U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF CCHP- INC.

DATE: JUNE 14, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR NONIMMIGRANT WORKER

The Petitioner, an importer and wholesaler of home appliances and hardware, seeks to continue temporarily employing the Beneficiary in the L-1A nonimmigrant visa category as its chief executive officer (CEO). Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). L-1A classification allows a business to transfer a qualifying foreign employee to a related U.S. entity to work in a managerial or executive capacity.

The Director of the California Service Center denied the petition. The Director concluded that, contrary to regulation, the Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity.

On appeal, the Petitioner submits additional evidence. It also asserts that the Director overlooked previously submitted evidence, misapplied the standard of proof, and disregarded Congressional intent and an executive order that the company claims support the petition's approval.

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.*

## II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Petitioner does not claim that it would employ the Beneficiary in a managerial capacity. We therefore consider only whether his work would be executive in nature.

"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). The Petitioner must also 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 assessing the executive nature of an offered position, we examine a petitioner's description of the job's duties. *See* 8 C.F.R. § 214.2(l)(3)(ii) (requiring an L-1 petitioner to submit "a detailed description of the services to be performed"). We also examine: the entity's organizational structure; its other positions and their job duties; the nature of its business; and additional factors affecting a beneficiary's role and duties.

The Petitioner here incorporated in late 2012. It states that it imports products manufactured by its parent company in China, such as air conditioners, and sells them in the United States. The Petitioner claims that it has 13 workers, including eight employees and five independent contractors. The company states that its general manager, chief financial officer (CFO), and five department managers report to the Beneficiary. The Petitioner's organizational chart describes its departments as: office; freight; sales; development; and technology.

A. Staffing and Organizational Structure

The term "executive capacity" describes an elevated position within a complex, organizational hierarchy. *See* section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must be able to "direct the management" and "establish the goals and policies" of an organization. *Id.* An executive position therefore must focus on an organization's broad goals and policies, rather than on its day-to-day operations.

Here, the Petitioner has not demonstrated that it has sufficient, subordinate staff to allow the Beneficiary to focus on the company's broad policies and goals. First, inconsistencies of record cast doubt on the Petitioner's claim that five independent contractors work for it. This extension request included a copy of IRS Form 1096, Annual Summary and Transmittal of U.S. Information Returns. The form indicated that, in 2017, the company issued one IRS Form 1099, Miscellaneous Income, to an individual, independent contractor. In response to the Director's request for additional evidence (RFE), however, the Petitioner submitted another version of its 2017 Form 1096. The second version states the company's issuance of four Forms 1099. The unexplained discrepancies in the number of Forms 1099 issued cast doubt on the Petitioner's claim that five independent contractors work for it.

*See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). The inconsistencies also cast doubt on the authenticity of the Petitioner's evidence. *Id.* (stating that doubt cast on one aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of its remaining evidence).

In addition, the Petitioner's organizational chart names three individual, independent contractors who purportedly serve as the company's sales representatives. The three additional Forms 1099 in the Petitioner's RFE response, however, do not indicate their issuance to the individuals listed on the organizational chart. Rather, the Petitioner addressed the forms to companies with which it has sales representation agreements. The agreements allow the companies to sell the Petitioner's products to designated customers and require the companies to employ any personnel needed to fulfill the agreements. Thus, the Forms 1099 and sales agreements indicate that the companies that signed the agreements employ the individual sales representatives listed on the Petitioner's organizational chart. The materials also indicate that, pursuant to the agreements, the Petitioner issued the additional Forms 1099 to the companies for commissions on sales of its products.[1] This arrangement does not corroborate the claims made regarding the Petitioner's business model or the description of the Beneficiary's duties and oversight. The job duties of the Petitioner's sales manager indicate that he manages a sales staff. If the other companies employ the sales representatives, however, the record does not explain how the Petitioner's sales manager supervises them, or whether the Petitioner has other sales staff. This raises questions about both the claimed duties of the sales manager and the claimed duties of the Beneficiary as they relate to the business' sales function.

Further, the Petitioner states that eight employees of its parent company manage and staff its freight and development departments from China. The Petitioner provided a letter from its general manager asserting its need for the employees' services and a list of their positions and job duties with it. Contrary to the RFE's request, however, the Petitioner has not explained and documented how the employees support the U.S. entity in addition to its parent company or how these employees divide their time. Also, the employees' U.S. positions appear inconsistent with their listed titles on an organizational chart of the parent company. The chart lists the manager of the Petitioner's freight department (or someone with the same name) as the manager of the parent company's domestic sales department. The chart also appears to list a subordinate worker in the Petitioner's development department as the parent company's manager of international trading. This worker also shares the name of a shareholder listed on a corporate document of the parent company. The record does not explain whether these employees are the same workers listed on the organizational chart of the parent company and, if so, why they are working in different roles for the Petitioner. *See Matter of Ho*, 19 I&N Dec. at 591 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of its remaining evidence). The Petitioner has also not explained how the employees are supporting it or dividing their time between the disparate positions such that the freight and development departments of the Petitioner are fully staffed.

[1] Public information identifies two of the individuals listed as sales representatives on the organizational chart as principals of two of the three companies that signed sales representation agreements with the Petitioner. The third individual appears to be an employee of the remaining company.

As the Petitioner asserts on appeal, we may consider the Beneficiary's role in the larger qualifying organization. *See Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016). Unlike in *Z-A-*, however, the record here does not establish the existence of the foreign staff of the Petitioner's parent company or the staff's purported support to the Petitioner. Absent a credible explanation of how the employees serve both the U.S. entity and the parent company, we cannot conclude that the U.S. entity has sufficient staff to relieve the Beneficiary from performing the daily operational duties of the business.

