U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10344721

Date: SEPT. 8, 2020

Appeal of Vermont Service Center Decision

Form I-129, Petition for L-1A Manager or Executive

The Petitioner, a clothing manufacturer and retailer, seeks to temporarily employ the Beneficiary in the United States as its chief operating officer (COO) 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 Director of the Vermont Service Center denied the petition, concluding the record did not establish that the Beneficiary would be employed in a managerial or executive capacity in the United States. On appeal, the Petitioner contends it has provided sufficient evidence to demonstrate that the Beneficiary would act primarily in an executive capacity in the United States.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. 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. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue we will address is whether the Petitioner established that the Beneficiary would be employed in a managerial or executive capacity in the United States. The Petitioner does not claim that the Beneficiary would be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary would 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.

When examining the executive capacity of a given beneficiary, we will review 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).

A. Duties

To be eligible for L-1A nonimmigrant visa classification as an executive, the Petitioner must show that the Beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(B)(i)-(iv) of the Act. If the record does not establish that the offered position meets all four of these elements, we cannot conclude that it is a qualifying executive position.

If the Petitioner establishes that the offered position meets all elements set forth in the statutory definition, 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). In determining whether a given beneficiary's duties will be primarily executive, we consider the petitioner's description of the job duties, the company's organizational structure, the duties of a 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 a beneficiary's actual duties and role in a business.

The Petitioner stated it was formed in 2013 and engaged in "selling high quality and fashionable clothes, which include t-shirts, blouses, jackets, coats, dresses and accessories." The Petitioner indicated that it operated one retail clothing location in Florida and planned to "further develop its business activities in the U.S. by increasing its business operations and expanding its physical presence." In response to the Director's request for evidence (RFE), the Petitioner submitted the following duties for the Beneficiary as its COO:

1. Work with the CEO of [the Petitioner] towards the long-term development and expansion of the U.S. company – 35% of time spent on this task:
   - ∑ Meet with CEO to establish the long-term and short-term objectives of the company,
   - ∑ Examine reports prepared by her subordinates on existing and projected sales, required inventory/equipment and personnel, supply logistics and marketing disbursements,
   - ∑ Oversee the establishment of the company's store in [redacted] Florida,
   - ∑ Oversee expansion by opening 2-3 new stores and a warehouse in Florida in the coming year,

- ∑ Implement 5-year business model to establish comprehensive financial and production goals, and
- ∑ Report to the CEO only critical issues or decisions.

2. Provide the overall direction of the company's day-to-day operations to ensure operational and financial performance and development of the retail business channel in the U.S.A. – 25% of time to be spent on this task:
   - ∑ Oversee the effectiveness of the retail operations and decide if prompt corrective action must be taken,
   - ∑ Oversee the conduct of regular market analysis programs to drive cost savings and supplier improvements,
   - ∑ Oversee the development and maintenance of client relations in order to ensure growth,
   - ∑ Meet with suppliers to ensure production meets company standards, and
   - ∑ Negotiate best pricing and payment terms with contractors and suppliers.

3. Design and implement the company's business operations structure – 15% of time allocated to this responsibility:
   - ∑ Create an operating budget with financial reports and then initiate action to operate within those fiscal plans,
   - ∑ Direct the development of the business plans and marketing strategies,
   - ∑ Establish store policies and guidelines outlining general practices to be followed by all employees across each store,
   - ∑ Work with design and production team to establish merchandising strategies and regularly adjust them to drive sales,
   - ∑ Develop strict production/marketing timeline including product releases and arrivals,
   - ∑ Develop and communicate to subordinates the protocol for handling manufacturing issues and accountability, and
   - ∑ Plan and develop inventory strategies.

4. Direct and oversee the work of her direct subordinates – 15% of time spent on this task:
   - ∑ Meet with subordinates/future hires to discuss issues and recommendations to develop and implement strong retail strategies,
   - ∑ Correspond frequently with the managers to assess their operational efficiency,
   - ∑ Actively listen to manager's needs to order to ensure everyone is properly trained to offer excellent customer service, and
   - ∑ Review the performance of her subordinates/future hires on a bi-weekly basis to ensure that they meet the company's goals and objectives and conform with internal guidelines and procedures.

5. Oversee the recruitment process of 12 new employees in the next year – 9% of time allocated to this responsibility:
   Interview potential candidates for head of each department, approve hires/fires, and approve promotions/bonuses.

6. Manage the promotions and organize special events – 1% of time spent on this task:
   Analyze sales data and suggest promotions and events, organize them, and supervise managers and employees in establishing promotions.

The Petitioner submitted supporting documentation indicating that it is more likely than not that the Beneficiary would primarily be engaged in non-qualifying operational level duties rather than executive-level tasks. For instance, the Petitioner submitted an advertising contract dated in August 2018 listing the Beneficiary as a contact when ordering an advertisement in a local publication.[1] In addition, the Petitioner provided sales receipts from 2018, one dated as late as September 2018 for the sale of approximately $511 worth of clothing, listing the Beneficiary as a sales representative. Likewise, the Petitioner submitted several shipping invoices including the Beneficiary's name from March through October 2018 reflecting the shipment of goods from Canada to the United States.

