U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-(USA) INC.

DATE: OCT. 30, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an electronic payment systems seller, 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 Vermont Service Center denied the petition, concluding that the Petitioner had not established, as required, that the Beneficiary would be employed in an executive capacity for the U.S. entity.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary is the senior most employee of the company and that he will make decisions and work in an executive capacity as defined in the regulations.[1]

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 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

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

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.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Petitioner, established in December 2012, markets and sells payment processing products and technology developed and produced by its Canadian parent company. The Petitioner states on the Form I-129, that it employs two individuals in the United States. In a letter submitted in support of the petition, the Petitioner noted that it had signed contracts with advisers in New York to effect a initial public offering (IPO) and that it and the parent company had determined "that it is in the best interests of the successful completion of the IPO and the growth of the business for [the Beneficiary] to transfer to the Petitioner." On appeal, the Petitioner submits evidence that the Securities and Exchange Commission accepted the foreign entity's initial public offering filing on 2017.

The Director found that the Petitioner had not submitted a detailed description of the Beneficiary's proposed duties and had not explained how the Beneficiary would be relieved from performing non-qualifying duties. The Director determined that the Petitioner had not established that it will employ the Beneficiary in an executive capacity.

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 an 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's proposed duties included working with advisors to complete the IPO and ramping up the U.S. office to assume greater responsibility for management and administration of business and implementation of strategy to

commence product development in the United States. The Petitioner and the foreign entity, in separate letters, stated that "[s]ince [the Beneficiary] will continue to serve as Chief Executive Officer of the Canadian firm as well as of the US firm, we anticipate that our firm will continue to pay this salary until such time as his work with [the Petitioner] begins to absorb sufficient of [*sic*] his time and energy to allow it to assume responsibility for the salary."

In response to the Director's request for evidence, the Petitioner stated that the Beneficiary is to "initially work to secure the leases and infrastructure required, hire the management personnel for the expansion of the U.S. company following the IPO," and that "[h]is duties beyond the IPO and expansion include the ongoing management and direction for the entire company." The Petitioner noted its plans to establish offices, a warehouse and assembly facility, and an R&D facility, and listed the Beneficiary's duties after the IPO and expansion as:

1. Ongoing organization and management of business development (20%)
2. Management and participation in recruitment and hiring of new employees (20%)
3. Management of partnership relations with suppliers and vendors (30%)
4. Management and direction of sales and marketing of the Solo Series products to new and existing customers (10%)
5. Management of Performance Reviews carried out on employees and sub-contractors (5%)
6. Management of relationship with sub-contractor supplier [redacted] responsible for selling products in the United States (5%)
7. Day[-]to[-]day management of personnel and implementation of plans for continued expansion (10%)

The Beneficiary's initial duties, to complete the [redacted] IPO, to secure leases and infrastructure, and to hire management personnel, are not executive duties for the Petitioner as defined by the Act. The initial public offering was filed on behalf of the Petitioner's foreign parent company, and thus, the Beneficiary's work on the initial public offering was on behalf of the foreign entity. Securing leases and infrastructure and hiring management personnel for the Petitioner are operational and administrative duties for a start-up company, not one that has been established for several years and has been doing business in the United States during that time.[2] On appeal, the Petitioner appears to acknowledge that the Beneficiary "carries out operational duties" and claims that the Beneficiary's actions are "strictly because the firm was a start[-]up" and that it is the Beneficiary's nature "to do what needs to be done."

There are separate eligibility requirements applicable to new offices. The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or

[2] The record includes the Petitioner's lease for a two-person office in New York when the petition was filed, as well as invoices from and payments made to the Petitioner for several years.

managerial position. Where, as here, the Petitioner does not meet the definition of a new office, the record must establish that the company can support a managerial or executive position as of the date the petition is filed.

The Petitioner also does not indicate how much time the Beneficiary will spend working on behalf of the foreign entity and does not detail how his work will impact carrying out duties for the Petitioner. The Petitioner seems to acknowledge that the Beneficiary will primarily work on behalf of the foreign entity "until such time as his work with [the Petitioner] begins to absorb sufficient of his time and energy to allow [the Petitioner] to assume responsibility for the salary." Thus, the Petitioner's allocation of the Beneficiary's time, as noted above, includes only some undefined portion of the Beneficiary's workload.

