U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-G-L-A-, INC.

DATE: APR. 4, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a transportation and logistics business, seeks to continue the Beneficiary's temporary employment as its president and chief operations officer under the L-1A nonimmigrant classification for intracompany transferees. 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 Texas Service Center denied the petition, concluding that the Petitioner did not establish, as required, that: (1) it would employ the Beneficiary in a managerial or executive capacity under an extended petition; and (2) it has a qualifying relationship with the Beneficiary's last foreign employer. The Director further found that the Petitioner did not establish that the Beneficiary's prior education, training, and employment qualify her to perform the intended services in the United States.

On appeal, the Petitioner submits additional evidence and asserts that it demonstrated that all eligibility requirements have been met. The Petitioner emphasizes that the Beneficiary was previously granted an extension of L-1A status and asserts that the Director should have given deference to the prior approval.

Upon *de novo* review, we will dismiss the appeal as the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States. However, we find sufficient evidence to establish that the Petitioner and foreign entity have a qualifying relationship and will withdraw the Director's decision with respect to that issue.[1] Further, we will withdraw the Director's finding that the Beneficiary's prior education, training, and employment do not qualify her to perform the intended services in the United States.[2]

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[1] The evidence of record, including additional evidence submitted on appeal, establishes that the Petitioner and the Beneficiary's prior employer in Canada are affiliates based on common ownership and control by the Beneficiary. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(defining "affiliate").

[2] The Director cited to the regulation at 8 C.F.R. § 214.2(l)(3)(iv), but did sufficiently explain why the Petitioner did not meet this eligibility requirement. An officer must fully explain the reasons for denying a visa petition in order to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.3(a)(1)(i).

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.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. DEFINITIONS

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

The term "executive capacity" is defined 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.

Based on the definitions of managerial and 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 or 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 at 1533.

III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The primary issue to be addressed is whether the Petitioner established that it would employ the Beneficiary in a managerial or executive capacity under an extended petition.[3]

[3] The Petitioner previously indicated that the Beneficiary will be employed in an executive capacity, but on appeal, claims that her position meets the criteria for both managerial and executive capacity.

When examining the managerial or 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 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, its staffing levels, and its organizational structure.

A. Duties

The Petitioner states that the Beneficiary will be serving as its president and chief operations officer, and will be working in the United States on a part-time basis while continuing to serve as president of the Petitioner's Canadian affiliate. Both companies are engaged in the provision of ground transportation and logistics services. The Petitioner explained that the Beneficiary "has ultimate authority over the Company's operations, its employees, its subcontractors, and its independent contractors in Canada and in the U.S."

The Petitioner further described the Beneficiary's duties as follows (bullets added):

- Creates and implements the organization's long and short term plans.
- Determines and communicates the company's strategic direction and supervises the organization's overall direction.
- Determines how the company will balance its capital and human resources.
- Assesses the principal risks of the Company and ensures that these risks are being monitored and managed; identifies and leverages the Company's strengths.
- Acts as a hands-on part of the Company's day to day operations, including implementing internal controls, leading, guiding, and evaluating the work of employees and independent contractors (with independent authority to hire and terminate staff and contractors), working with finance companies and even compiling quotes for customers.
- Regularly attends trade shows to identify new industry developments and keep abreast of material external factors affecting the Company.
- Holds recurrent monthly meetings to evaluate the Company's progress.
- Energizes and engages stakeholders at all levels.

The Petitioner further noted that she "will continue to have primary responsibility for establishing legal and accounting relationships in the United States, establishing and maintaining customer relationships, and establishing financial and banking relationships."

In a request for evidence (RFE), the Director advised the Petitioner that it would need to provide a more detailed description listing the Beneficiary's specific duties and the amount of time she will spend on each task.

In response, the Petitioner submitted a new letter in support of the petition, but it did not include a list of the Beneficiary's specific day-to-day tasks or the amount of time she would spend on each job duty. Rather, the Petitioner's letter re-stated parts of the initial job description, and reiterated that Beneficiary would continue in her role as president of both the U.S. and Canadian entities. The Petitioner emphasized that she "has ultimate managerial and operational authority of the organization, including all of its departments, subdivisions, functions, and every component thereof," and that she "establishes the goals and policies of the organization and exercises unrestricted decision-making authority."

