U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-G-H-, INC.

DATE: SEPT. 24, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which operates retail franchises selling electric massage equipment at shopping malls, seeks to continue the Beneficiary's temporary employment as its president, chief executive officer, and general manager 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 matter is now before us on appeal. On appeal, the Petitioner submits additional evidence and asserts that the Director erred by requiring an unreasonable amount of growth and development from the petitioning entity during its first year of operation.

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 from March 20, 2017, until March 19, 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.

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 a managerial or executive capacity. The Petitioner does not claim that it will employ the Beneficiary 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 stated that the Beneficiary performs the following duties, with the approximate percentage of time to be dedicated to each:

- Develop strategies for further company growth, establish goals, and formulate corporate policy to ensure consistent practices, set and approve budgets (15%);
- Provide overall direction of the company by developing 3 and 5 year plans (15%);
- Plan, direct, or coordinate operational activities such as the manufacturing, marketing or sale of our products, at the highest level of management through subordinate staff managers (15%);
- Oversee and responsible for consistent quarterly revenues, maintain a region pipeline to drive quarterly quota, manage costs, sales and pricing, and provide monthly forecast (10%);
- Direct the Sales, Marketing and Business Development Department, Operations, Customer Service and Accounting Departments (15%);
- Insure a high level of customer and partner satisfaction and engage in any customer related issues when necessary (5%);
- Manage the Regional Sales Manager, Marketing Manager, Accounting Manager, Operations Manager, and maintain the authority to hire, fire, retain quality employees holding management positions (15%); and
- Through managerial subordinates, direct the daily operations of the company (10%).

The above job description is repetitive; several of the listed items appear to be different phrasings of the same basic assertion — that the Beneficiary controls the company by supervising subordinate managers. Also, many of the items describe responsibilities but do not identify tasks that the Beneficiary performs to meet those responsibilities. For example, the list does not say exactly what the Beneficiary does to ensure customer satisfaction and oversee revenues.

The job description referred to Operations and Customer Service Departments, but the Petitioner's organizational chart does not show any Operations Department. The chart does show a Customer Service Department, but that same chart also indicated that all the positions in that department were vacant. Similarly, the Petitioner claimed that the Beneficiary will "[p]lan, direct, or coordinate . . . manufacturing," but the Petitioner has not identified any manufacturing staff. We will discuss the company's staffing in more detail further below.

The Petitioner asserted that the Beneficiary "will continue to direct and manage the overall strategy as it relates to all Sales and Pre-Sales activities in the United States, Australia, New Zealand and Canada." The Petitioner did not specify how much time the Beneficiary would devote to activities outside the United States, or explain how those activities support or relate to the operation of the business in the United States. Continued authority over foreign business activities is not inherently

qualifying, regardless of whether the Beneficiary is in the United States while exercising that authority.

The Director found that the Petitioner had insufficiently described the Beneficiary's duties. On appeal, the Petitioner submits a schedule for what it calls a typical workday for the Beneficiary. This information is condensed below.

9:00-11:00	Reading and replying to emails from international affiliates
11:00-12:30	Review sales reports, marketing analysis, and development plan in use in other countries, consolidate for use in the United States
12:30-1:30	During lunch break, meet with "Key Business stakeholder[s]" regarding banking, marketing, etc.
1:30-2:30	Conference calls with management teams in United States and abroad, on a rotating basis (one country's team each day)
2:30-4:00	Meet with sales manager and marketing and business development manager to discuss policies and goals
4:00-5:00	Conference call with franchisor in Singapore
5:00-6:00	Meet with accountant to discuss budget and finances

The above schedule of meetings and calls does not much resemble the earlier list of responsibilities. It includes significant amounts of time devoted to foreign affiliates which appear to operate in parallel with the Petitioner, as sales offices in their respective countries, rather than supporting or otherwise meaningfully interacting with the petitioning U.S. company.

The Petitioner submits printouts of email exchanges that the Beneficiary had with employees, the franchisor, and shopping mall leasing offices. These messages show that the Beneficiary discussed budget and inventory issues; potential store locations; and particulars of contracts. The messages illustrate the Beneficiary's decision-making authority, but the Beneficiary's control over the company is not at issue in this proceeding.

The Petitioner has not shown that a franchisee selling one franchisor's products in three Southern California shopping malls would require hours of daily policy discussions, or layers of management with which to conduct those discussions.

The Petitioner has not established that the Beneficiary's duties are, or 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.

The Petitioner stated that the Beneficiary "will direct and manage 20 subordinate staff and direct the performance of subordinate tasks across our company's [redacted] brand."[2] The Petitioner, however, did not claim to have all those employees already on staff at the time of filing. On the petition form, the Petitioner claimed 13 current U.S. employees, including the Beneficiary. Payroll documents from December 2017, weeks before the filing date in early January 2018, identified 12 employees, 11 of whom have positions specified on an organizational chart:

- The Beneficiary
- 3 Store Managers
- 5 Sales Consultants
- Accountant
- Business Development Manager

The 12th named employee, whose job title is not evident from organizational charts or employee lists in the record, worked only briefly for the company, earning less than $1300 in late 2017.

The organizational chart also included planned positions that were not yet filled, such as national sales manager, and several positions within an unstaffed Customer Service Department. The Petitioner did not say who, if anyone, was performing the duties of the vacant positions at the time of filing. While a new office petition can take into account a company's projected growth and development over the year following the filing date, there is no such provision for new office extensions. The Petitioner must be able to support a managerial or executive position at the time it files for the extension.

The Petitioner submitted job descriptions for positions subordinate to the Beneficiary. This submission included descriptions for vacant positions, as well as for positions that do not exist on the organizational chart at all, such as "Creative Executive" and "Assistant Business Development Manager." Therefore, the descriptions do not appear to accurately depict the duties of subordinate employees as of the filing date.

The Petitioner did not show that any of the Beneficiary's subordinates held primarily managerial positions at the time of filing. The accountant, initially called "account manager," has administrative

[2] Notwithstanding the reference to "our company's [redacted] brand," and the Petitioner's use of the [redacted] logo on its letterhead, the Petitioner acknowledges on appeal that [redacted] based in Singapore, is the Petitioner's franchisor rather than its affiliate.

duties such as recording all financial transactions, completing tax forms, and processing payroll. The store manager is a first-line supervisor of a small sales staff. The responsibilities of the business development manager, like those of the Beneficiary, often lack identifiable tasks. Such responsibilities include "Identify, Strategize and Manage business development strategy" and "Manage and monitor all business development activities."

In the denial notice, the Director found that the Petitioner did not establish that the Beneficiary primarily directs the management of the company; it is not evident that the company has a significant management structure for him to direct.

On appeal, the Petitioner asserts that the Beneficiary's "position is at the top of the organizational hierarchy." 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 management 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 asserts that it "is beyond reason" to require the "Petitioner to hire all managers during the first year of business operation." The Petitioner need not reach its final level of growth during the first year, and we must consider the stage of the company's development, but the regulations require the Petitioner to support a primarily managerial or executive position within a year of approval of a new office petition. By definition, an executive capacity necessarily involves some type of management for the executive to direct. The Director has no discretion to disregard the regulatory requirements.

The Petitioner has documented its employment of subordinates under the Beneficiary's authority, but the record does not show that these subordinates, at the time of filing, constituted management of the company subject to the Beneficiary's direction.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will primarily direct the management of the petitioning U.S. employer.

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 W-G-H-, Inc.*, ID# 1664294 (AAO Spt. 24, 2017)