U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-I-G- LLC

DATE: SEPT. 26, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an export company, seeks to continue the Beneficiary's temporary employment as its chief executive officer under the L-1A nonimmigrant classification for intracompany transferees.[1] *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 record did not establish, as required, that the Beneficiary will be employed in a managerial or executive capacity under the extended petition or that the Petitioner has the ability to support a managerial or executive position after its initial year of operations.

On appeal, the Petitioner asserts that the Beneficiary will continue to perform executive duties for the company and that it has sufficient staff to support the Beneficiary in an executive capacity.[2]

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, or in a position involving specialized knowledge, for one continuous year within three years preceding the beneficiary's application for admission into the United States. 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

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period January 7, 2016, until January 6, 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.

[2] As the Petitioner does not claim that the Beneficiary will perform primarily managerial duties, we will restrict our analysis to the Petitioner's claim that the Beneficiary will be employed in an executive capacity.

subsidiary or affiliate thereof in a managerial or executive capacity. Section 101(a)(15)(L) of the Act.

Additionally, a petitioner seeking to extend an L-1A new office petition 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).

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 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.

Additionally, 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.

II. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director found that the Petitioner's description of the Beneficiary's proposed duties showed that he would perform the day-to-day activities associated with providing goods and services to the Petitioner's clients and customers. The Director also found that the descriptions of the subordinates' duties did not correspond with the organizational chart submitted. The Director noted several other inconsistencies in the evidence submitted and determined that the Petitioner did not have the financial status or staffing to support a primarily executive position.

On appeal, the Petitioner addresses some of the inconsistencies noted by the Director; however, as will be discussed, not all inconsistencies and deficiencies have been resolved. The Petitioner asserts that the Beneficiary's direct subordinates hold managerial positions and repeats some of their duties. The Petitioner also emphasizes that it "serves as a sourcing, logistics and warehouse entity to [the Beneficiary's foreign employer]," and can also rely on the foreign entity's financial support.

When examining the executive capacity of a given beneficiary, we will look first 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 an executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we also 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.

A. Duties

Based on the definition of executive capacity, a 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.

In a letter submitted in support of the petition, the Petitioner stated that it was organized "to source products in the US, export, and sell the products wholesale to brick and mortar retailers in Nigeria." The Petitioner noted that during its first year of operations it shipped items such as groceries, office supplies, computers, and other electronic devices to be sold through its Nigerian parent company. The Petitioner stated further that the Nigerian economy and the Nigerian government's directives disrupted and negatively impacted its performance causing it to redirect its business. The Petitioner claimed that it expanded its operations to include the export of hazard and fire control material to Nigeria, that it partnered with a U.S. manufacturer of fire control material for this purpose, and that its parent company has been recognized as the sole representative of in Nigeria.[3]

The Form I-129, Petition for Nonimmigrant Worker, was filed in December 2016. The Petitioner stated on the Form I-129 that it currently employs three people. In the letter submitted in support of the petition, the Petitioner listed the Beneficiary's job duties as chief executive officer to include:

- Formulating and successfully implementing company policy; 20%
- Directing strategy towards the profitable growth and operation of the company; 15%
- Developing strategic operation plans that reflect the longer-term objectives and priorities established by the board; 10%
- Sourcing for business for the company and providing funds to execute jobs; 10%
- Putting in place adequate operational planning and financial control systems; 5%
- Ensuring that the operating objectives and standards of performance are not only understood but owned by the management and other employees; 5%

[3] The record includes evidence that the foreign entity was appointed the master distributor of for the Nigeria territory on September 1, 2015. The record does not include an agreement between the Petitioner and The Petitioner does not sufficiently explain its new purpose and involvement in the partnership established by the foreign entity with a partnership established more than a year prior to filing this extension petition.

- Closely monitoring the operating and financial results against plans and budgets; 5%
- Taking remedial action where necessary and informing the board of significant changes; 5%
- Maintaining the operational performance of the company; 5%
- Monitoring the actions of the functional board of directors; 5%
- Assuming full accountability to the board for all company operations; 5%
- Representing the company to major customers and professional associations; 5%
- Building and maintaining an effective executive team; 5%

These general responsibilities do not convey an understanding of the Beneficiary's actual day-to-day duties. Reciting 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 and 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).