The Director found that the description was lacking sufficient detail to establish that the Beneficiary's actual duties would be primarily managerial or executive in nature, and suggested that she would spend some time on operational tasks, such as "compiling quotes." We agree that the description is overly broad as it does not list the specific tasks the Beneficiary would perform on a day-to-day basis within the context of the Petitioner's trucking and transportation business.

Many of the duties reflect the Beneficiary's senior level of authority without providing any insight into what she primarily does as a part of her regular routine. Duties such as creating short and long term plans, determining the company's strategic direction, supervising the overall direction of the company, evaluating the company's progress, identifying and leveraging the company's strengths, and balancing its resources are too ambiguous to establish the nature of the Beneficiary's typical duties and are insufficient to establish that she primarily performs higher-level tasks consistent with the statutory definition of either managerial or executive capacity. The Petitioner did not provide examples of the Beneficiary's actual duties, evidence of her work product, or other supporting documentation that would assist in establishing the nature of the specific tasks she performs for the company, and this description did not meet the Petitioner's burden to submit a detailed description of the Beneficiary's position. Specifics 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 the regulations. *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).

On appeal, the Petitioner states that the Beneficiary's "executive and managerial duties should be allocated the following percentages":

- 25% - Coaching, managing, and meeting with sales and operations teams, including setting sales and operational initiatives, supervising cost and determining pricing and profit margins, supervising and ensuring regulatory compliance, and supervising and ensuring legal and tax compliance;
- 25% - Establishing, cultivating and insuring customer relationships, including visiting U.S. customers and negotiating quotes and contracts;

- 15% - Conducting financial operations, overseeing AP/AR and monitoring company accounts;
- 15% - Monitoring capital assets, including fleet issues. Meet with U.S. fleet providers regarding recalls, new technology, and compliance issues; and
- 20% - Implementing and overseeing development, including meetings with senior staff and employees to monitor day-to-day operations to ensure objectives are met.

While this description contains specific references to the Petitioner's actual business operations, it bears little resemblance to the initial description provided by the Petitioner and is insufficient to establish what the Beneficiary primarily does on a day-to-day basis as the company president. The Petitioner refers to the Beneficiary's oversight of "sales" teams but the Petitioner's organizational chart does not include any sales staff. This lack of sales staff also raises questions regarding the nature of the Beneficiary's responsibility for cultivating customer relationships, visiting U.S. customers, and negotiating contracts. Without evidence of lower level sales employees, we cannot determine if the Beneficiary is relieved from directly selling the Petitioner's services.

In addition, several elements of this revised positon description are vague, such as the Beneficiary's responsibility for "conducting financial operations" and "implementing and overseeing development." These broad statements are not clearly classifiable as managerial or executive duties. Finally, we note that, although the Petitioner states that the Beneficiary is responsible for dealing with fleet safety and compliance issues, it is unclear why such duties would be assigned to the Beneficiary and not to the company's claimed safety and compliance director. Overall, the position descriptions submitted are not consistent with one another and do not provide the necessary detail or an adequate explanation of the Beneficiary's proposed activities in the course of her daily routine.

The fact that the Beneficiary will manage or direct a business as its owner and senior employee does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or 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 or managerial in nature. 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, a broad position description alone is insufficient to establish that her actual duties would be primarily managerial or executive in nature.

B. Business Activities, Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual will be acting in a managerial or 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.

The Petitioner states that it operations a trucking and logistics business with 14 employees and gross annual income of $443,102. Its initial submission did not include an organizational chart or other evidence showing the staffing and structure of the company at the time of filing.

In the RFE, the Director requested a copy of the Petitioner's organizational chart, as well as information regarding each employee including their name, job title, summary of duties, education level, and salary, as well as evidence of wages paid to employees and contractors. In response to the RFE, the Petitioner stated that it has 14 employees and two subcontractors.

The Petitioner's organizational chart depicts the Beneficiary as president, with one direct subordinate, a vice president. The chart shows that the vice president supervises a director of operations, a safety/compliance director, and an employee responsible for accounts payable and receivable. The director of operations is shown as supervising a fleet manager and a customer service representative. Finally, the chart indicates that the fleet manager supervises 10 drivers.