On appeal, the Petitioner argues that its U.S. workers and the eight employees of its parent company in China would relieve the Beneficiary of daily, operational duties. As previously discussed, however, the record does not establish the existence of all of the Petitioner's claimed subordinate workers. The Petitioner has not demonstrated how the eight employees in China would support the U.S. entity. Also, the record indicates that other companies employ three of the Petitioner's claimed five independent contractors. Thus, the Petitioner has not sufficiently explained who would perform daily activities in its sales, freight, and development departments. The record therefore does not establish the Petitioner's possession of sufficient staff to allow the Beneficiary to primarily focus on executive duties.

As previously indicated, we must consider the Petitioner's reasonable needs in light of its overall purpose and developmental stage. *See* section 101(a)(44)(C) of the Act. We cannot impose a minimum size requirement on an L-1A petitioner. But we may consider size as a factor in assessing whether a business can support a manager or executive. *See, e.g., Brazil Quality Stones, Inc. v. Chertoff*, 531 F.3d 1063, 1070 (9th Cir. 2008) (holding that "size is nevertheless a relevant 'factor in assessing whether [the petitioner's] operations are substantial enough to support a manager'") (citation omitted). Here, our analysis of the executive nature of the offered position considered the Petitioner's size. But we also examined the Petitioner's organizational structure; its other positions and their job duties; the nature of its business; and the staff of its parent company. Our analysis therefore does not improperly focus on the Petitioner's size.

B. Job Duties

The Petitioner states that, as its CEO, the Beneficiary would: adjust and implement the company's goals, policies, and objectives; seek out investment opportunities; contemplate major expenditures; monitor financial performance and procedures; choose business strategies and overall direction; review and approve personnel actions; negotiate; and represent the company at conferences. The Director described the proposed job duties as "very general," finding that they did not detail the Beneficiary's daily duties. *See 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) (stating that "[s]pecifics are clearly an important indication of whether [a beneficiary's] duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating regulations").

On appeal and in response to the Director's written request for additional evidence (RFE) the Petitioner expanded its job description and provided examples of the position's duties in the context of the company's business. The Petitioner claims that as CEO, the Beneficiary he would devote his time primarily to high-level responsibilities. However, given the questions about the Petitioner's staffing and organizational structure detailed above, we do not find the description of the duties to be credible

and cannot find that the Petitioner has sufficient staff to relieve the Beneficiary from performing operational duties such that he would *primarily* perform executive duties ascribed to him.

On appeal, the Petitioner also argues that USCIS misapplied the standard of proof. The company contends that a preponderance of probative evidence demonstrates that it would more likely than not employ the Beneficiary in an executive capacity. *See Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (stating that a petitioner must prove its eligibility for a requested benefit by a preponderance of evidence). As previously discussed, however, the Petitioner has not explained evidentiary discrepancies casting significant doubts on the nature of the Beneficiary's proposed employment and the authenticity of the company's evidence. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). Thus, the record does not demonstrate that the company would employ the Beneficiary in an executive capacity. USCIS therefore did not misapply the standard of proof.

Finally, the Petitioner argues that USCIS disregarded Congress's intent in establishing the L-1 visa program and a 2017 executive order promoting the hiring of U.S. workers. The Petitioner has not shown how it qualifies for the benefit sought, nor has it shown how the executive order would excuse it from having to demonstrate that it would employ the Beneficiary in an executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

## III. EMPLOYMENT ABROAD WITH A QUALIFYING ORGANIZATION

Although unaddressed by the Director, the record also does not establish the Beneficiary's foreign employment with a qualifying organization during the required period before his admission. As previously indicated, an L-1A petitioner must demonstrate that, within the three years before a beneficiary's U.S. admission, he or she had at least one continuous year of full-time employment abroad with the petitioner or its parent, branch, subsidiary, or affiliate. 8 C.F.R. § 214.2(l)(3)(iii).

Here, the Petitioner states that the Beneficiary served full-time as president of its parent company in China from 2007 to 2014, when he gained admission to the United States in L-1A status. A copy of a stock certificate identifies the Petitioner as a wholly owned subsidiary of its parent company. A letter from the general manager of the parent company supports the claimed employment.

The Beneficiary's applications for nonimmigrant U.S. visas, however, indicate that other companies employed him from 2007 to 2014. In applications for visitor visas in 2011 and 2012, the Beneficiary stated that he left the employment of the Petitioner's parent company in 2007. These applications and a later one indicate that the Beneficiary then worked for two other companies in China through 2013. The 2011 application indicates that, as of its filing, he worked for [redacted] The 2012 and 2013 applications indicate that [redacted] then employed him. The Petitioner must demonstrate that the Beneficiary "has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding" his admission to the United States in 2014. 8 C.F.R. § 214.2(l)(3)(iii). Here, given the contrary statements made by the Beneficiary on his visa application, the record does not establish the Beneficiary's claimed employment with the Petitioner's parent company.

A petitioner must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591. Thus, the record here does not establish the Beneficiary's employment abroad with a qualifying organization for at least one continuous year during the requisite period. In any future filings in this matter, the Petitioner must demonstrate that, within the three years before the Beneficiary's admission to the United States in L-1A status, its parent company employed him full-time as president for at least one continuous year. The Petitioner must also explain the Beneficiary's contrary statements in the nonimmigrant visa applications and provide independent documentary evidence of the Beneficiary's claimed employment abroad.

## IV. CONCLUSION

The record on appeal does not establish that the Petitioner would employ the Beneficiary in an executive capacity. We will therefore affirm the Director's decision. A petitioner bears the burden of demonstrating its eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Petitioner did not meet that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of CCHP- Inc.*, ID# 3752241 (AAO June 14, 2019)