In response to the Director's request for evidence (RFE), the Petitioner re-stated some of the initially described duties and in some instances re-allocated the amount of time the Beneficiary would spend on each broad area of responsibility. For example, the Petitioner initially indicated that the Beneficiary would spend 15 percent of his time directing strategy towards the profitable growth and operation of the company and 10 percent of his time developing strategic operations plans that reflect longer-term objectives and priorities. However, in response to the Director's RFE, the Petitioner combines these two general responsibilities and claims that the Beneficiary will only spend 5 percent of his time on this duty. The Petitioner does not explain the re-allocation of the Beneficiary's time and does not further expand upon the actual duties that will engage the Beneficiary in performing these general responsibilities.

The Petitioner also added duties to the original job description. For example, the Petitioner claims, in response to the Director's RFE, that the Beneficiary will spend 10 percent of his time supervising the selection process, price negotiations, and shipment of product to be exported to Nigeria, will spend 15 percent of his time participating in major negotiations with vendors, such as [redacted] on behalf of the company, and will continue to spend 15 percent of his time directing key marketing efforts such as bringing Nigerian delegations to Georgia for live demonstrations of the fire equipment. Even with the additional duties added, the re-allocation of the Beneficiary's time does not total 100 percent. The revision of the Beneficiary's continued duties and responsibilities and the revision to the time the Beneficiary spends on certain duties creates ambiguity in the record regarding the tasks outlined and what the Petitioner will expect of the Beneficiary in the course of his daily routine.

Additionally, the Beneficiary's negotiations with [redacted] and marketing the fire control equipment are not sufficiently detailed to establish that these duties comprise primarily executive duties for the Petitioner rather than operational tasks for the Petitioner or

operational tasks on behalf of the foreign entity. The record does not include information or evidence explaining why the Petitioner is negotiating with and marketing the fire control equipment to Nigeria, when the foreign entity had already been established as the master distributor for this product in September 2015. The Petitioner does not adequately explain how the Beneficiary's negotiation and marketing of fire control products relate to its business operations. Moreover, the Petitioner claims that it "serves as a sourcing, logistics and warehouse entity," but does not sufficiently detail how its redirected operations connect with these services.

Further, the fact that the Beneficiary 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) 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, the position descriptions in this matter do not describe the Beneficiary's actual day-to-day duties and thus are insufficient to establish that his actual duties would be primarily executive in nature.

B. Staffing

In the letter in support of the petition, and in response to the Director's RFE, the Petitioner identified three employees in addition to the Beneficiary, including a head of operations and administration, a sales representative, and a logistics coordinator. The record includes a copy of the Petitioner's IRS Form 941 and the Georgia State Department of Labor's Employer's Quarterly Tax and Wage Report filed for the fourth quarter of 2016, the quarter in which the petition was filed. The fourth quarter wage reports indicate that the Petitioner employed three individuals, including the Beneficiary. The individuals shown as employed on the fourth quarter tax and wage report are the Beneficiary, and the individuals in the positions of head of operations and administration and sales representative. The Petitioner's 2016 IRS Forms W-2 were issued to the Beneficiary, the head of operations and administration, and the sales representative.

The record does not include evidence that the logistics coordinator was employed when the petition was filed in December 2016.[4] As the record does not contain evidence that the logistics coordinator was employed when the petition was filed, his employment may not be considered to support this petition. 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).

[4] The record includes an employment offer to the individual identified as the logistics coordinator which is dated December 15, 2016. However, as detailed above, the record does not include evidence that this individual started work for the Petitioner in December 2016.

The Petitioner explained in response to the Director's RFE and again on appeal that because of its business setbacks in the first year of operations, it had reduced the hours of the head of operations and administration and sales representative[5] and renegotiated their salaries.[6] The Petitioner does not include evidence or other detail regarding the number of hours reduced and whether it employed these two individuals full-time.

