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)(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, these elements alone are not sufficient to establish that his actual duties would be primarily executive in nature. 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). As such, a detailed job description is critical to a determination of whether the Beneficiary would be employed in an executive capacity. Here, the record lacks a job description that delineates the Beneficiary's specific tasks based on the Petitioner's staffing and scope of operations at the time of filing.

On appeal, the Petitioner reiterates the prongs that comprise the definition of executive capacity and continues to make broad statements about the Beneficiary's discretionary authority without providing evidence to support its claims. For instance, the Petitioner states that the Beneficiary "may instruct officials and executives of different departments," "controls and runs all business operations," and has "full autonomy" to determine the means for achieving company goals and correcting discrepancies. Although it is likely that the Beneficiary would have a level of discretion that is consistent with that of an executive, the Petitioner's claims do not address the documentary deficiencies that are present in this matter, including the lack of a detailed job description and evidence showing whom the Petitioner employed at the time of filing. Despite claiming that the Beneficiary would direct the management of the organization through a subordinate managerial tier, the Petitioner has not provided sufficient evidence to corroborate this assertion.

In light of the above described deficiencies, we find that the Petitioner has not established that it would have the ability to employ the Beneficiary in a position where the primary portion of his time would be allocated to executive job duties.

III. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary will be employed in the United States in an executive capacity. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.

Cite as *Matter of F-B- Inc.*, ID# 1637248 (AAO Oct. 10, 2018)