We note that the Petitioner indicates that the Beneficiary divides her time between the Petitioner and its Canadian affiliate. The Canadian entity's organizational chart identifies a total of six employees, including the Beneficiary, the Petitioner's U.S.-based vice president, director of operations and director of safety/compliance, as well as a chief financial officer and "subcontractors," but no fleet manager or customer service staff.

The Petitioner's New York quarterly wage reports indicate that the Petitioner paid 13 employees a total of $149,921 in the first three months of 2018. In the second quarter of 2018, the Petitioner reported that it had 14 employees in April and May 2018, and 0 employees in June 2018, with a total of $91,561.69 in wages paid.

While the Petitioner documented wages paid to its staff, it did not explain this apparent reduction in staff from 14 to 0 employees shortly after the petition was filed. Further, it did not respond to the Director's request for position descriptions for the Beneficiary's subordinate staff. Although the Director specifically cited to the lack of documentation relating to the duties and credentials of the subordinate employees, the Petitioner has not addressed this evidentiary deficiency in its appeal.

The evidence must substantiate that the duties of a given beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; an organizational chart reflecting tiers of subordinate employees and employee job titles, without more, is not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. Further, as noted, it appears that several of the Beneficiary's direct and indirect subordinates are required to divide their time between performing duties for the Petitioner and its Canadian affiliate and the Petitioner has not explained the respective staffing needs of the companies or the ability of these employees to relieve the Beneficiary from performing non-qualifying duties associated with either entity.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act. Personnel managers are required to primarily

supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional."[4] *Id.* If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

Although the Director requested the information, the Petitioner did not provide the level of education required for any subordinate position, nor did it provide duty descriptions for any employee other than the Beneficiary herself. Thus, the Petitioner has not established that the Beneficiary's subordinate employees possess baccalaureate degrees and that their positions require such degrees, such that we can consider the employees to be professionals. Further, without position descriptions for the Beneficiary's subordinates, we cannot determine whether any of them are employed as supervisors or managers. Thus, the Petitioner has not shown that the Beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. The Petitioner did not submit sufficient evidence to establish that the Beneficiary would be employed as a personnel manager, and has not claimed that the Beneficiary qualifies as a function manager.

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 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 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.*

Here, the Petitioner did not provide detailed, consistent descriptions of the Beneficiary's actual job duties in support of a claim that her duties are primarily executive in nature. Further, without information regarding the duties performed by the Petitioner's subordinate staff, some of whom appear to divide their time between the U.S. and foreign entities, we cannot determine that the Beneficiary would be relieved from significant involvement in the day-to-day, non-executive tasks required to operate the organization's cross-border ground transportation operations. The Petitioner's staffing is

[4] In evaluating whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

of particular note given the unexplained decline in staffing levels that appears to be reflected in its quarterly wage report for the second quarter of 2018.

Further, as noted, the Petitioner indicates that the Beneficiary oversees a "sales team" but has not identified any sales staff working for either the Petitioner or its affiliate. As noted the job description provided for the Beneficiary on appeal suggests that she is the person responsible for forming client relationships and negotiating the sale of the Petitioner's services, and that she spends a significant amount of time on this non-qualifying function.

Accordingly, while the Petitioner has consistently identified the Beneficiary as the senior employee in the United States, its claims are not supported by sufficient evidence regarding the Beneficiary's duties or the duties performed by her subordinate staff.

Finally, we note that the Petitioner emphasizes that the Beneficiary was previously granted an extension of her L-1A status and cites to a 2004 USCIS memorandum which stated that "in matters related to an extension of nonimmigrant petition validity involving the same parties and the same underlying facts, deference should be given to an adjudicator's prior determination of eligibility." *See* Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQOPRD 72/11.3, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity* (Apr. 23, 2004).

The Yates Memorandum has been rescinded by USCIS Policy Memorandum PM-602-0151, *Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status* (Oct. 23, 2017), https://www.uscis.gov/laws/policy-memoranda. The new policy memorandum, which is binding on all USCIS components, including the AAO, states: "An adjudicator's fact-finding authority . . . should not be constrained by any prior petition approval, but instead, should be based on the merits of each case." *Id.* at 3.

Due to the evidentiary deficiencies addressed above, the Petitioner has not met its burden to establish that the Beneficiary would be employed in a managerial or executive capacity under an extended petition.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons. 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.

Cite as *Matter of T-G-L-A- Inc.*, ID# 3011035 (AAO Apr. 4, 2019)