Further, in a provided affidavit, the Beneficiary discussed various operational aspects of the business that she would be engaged in, such as ordering merchandise, guiding an employee on selling shoes as opposed to clothes, and assisting salesclerks in the store. Similarly, although we acknowledge the Petitioner submitted claimed policies for its retail clothing store, these documents reflect the Beneficiary's engagement in all of the day-to-day operations of this business, such as how clothing is hung, arranged, folded, and labeled, amongst other non-qualifying functions. Despite this substantial evidence reflecting the Beneficiary's apparent involvement in day-to-day non-qualifying duties, the Petitioner questionably asserted that her duties "will be exclusively executive in nature."

Whether the Beneficiary is an executive employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" executive. See sections 101(a)(44)(B) of the Act. Here, the Petitioner does not sufficiently document what proportion of the Beneficiary's duties would be executive functions and what proportion would be non-qualifying. The Petitioner lists the Beneficiary's duties as including both executive tasks and administrative or operational tasks but does not quantify the time she spends on these different duties. For this reason, we cannot determine whether the Beneficiary would primarily perform the duties of an executive under an approved petition. See IKEA US, Inc. v. U.S. Dept. of Justice, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In contrast to the substantial evidence of the Beneficiary's involvement in the apparent non-qualifying operational aspects of its clothing store in the United States, the Petitioner has provided few details and little supporting evidence to support that she would likely be primarily engaged in executive-level tasks. In fact, the Petitioner's statements leave substantial uncertainty as to whether it was developed sufficiently as of the date the petition was filed to allow the Beneficiary to be primarily focused on qualifying executive-level tasks related to its goals and policies. For example, the Petitioner stated in response to the RFE that it is a "family business that has not yet had the chance to fully grow," noting it was "in it early stages of development," and that the Beneficiary would work to "remedy this situation." Further, the Beneficiary's duties indicated that she would be tasked with establishing its lone store in Florida and that she would work to establish two to three additional stores as well as a warehouse in the United States. However, the Petitioner provided little detail as to how this expansion

[1] The petition was filed on December 14, 2018.

would be accomplished or how the Beneficiary would be relieved, as of the date the petition was filed, from the apparent non-qualifying operational aspects of performing this expansion. It also did not sufficiently describe the Beneficiary's claimed executive level tasks, such as the business models or plans she would implement, critical issues or decisions she would be involved in, suppliers she would negotiate with, or marketing strategies she would put in place.

Again, whether the Beneficiary is an executive employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" executive. See section 101(a)(44)(B) of the Act. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. 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). In sum, the Beneficiary's duties and the other supporting evidence indicate that she would likely be primarily engaged in the non-qualifying operational aspects of its retail clothing location as of date the petition was filed. We note that 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).

Even though the Beneficiary holds a senior position within the organization, the fact that they will manage or direct a 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. Id. 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; however, the position descriptions alone are insufficient to establish that his actual duties would be primarily executive in nature.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, we 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.

As noted, the Petitioner claims the Beneficiary would act in an executive capacity in the United States. 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 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 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.

The Petitioner submitted an organizational chart with the petition reflecting that the Beneficiary would supervise an "acting" financial manager and head of human resources supervising a "U.S.A. accountant." In addition, the organizational chart indicated that the Beneficiary would oversee a manager supervising an assistant manager. The chart also showed that the assistant manager would oversee a seasonal salesclerk.

The Petitioner submitted evidence indicating that it was not sufficiently developed to support the Beneficiary as an executive within a complex organizational hierarchy as of the date the petition was filed. As discussed, the Petitioner stated that its business was not sufficiently developed as of the date the petition was filed, emphasizing it was still in the "early stages of development" and that the Beneficiary was being sent to the United States to "remedy this situation." It also indicated that the Beneficiary would be tasked with establishing its lone retail location and hiring its managers. The Petitioner further stated that as of the date the petition was filed it only employed two individuals, the claimed manager and assistant manager and state employer's quarterly wage documentation most recent to the date the petition was filed from the fourth quarter of 2018 corroborates this. The limited staffing are also reflected in the Petitioner's internal wage documentation, which indicated that the claimed manager was employed fulltime (80 hours per week from December 14 to 28, 2018) while the asserted assistant manager worked only 65.5 hours during this same period.

Further, the Petitioner provided several invoices indicating that the asserted manager was also acting as a sales representative completing clothing sales on the floor of the store throughout 2018. As such, it is reasonable to conclude that the manager and assistant manager were not acting in supervisory capacities as claimed but were operating the Petitioner's sole retail clothing location when the petition was filed. In light of the other documentary evidence also reflecting that the Beneficiary was completing clothing sales and performing various other non-qualifying operational tasks for the Petitioner, it appears likely that she would have been engaged as a first line supervisor of these two salesclerks, rather than as an executive primarily performing higher-level tasks related to goals and policies. In fact, this is further reflected in the proposed store policies the Petitioner contends the Beneficiary drafted, as these involve all day-to-day operational aspects of the clothing business, such as instructions on how clothing and shoes will be arranged, folded, and labeled.

In contrast, the Petitioner projected it would establish two to three additional retail locations and a warehouse during the first year and hire an additional 12 employees. However, it is not clear how, as of the date of the petition, it had sufficient staffing to support the Beneficiary within a complex organizational hierarchy where she would primarily focus on the broad goals and policies of the organization rather than day-to-day operations. Indeed, as we discussed, the Petitioner provided little detail as to the Beneficiary's proposed executive-level tasks as of the date the petition was filed; for instance, how she would expand its locations and hire an additional 12 individuals.

For the foregoing reasons, the Petitioner has not established that the Beneficiary would act in an executive capacity in the United States.

ORDER: The appeal is dismissed.