Further, the Petitioner does not sufficiently detail the Beneficiary's tasks so that we may analyze whether such duties incorporate managerial, executive, or non-qualifying duties. For example, the Beneficiary's responsibility for "[o]ngoing organization and management of business development" does not convey an understanding of what the Beneficiary will actually be required to do for the Petitioner on a daily basis when performing this function. Similarly, "[m]anagement and participation in recruitment and hiring of new employees," and "[m]anagement of partnership relations with suppliers and vendors" may involve executive or managerial duties, or may involve operational tasks necessary to run the company. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The Petitioner has not provided the necessary detail or explanation of the Beneficiary's activities in the course of his daily routine. 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).

On appeal, the Petitioner asserts that the Beneficiary, under his discretionary decision-making power, has carried out and will carry out activities on behalf of the Petitioner. Although the Petitioner lists several of these activities, such as recruiting and hiring a senior vice-president and president, establishing sales and marketing offices in the United States, and establishing and operating a warehouse and assembly facility, these duties involve the operational duties necessary to expand the Petitioner's business. The Petitioner has not sufficiently explained and supported how these duties satisfy the definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Further, the Petitioner does not include evidence of when the Beneficiary established offices in the United States, if he has done so, and when he will establish a warehouse and assembly facility. It is not clear if these items are in the planning stage or are tasks that have already been carried out.

The fact that the Beneficiary manages or directs a business 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. Sections 101(A)(44)(B) of the Act. Although 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 descriptions alone are insufficient to establish that his actual duties would 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 included a senior vice-president of business development and a vice-president of business development, as well as 12 sub-contractors, reporting to the Beneficiary. Although requested by the Director, the record does not include copies of state quarterly wage reports, IRS Forms W-2, or IRS Forms 1099, for the 2016 year. The record includes six IRS Forms 1099 for 2015 issued to individuals, two of whom are identified on the Petitioner's organizational chart as subcontractors. However, 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). As this petition was filed in December 2016, the pertinent wage records would fall within the 2016 year and most relevant, the fourth quarter of that year. The Petitioner has not provided evidence in support of its claim that it employed two individuals and 12 subcontractors when the petition was filed.

The record does include a partial copy of the foreign entity's agreement with for the purchase of products for resale to end-users when integrated with the foreign entity's proprietary original equipment manufacturer solutions, which is dated August 2011. The record further includes a copy of an independent sales contractor agreement between the Petitioner and , as well as several "Tri-Party Referral Partner Agreement[s]" which identified the Petitioner, and different third parties as signatories for each agreement.[3] Two of the signatories to the tri-party referral partner agreements are depicted on the Petitioner's organizational chart as the senior vice-president business development and the vice-president of business development. The Petitioner, however, does not advise on when these individuals were hired to fill these positions. Although the documents submitted show that the Petitioner has been doing business, these documents are insufficient to establish that the Petitioner employed or employs individuals to carry out the operational and administrative tasks to develop the Petitioner's business, to recruit and hire new employees, to perform the supervisory tasks related to suppliers and vendors, and to perform the managerial duties related to sales and marketing of the Petitioner and its foreign parent's products. The Petitioner has not provided evidence establishing

[3] The tri-party agreement referred to the Petitioner as an entity with an independent sales contractor agreement with and noted that the referral partner[s] entered the agreement to refer merchants who use electronic payment processing services to the Petitioner. The 17 tri-party agreements are dated beginning in 2013 (4), and continuing through 2014 (2), 2015 (7), 2016 (3), and one that is undated.

that it employs personnel who will relieve the Beneficiary from performing the non-qualifying operational and administrative tasks.

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.* Here, the Petitioner has not established that the Beneficiary has a subordinate level of managerial employees to direct, or sufficient staff to relieve him from significant involvement in the day-to-day operations of the company.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in an 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. The Petitioner markets and sells processing products and technology developed and produced by its Canadian parent company and has been operating since 2013. Although the Petitioner's organizational chart lists two individuals and 12 subcontractors reporting to the Beneficiary, the record does not include evidence that these individuals were employed or were receiving compensation for contracted services when the petition was filed. The record also does not include evidence that these individuals relieve the Beneficiary from performing the actual day-to-day, non-executive operations of the company. Moreover, the Petitioner has not provided evidence that the foreign entity's staff will perform the marketing and sales tasks necessary to serve the Petitioner's operations and to support the organization as a whole.

The Petitioner has not established that the Beneficiary will be employed in an executive capacity.

III. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary will be employed in the United States in an executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of R-(USA), Inc.*, ID# 670226 (AAO Oct. 30, 2017)