U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-S-USA, LLC

DATE: SEPT. 28, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a restaurant operator, seeks to continue the Beneficiary's employment as its "President/CEO" 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 new office extension petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in an executive capacity.

On appeal, the Petitioner submits a brief citing to a precedent decision to support the claim that it provided sufficient evidence establishing that the Beneficiary will primarily perform executive job duties.

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 manager, 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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period March 11, 2015, through March 10, 2016. 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 found that the Petitioner did not establish that the Beneficiary would be employed in the United States in an executive capacity.[2]

The statute defines an "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 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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) 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 the 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 a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

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 managerial 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.

[2] The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, our analysis will address only whether the record contains sufficient evidence to establish that the Beneficiary's proposed employment would be in an executive capacity.

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it operates a restaurant and has eight employees. The Petitioner provided a new business plan and stated that the Beneficiary's job duties as president/CEO would remain unchanged, despite the fact that the company changed its business model from a cellular phone and service business to a fast food restaurant. It claimed that the Beneficiary "directs the organization and continues exercising an extraordinary amount of discretion [*sic*] authority and will make decisions on all major issues."

The Petitioner provided a separate job description for the Beneficiary, highlighting six broad categories with a corresponding percentage breakdown and a list of duties and responsibilities within each category, summarized as follows: (1) "Legal Compliance" (5% of the Beneficiary's time) - ensuring proper filing of documents and compliance with laws and regulations; (2) "Mission, Policy, and Planning" (10%) - working with "top management" to establish company goals and "evaluate [the Petitioner]'s relevancy to the community" and keeping management "fully informed on the condition of [the Petitioner]"; (3) "Management and Administration" (35%) - overseeing the Petitioner's proper function, program quality, staffing, and management personnel; (4) "Governance" (20%) - evaluating company performance, establishing strategies, and managing the company's "due diligence process"; (5) "Financing" (10%) - promoting the Petitioner's "programs and services," overseeing the Petitioner's fiscal activities, and ensuring that the Petitioner has "an effective fund development program" and "availability of products to support solicitation"; and (6) "Community Relations" (20%) - advocating for the Petitioner's interests in the public and private sectors, hearing client and community feedback and maintaining "cooperative relationships with key constituencies," and representing the Petitioner within the community.

In response to the Director's request for a more detailed description of the Beneficiary's duties, the Petitioner provided a nearly identical position description. The Petitioner also added a job summary in which it again highlighted the Beneficiary's discretionary authority, wide latitude in making discretionary decisions, and his lack of accountability to a higher authority. The Petitioner claimed that the Beneficiary "delegates responsibility for management and day-to-day operations" to the restaurant's general manager, who then "carries out its governance function."

The Petitioner also did not clarify the multiple ambiguities in its original job description, which contained vague language that is not readily applicable within the context of the Petitioner's business and gives little indication as to the specific underlying tasks the Beneficiary would perform as president/CEO of a fast food restaurant. For example, the job description used phrases like "relevancy to the community" and "philanthropy and fund development" when discussing the Beneficiary's role with respect to the Petitioner's mission, policy, and planning. However, further clarity is needed to convey an understanding of these phrases and the Beneficiary's actual role in the day-to-day operation of the business.

Likewise, the Petitioner claimed that the Beneficiary would further governance of the company by "[h]elp[ing] the [c]ompany articulate its own role and accountabilities" and that managing the company's finances would involve "[p]romot[ing] programs and services." Again, these general claims require further explanation as neither is readily understood within the context of the Petitioner's business. It is unclear what "role and accountabilities" the Petitioner would articulate or

to whom it would articulate these elements. The Petitioner was equally vague in neglecting to specify the nature of "programs and services" it seeks to perform; aside from promoting the restaurant and the food it serves, it is unclear what other "programs and services" the Petitioner can offer or promote.

In the denial decision, the Director emphasized that the Beneficiary's position description was vague and only identified generic job responsibilities. The Director further noted that the Petitioner did not list the Beneficiary's specific daily job duties or provide examples of the types of executive-level decisions the Beneficiary has made or would make. Based partly on these findings the Director concluded that the Petitioner did not establish that the Beneficiary would primarily perform executive duties under the extended petition.

On appeal, the Petitioner submits a brief in which it emphasizes that it need only establish eligibility by the preponderance of the evidence and claims that it submitted sufficient evidence to meet this standard. The Petitioner compares its supporting evidence to the evidence submitted in *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), where we determined that a letter from the applicant's employer and an SEC Form 10-K constituted sufficient evidence for the purpose of establishing that the U.S. entity was a subsidiary of the Beneficiary's temporary employer abroad. We disagree with the Petitioner's argument and find that the facts and circumstances in the present matter are not analogous to those in *Chawathe* and thus the Petitioner has not established a basis for sustaining this appeal. Unlike in the present matter, the applicant in *Chawathe* was required to submit evidence to prove an objective fact, i.e., a parent-subsidiary relationship between the applicant's foreign and U.S. employers. The applicant did that by submitting a tax document and a letter from his employer. In light of the hardship involved in obtaining a more probative piece of evidence, such as company-issued stock certificates, and the applicant's submission of the SEC Form 10-K, which included information that was sufficiently probative and readily available, we determined that the Petitioner met the preponderance of the evidence standard. *See id.*

In the present matter, the Director adequately conveyed the importance of submitting a detailed job description with a list of the specific tasks the Beneficiary would perform. Without this critical information, we cannot determine whether the primary portion of the Beneficiary's time would be allocated to executive tasks. The actual duties themselves 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 fully discussed above, the Petitioner in this instance provided an inadequate job description that lacked a detailed discussion of the Beneficiary's job duties and instead relied on ambiguous terminology that was not applicable to the Beneficiary's position and could not be interpreted within the context of the Petitioner's business. The Petitioner was merely instructed to provide a more probative job description, which it could have easily done, since it already employs the Beneficiary in the offered position. While the Petitioner successfully conveyed an understanding of the Beneficiary's level of discretionary authority, the vague nature of the job description precludes us from understanding how the Beneficiary would use that authority and what underlying duties he would carry out on a daily basis as the president and CEO of a restaurant.

