U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6313653

Date: FEB. 13, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Multinational Managers or Executives)

The Petitioner, a provider of cosmetic services and products, seeks to permanently employ the Beneficiary as chief executive officer (CEO) under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This employment-based "EB-1" immigrant classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in a managerial or executive capacity.

The Director of the Nebraska Service Center denied the petition on the ground that the Petitioner did not establish, as required, that the Beneficiary will be employed in a managerial or executive capacity in the United States.

On appeal the Petitioner submits a brief and additional evidence, and asserts that the record establishes that the Beneficiary has been and will continue to be employed in an executive capacity in the United States.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

The term "executive capacity" is defined in section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), as "an assignment within an organization in which the employee primarily –

> (i) directs the management of the organization or a major component or function of the organization;
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> (ii) establishes the goals and policies of the organization, component, or function;
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> (iii) exercises wide latitude in discretionary decision-making; and
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> (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization."

Section 101(a)(44)(C) of the Act further provides, in pertinent part, that:

> If staffing levels are used as a factor in determining whether an individual is acting in a[n] . . . executive capacity, [U.S. Citizenship and Immigration Services] shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a[n] . . . executive capacity . . . merely on the basis of the number of employees that the individual . . . directs or has directed.

II. ANALYSIS

The I-140 petition in this case was accompanied by a letter from the Petitioner's general manager, which addressed the substantive requirements of 8 C.F.R. § 204.5(j)(3). As explained by the general manager and documented with supporting materials, the Beneficiary is the sole owner of a company in China, which was established in 2003 and is described as a manufacturer of display rooms, display cabinets, and display props of major electrical appliance companies such as , , , , , and

In 2014 the Petitioner was incorporated in California, by , who launched a nail and facial salon engaged in the sale of cosmetic services and products. In December 2016, the sole shareholder up to then, sold a 60% interest in the business to the Beneficiary for a price of $300,000. The Beneficiary continued to operate his company in China until July 2017, after which he entered the United States on an L-1A nonimmigrant visa to assume the position of CEO with the Petitioner. now a minority co-owner with a 40% interest the Petitioner, continues to work for the business in the subordinate position of general manager. In March 2018, the instant petition was filed seeking immigrant status for the Beneficiary as a multinational executive.

After issuing a notice of intent to deny (NOID) and receiving the Petitioner's response, the Director denied the petition on the grounds that the Petitioner did not submit sufficient evidence to establish that the Beneficiary would be working in an executive (or managerial) capacity for the U.S. business

and that the organization of the U.S. business was not mature or complex enough to warrant the services of a fulltime multinational executive (or manager). The Director found that while the Beneficiary may spend some of his time overseeing and directing other employees, he would also be involved in non-qualifying administrative and operational duties and would not be employed primarily in an "executive capacity." The Director concluded that the Beneficiary was, in effect, a supervisor of non-managerial and non-professional employees.

On appeal, the Petitioner asserts that the Director's decision did not properly consider all of the evidence it submitted, contained factual and legal errors, failed to consider the reasonable needs of the Petitioner's business, did not apply the correct standard of proof, and ignored the intent of Congress and a recent executive order. The Petitioner also submits some additional evidence. For the reasons discussed hereinafter, we find that the Petitioner has not overcome the Director's grounds for denial.

When examining whether a beneficiary will be employed in an executive capacity, we first look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Based on the statutory definition of executive capacity, the petitioner must 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). The petitioner must also demonstrate 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. Beyond the required description of the job duties, we examine the company's organizational structure, the duties of the 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 the beneficiary's actual duties and role in the business.

As evidence of the Beneficiary's duties as CEO of the U.S. entity, the Petitioner provided a list of ten specific duties, each of which is linked to one or more of the first three criteria of "executive capacity" as defined in section 101(a)(44)(B) of the Act. None of the duties is linked to the fourth criterion of "executive capacity" in section 101(a)(44)(B) of the Act. While the job duties described on appeal appear to be largely executive in nature, they do not by themselves demonstrate that the Beneficiary's position is one of "executive capacity" as contemplated in the Act. The language of the four criteria in section 101(a)(44)(B) clearly indicates that the petitioning organization must have a certain size and complexity to warrant the services of an employee with "executive capacity" duties and responsibilities.