The Petitioner initially listed the duties of its head of operations and administration as: developing and managing the annual budget, ensuring financial targets are met, driving the business to increase profit, working with the legal department, reporting to the Beneficiary regarding financial commitments, payroll, purchases, taxes, and procurement, organizing HR training and following up on business development needs, and maintaining marketing efforts including overseeing the marketing program. The Petitioner does not expand upon or explain the actual duties that engage the individual in this position in the course of her daily routine.

In response to the Director's RFE, the Petitioner re-allocated the time the head of operations and administration spent on her duties and added that she spent 25 percent of her time liaising with the foreign company's sales team, with vendors, and with the Petitioner's outside accounting service. On appeal, the Petitioner emphasizes that the individual in this position conducts HR training and is in charge of training for the Nigerian delegations coming to the United States. Although the record includes evidence of a two-day training course on administrative procedures, sales, operations management, and logistics coordination attended by the Beneficiary, the administration/sales employee, and the logistics coordinator, the purpose of the training and its curriculum are unclear. The curriculum, for example, does not specifically relate to the Petitioner's operations.

Additionally, the record includes evidence that the president of [redacted] not the Petitioner's employee(s), prepared the curriculum, invited foreign dignitaries, and conducted the fire control product training for the Nigerian delegations.[7] The inconsistent information regarding this position's actual role for the Petitioner casts doubt on the actual duties expected of and performed by the individual in this position. The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Additionally, although the administrative/sales position is depicted on the Petitioner's organizational chart as reporting to this position, the duties described do not reflect that the head of operations and administration primarily supervises any position or that she manages a

[5] In response to the Director's RFE, the sales representative's title was changed to "administration/sales liaison."

[6] The initial employment offer to the individual in the position of head of operations and administration is dated November 5, 2015, and is for a significantly higher salary than the subsequent January 8, 2016, employment offer. The initial employment offer to the individual in the sales representative or administration/sales liaison position was not included for the record. The record includes a copy of an employment offer dated January 8, 2016, issued to the individual in the administration/sales liaison position.

[7] The dates and certificates of the training offered to the Nigerian delegation include inconsistencies. For example, a certificate of achievement to use certain fire control products is dated January 25, 2016, a date prior to the date of the invitation letters and prior to the dates various trainings began, later in that year. The record lacks consistent information regarding this training and lacks probative evidence of the Petitioner's direct involvement in this training.

specific function whose duties are carried out by U.S. or overseas staff. The record does not include sufficient consistent, probative evidence to establish that this position is a managerial, supervisory, or professional position.

The Petitioner initially described the sales representative position as spending time on administrative and office support activities, performing some of the logistics coordinator duties such as monitoring the shipper until goods reached their destination, and negotiating product purchases and communicating with the executive manager, as well as tracking sales progress. In response to the Director's RFE, the Petitioner revised the title of this position and the duties indicating that the position is primarily an administrative or clerical position. On appeal, the Petitioner emphasizes that the administrative/sales position coordinates with the foreign entity's sales team but does not sell goods in the United States. However, neither iteration of this position's duties is sufficient to establish that the individual in this position will relieve the Beneficiary from performing non-qualifying duties.

To establish employment in an executive capacity under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of the organization. Inherent to this definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. One does not qualify as an executive under the statute simply because one "directs" the enterprise as the sole managerial employee. Here, the Petitioner has not established how the positions held by the Beneficiary's subordinates are managerial positions. Rather, the record shows that these individuals perform the operational and administrative tasks necessary to continue the Petitioner's business. The record is deficient in establishing that the Beneficiary directs a subordinate level of managerial employees and will perform primarily executive duties.

On appeal, the Petitioner asserts that the Beneficiary's direct subordinates - the head of operations/administration, and the logistics coordinator - are managerial positions and that this visa classification was not meant to limit executives or managers to persons who supervise a large number of persons or a large enterprise, but rather U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization. Although we consider the overall purpose and stage of development of the organization if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the Petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. Here, the Petitioner has not established that its business has the necessary staffing to sufficiently relieve the Beneficiary from performing the necessary first-line supervisory duties of non-managerial, non-supervisory, and non-professional employees and from performing other routine day-to-day operational tasks. Accordingly, the Petitioner is ineligible for an extension of its new office petition.

III. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of K-I-G- LLC*, ID# 610906 (AAO Sept. 26, 2017)