Moreover, the Petitioner indicated that the Beneficiary would market the Petitioner's products, but did not state specifically how much time the Beneficiary would allocate to this non-executive task. In addition, as discussed further below, the record does not support a finding that the Beneficiary's subordinate staff would relieve him from involvement in the many non-executive activities associated with the daily operation of the Petitioner's business. While no beneficiary is required to allocate 100% of their time to managerial-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Where, as in this instance, the Petitioner provides a job description that does not disclose the Beneficiary's actual job duties, we are unable to gauge how the Beneficiary would spend the primary portion of his time or whether the tasks to be performed would be primarily of an executive nature.

B. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining a beneficiary's claimed executive capacity, 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 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.*

The Petitioner provided an organizational chart, which shows that the Beneficiary directly supervises a general manager who, in turn, supervises three cooks and three cashiers. The Petitioner also provided an employee list which included each employee's name, title, and annual salary and suggested that all employees were working full-time or close to full-time. The request for evidence notified the Petitioner that this evidence was insufficient to establish that it has sufficient staffing

levels to support the Beneficiary in an executive position. The Petitioner was also notified that the record lacked a discussion of the support staff and their assigned job duties.

In response, the Petitioner did not provide the requested job descriptions for its support staff and instead resubmitted the original organizational chart and employee list, accompanied by wage and tax documents for 2016 and a 2016 payroll register. While Petitioner's wage report for the 2016 first quarter indicates that it had 11 employees in March 2016 during which the petition was filed, the payroll register supports the information claimed in the Petitioner's Form I-129. That said, the payroll register indicates that most of the Petitioner's employees worked on a part-time basis and indicates that two of the three cooks who were named on the organizational chart did not work for the Petitioner at all in March 2016 when the petition was filed. One other employee, a cashier, worked only four and a half hours during the two-week time period that includes the date of petition's filing. Thus, while the payroll register supports the claim that the Petitioner had at least eight employees at the time the petition was filed, it is unclear whether the Petitioner's staffing was sufficient to relieve the Beneficiary from having to engage in the various non-executive tasks involved in working in and running a restaurant as most of the employees are shown to have received wages commensurate with part-time employees and three of the employees were not listed in the organizational chart, thereby making it impossible to determine what positions these employees held.

In denying the petition, the Director noted the absence of employee job descriptions and educational credentials and concluded that the record lacked sufficient evidence to establish that the Petitioner would be able to relieve the Beneficiary from having to primarily perform its non-executive functions.

On appeal, the Petitioner submits job descriptions for all of the positions within its organization, indicating that aside from employee scheduling, training, and general oversight, the general manager performs many of the restaurant's daily operational tasks and customer service functions. Further, the payroll register indicates that the general manager was actually paid a salary of only $700 bi-weekly, which is considerably less than her claimed $30,000 annual salary. This wage discrepancy indicates that the general manager may not have been working on a full-time basis, thus raising the question of who, if not the Beneficiary, would assume the general manager's non-qualifying operational and first-line supervisory duties when she is not available to carry out those tasks. In fact, even if the general manager was working on a full-time basis at the time of filing, it is doubtful that she was available to work during all of the restaurant's hours of operation, which would reasonably exceed 40 hours per week. It is unclear who, if not the Beneficiary, would take over the general manager's non-executive tasks when she is not on duty.

We must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in denying a visa petition for classification as a multinational manager or executive. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company.

Family Inc. v. USCIS, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, the Petitioner did not establish that the subordinate staff in place at the time of filing would be sufficient to relieve the Beneficiary from significant involvement in the day-to-day operations of its restaurant, and thus it has not supported its claim that he performs primarily executive duties or that it has a reasonable need for an executive employee who would spend his time primarily focused on the broad policies and goals of the organization.

For the reasons discussed above, the evidence submitted does not establish that the Beneficiary would be employed in an executive capacity under the extended petition.

III. DOING BUSINESS

Finally, while not addressed in the Director's decision, we find that the Petitioner did not establish, as required, that it had been doing business for the previous year. *See* 8 C.F.R. § 214.2(l)(14)(ii)(B). The phrase "doing business" is defined as the regular, systematic, and continuous provision of goods or services and does not include the mere presence of an agent or office.

The Petitioner's initial new office petition was approved in March 2015. At the time of filing this petition, the Petitioner did not disclose the prior year's gross or net income on the Form I-129. The Petitioner stated in its supporting cover letter that its original intent was to operate a [redacted] sales and service outfit, which it claimed it was forced to close. The Petitioner did not provide supporting evidence to show that it actually operated a [redacted] store or that it was doing business at any time in 2015. The record shows that the Petitioner started operating its restaurant business no earlier than January 2016, approximately two months prior to filing this petition.

In light of the above, the Petitioner has not provided sufficient evidence to show that it was doing business for the previous year. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in a managerial capacity under the extended petition or that it was doing business for the previous year.

ORDER: The appeal is dismissed.

Cite as *Matter of T-S-USA, LLC*, ID# 765103 (AAO Sept. 28, 2017)