The Petitioner has provided an organizational chart of [redacted] showing an otherwise unidentified board of directors at the top, below that entity the Beneficiary as CEO, and below him the general manager [redacted] Reporting to the general manager are the store manager and the "development department" manager. Reporting to the store manager are the managers of the marketing & administration, manicure & pedicure, and facial, tanning & body departments. Reporting to the development department manager are the managers of the product development and franchise store development departments. Rounding out the organizational chart are assorted operational positions such as cashiers, salespersons, technicians, and representatives. The chart shows a total of 31 positions, of which 18 are employees and 13 (all in the lower operational positions) are independent

contractors. According to the Petitioner, every employee in a managerial position has a bachelor's degree or at least some college education.

In a supplementary letter describing the Beneficiary's position in the hierarchy and tying his duties to the regulatory criteria of "executive capacity," the Petitioner states that the CEO, as its top executive, will (1) direct the management of each department [six in all] through department managers, develop overall objectives, strategies, policies and work plans, and supervise and evaluate job performances; (2) establish the goals and policies of the business and achieve business plan objectives utilizing the reports of the department managers, monitor industry and market trends, approve the operating budget formulated by the general manager and department manager, and set sales targets; (3) exercise wide latitude in discretionary decision-making by negotiating joint business agreements with other cosmetics companies, hiring independent contractors, and outsourcing service providers; and (4) receive only general supervision or direction from the board of directors.

While the Beneficiary may be relieved of performing any daily operational tasks of the business, such as direct sales of cosmetic products and the provision of nail and facial services, we agree with the Director that the Petitioner has not established that it is complex enough to warrant the services of a full-time multinational executive. The Petitioner consists of a single store selling cosmetic products and services, so it is a small operation without much organizational complexity.

While the Petitioner asserts that it has a board of directors to which the CEO is answerable, there is little evidence thereof in the record. Documentation submitted with the petition shows that a board of directors was created when was incorporated in 2014, and in its first meeting the sole shareholder served in the multiple positions of president, secretary, treasurer, chairman, and incorporator. No further documentation has been submitted to show that the board of directors has been updated to include additional members and officers aside from who is now the company's general manager and directly subordinate to the Beneficiary. It is unclear, therefore, whether the Petitioner has a functioning board of directors, as claimed, that exercises any supervision or provides any direction vis-à-vis its top executive, the CEO.

Having broad discretionary authority over a petitioner's day-to-day business operations does not infuse a position with all the definitional elements of "executive capacity." The statutory definition in section 101(a)(44)(B) of the Act indicates that a person must have an elevated position within a complex organizational hierarchy, or within a major component or function of the organization. An individual will not be deemed a multinational executive under the statute simply because they have an executive title or because they direct the enterprise as the owner or sole managerial employee. While the Beneficiary is not the sole owner or operator of the Petitioner, he is the majority shareholder of the company and the only other shareholder has a subordinate position with no evident authority to supervise, direct, or otherwise control the Beneficiary, as CEO. Thus, the Beneficiary runs a small enterprise with little oversight. He does not occupy an elevated executive position in a complex organization under the general supervision or direction of other high executives or a board of directors.

In summation, based on the size, scope, and nature of the Petitioner's business – a single store selling cosmetic products and services – we find that the Beneficiary, as its CEO, will not be employed in an "executive capacity" as contemplated in section 101(a)(44)(B) of the Act.

The Petitioner's claim that the Director applied the wrong standard of proof is without merit. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). To meet this burden, the petitioner must prove by a preponderance of evidence that it and the beneficiary are qualified for that benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The "preponderance of the evidence" standard requires that the evidence demonstrate that the petitioner's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Id.* (quoting *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. We have applied this standard in our appellate review, and find no reason in the record of proceeding to conclude that the Director did not do so in his original consideration and denial of the petition.[1]

III. CONCLUSION

The Petitioner has not established that the Beneficiary will be employed in an executive capacity in the United States. The appeal will be dismissed for the above stated reason. In visa petition proceedings it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

[1] The Petitioner also asserts that the Director failed to consider (1) the intent of Congress in its establishment of the visa programs for multinational executives and managers, both immigrant and nonimmigrant, to promote the seamless operation of international businesses and help U.S. businesses compete for international talent and market share; and (2) a recent executive order in 2017 to "buy American and hire American" and thereby foster U.S. economic growth and job creation. The AAO adjudicates appeals in accordance with applicable statutory and regulatory provisions. The Petitioner has not adequately explained how the intent of Congress in establishing this visa classification and the executive order mandates an approval or otherwise supports its petition filing. For the reasons stated herein, the Petitioner has not established that the Beneficiary will work in an executive capacity.