U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-L-Z-S- CORP.

DATE: APR. 7, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a wholesale shoe business, seeks to extend the Beneficiary's temporary employment as its president under the L-1A nonimmigrant classification for intracompany transferees. *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.

On appeal, the Petitioner asserts that the Beneficiary qualifies as an executive and as a manager, as the record demonstrates that she holds the top executive position and will continue to perform high-level managerial duties.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a managerial or executive capacity, or in a specialized knowledge capacity, 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 subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity. Section 101(a)(15)(L) of the Act.

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. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity under the extended petition. Specifically, the Director found that the Petitioner did not meet its burden to provide a detailed description of the Beneficiary's proposed duties under the extended petition or provide sufficient information regarding the Beneficiary's subordinate employees' duties to demonstrate that they would relieve her from significant involvement in the company's day-to-day operations.

On appeal, the Petitioner asserts that the evidence previously submitted is sufficient to establish that the Beneficiary performs primarily managerial or executive duties. It maintains that the company now has seven employees, has been in business for two years, pays all required taxes, and will need to close the business if the extension is not granted.

The term "managerial capacity" is defined as "an assignment within an organization in which the employee primarily":

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) 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;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) 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, 8 U.S.C. § 1101(a)(44)(A). Further, "[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." *Id.*

The term "executive capacity" is defined 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;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) 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, we 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 managerial or 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 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 1533.

On the Form I-129, the Petitioner stated that it is a "shoe business" with five employees. It described the Beneficiary's proposed duties under the extended petition as follows:

1) [I]ncrease management's effectiveness by recruiting, selecting, orienting, training, coaching, counseling, and disciplining managers; communicating values, strategies, and objectives; assigning accountabilities; planning, monitoring, and appraising job results; developing incentives; developing a climate for offering information and opinions; providing educational opportunities.
2) Develops strategic plan by studying technological and financial opportunities; presenting assumptions; recommending objectives.
3) [A]ccomplishes subsidiary objectives by establishing plans, budgets, and etc[.]

In a supporting letter, the Petitioner added that the Beneficiary "is to set all corporate policies, and is the head for the developing strategies for purchasing and marketing."

The Director issued a request for evidence (RFE) advising the Petitioner that the submitted position description does not contain sufficient detail to establish the Beneficiary's employment in a managerial or executive capacity. The Director requested a description the Beneficiary's duties during the previous year and a detailed statement of the specific duties she will perform under the extended petition, including percentages of time to be spent on each task.

In response, the Petitioner stated that during the previous year, the Beneficiary "was in charge of day-to-day operations," set guidelines and policies, supervised subordinate managers, directed marketing and sales professionals to promote company products, coordinated with the parent company in planning production and import-export projects, formulated budgets, and set sales targets for the company. It described her duties under the extended petition as follows:

> Beneficiary will continue to be the President of our company, in charge of our day-to-day operations, she will be vested with the discretionary authority in hiring and firing of subordinate managers and professionals, beneficiary will continue to be the top executive, formulating company policies in marketing and sales, beneficiary will spend about 90% of her time in executive and managerial functions. Our company has no other managerial staffs [*sic*] who have thorough knowledge of our products and product lines except for the beneficiary.
>
> Beneficiary will use company sales records, marketing and sales statistics collected during normal business activities to determine future marketing and sales policies.
>
> How the beneficiary will direct management –
> Beneficiary will supervise subordinate mangers, [redacted] who is our Vice President in charge of marketing and sales operations, [redacted] who is the Marketing Manager, [redacted] who is the Sales Manager. In particular, beneficiary will set marketing and sales guidelines for those managers to be carried out by other employees and professionals.
>
> How beneficiary will establish goals –
> Beneficiary will perform research on product trends and market demands based [sic], set goals and policies based on her past experience as well as company's marketing and sales records and statistics.
>
> How the beneficiary will exercise wide latitude in discretionary decision-making –
> Beneficiary will ha[ve] absolute power in hiring, promotion and firing of the subordinate managers and the vice president, she will be vested with authority in major decision making like formation and revision of company product lines and new styles, planning for production and approving marketing and sales territories and pricing, finalizing company budgets and expenditures.
>
> Whether beneficiary will receive supervision –
> Beneficiary will receive supervision only from the board of directors.

We agree with the Director's determination that the submitted position descriptions lack detail and do not demonstrate that the Beneficiary will primarily perform managerial or executive duties under the extended petition. Some of the duties paraphrase the statutory definitions of managerial and executive capacity. Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *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); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, several of the duties, without additional explanation, suggest that the Beneficiary would be involved in non-executive tasks. For example, the Petitioner stated that the Beneficiary is responsible for researching product and market trends, and has been involved in coordinating with the parent company on "planning productions and import and export projects." All staff hired to date appear to be involved in sales and marketing and it is unclear who, other than the Beneficiary is responsible for coordinating the production and import of the company's products into the United States. In addition, as discussed further below, the Petitioner did not provide a consistent description of its staffing or provide sufficient job descriptions for subordinate employees to allow us to determine how non-managerial duties are allocated among the subordinate staff.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an 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. One does not qualify as an executive under the statute simply because one "directs" the enterprise as the sole managerial employee.

Here, the Petitioner focuses on the Beneficiary's authority over subordinate managers and her responsibility for setting goals and policies, but without information regarding the specific tasks she will perform and the percentage of time she would spend on specific tasks, we cannot determine that executive-level duties would be her primary duties. While the Beneficiary may have the appropriate level of authority over the company as its senior employee, the submitted job descriptions are too general to demonstrate that the Beneficiary is primarily focused on the policies and goals of the company rather than on its day-to-day administrative and operational activities.

B. Staffing

Beyond the required description of the job duties, we examine the claimed managerial or executive capacity of a beneficiary, 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 Petitioner claimed to have five employees at the time of filing the petition on August 31, 2015. The Petitioner submitted an organizational chart with 15 positions and indicated that 6 positions were filled (including the Beneficiary's). The chart shows that the filled positions were vice president who reports to the beneficiary); sales manager who reports to and three sales persons (who report to The vacant positions include three sales positions and a warehousing manager (with assistant), who would report to and an accounting manager and marketing department manager who would report to the Beneficiary. Finally, the chart includes a vacant bookkeeper position, and an open sales representative position in the marketing department.

The Petitioner submitted a revised chart in response to the RFE in March 2016. This chart is similar to the initial chart, but lists as the marketing department manager, as sales manager, and three different employees in the sales person positions. The evidence does not show that worked for the petitioner in 2015. 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). We will not consider employees hired or positions filled subsequent to the filing date.

The record includes 2014 and 2015 IRS Form W-2s, payroll records and federal and state quarterly tax reports for all four quarters of 2015. The Petitioner consistently paid salaries to the Beneficiary and The record does not contain any evidence of payments to the purported vice president and the Petitioner has not provided an explanation for this omission or other evidence establishing that he is a regular employee or contractor of the company.

The Petitioner stated it pays its sales persons on commission and they receive IRS Form 1099s at the end of the tax year. However, the persons identified as sales persons in the initial organizational chart received Form W-2s and *are* included in the Petitioner's payroll records and tax filings for the first quarter of 2015, with each individual earning $5,500. Further, the Petitioner did not provide copies of any Form 1099s.

The Petitioner no longer employed the three individuals named as sales persons in the original chart in the third quarter of 2015 when it filed the petition. However, the Petitioner paid $5,500 to nine different individuals during the first three quarters of 2015 (three in each quarter) and the record shows each one worked for the company for exactly 3 months. While it is possible that some of these employees held positons other than "sales person," the Petitioner did not indicate that it had filled any other vacant positions over time. In the fourth quarter of 2015, the Petitioner paid only the Beneficiary, and one other person (who also received $5,500 for the quarter).

Therefore, the record substantiates the Petitioner's employment of the Beneficiary, the sales manager, and three other employees, who appear to be sales persons, at the time of filing.

[1] We note that the Petitioner has also referred to an employee named ' ' We assume for purposes of this decision that and are the same person.

The Petitioner has referred to the Beneficiary's position as both executive and managerial, and emphasized that she would supervise subordinate managers and professionals. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act. The Petitioner does not claim that the Beneficiary is a function manager. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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."[2] Section 101(a)(44)(A) of the Act. If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act.

Although requested by the Director, the Petitioner did not provide information regarding the job duties and educational requirements for the employees subordinate to the Beneficiary, and, as noted above, did not document its employment of the claimed vice president. We cannot determine based on job titles alone that the sales manager holds a managerial, supervisory, or professional position, or that the sales persons are professionals. 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 must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Even if we deemed the sales manager to be a supervisor based on his placement on the organizational chart, the Petitioner would not meet its burden to establish that the Beneficiary's duties are primarily managerial or executive or that it has sufficient staff to relieve her from significant involvement in the day-to-day operations of the company.

A company's size alone may not be the determining factor in denying an L-1A visa petition without taking into account the reasonable needs of the organization. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for U.S. Citizenship and Immigration Services (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 or a "shell company" that does not conduct business in a regular and continuous manner. *Family*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As the Petitioner requested an extension of a new office petition, the regulations require an examination of the organizational structure and staffing levels of the Petitioner. *See* 8 C.F.R.

[2] To determine whether the 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 United States 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."

§ 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation no more than one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this period. If a new office does not have the necessary staffing to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

The Petitioner claims to operate a "shoe business" and the record suggests that it was established to import and distribute shoes manufactured by its parent company in China. The company's organizational chart showed more vacancies than filled positions, and all four subordinate employees documented at the time of filing were working in sales roles. Specifically, the chart showed vacancies for marketing, accounting, bookkeeping, and warehouse positions and did not explain who was performing these functions at the time of filing. The Beneficiary's job description referred to her involvement in production planning with the parent entity and import and export matters, but the Petitioner did not appear to have subordinates who assist her with these tasks, nor does it appear to have anyone responsible for distribution functions within the United States. The Petitioner did not provide evidence that it rents a warehouse, but its tax return shows that it reported $120,000 in rental expenses in the fiscal year ended on August 31, 2015 (the Petitioner's annual office rent according to its lease agreement is $30,000). It remains unclear whether the Petitioner had a warehouse facility at the time of filing and, if so, who was responsible for its activities. For these reasons, we cannot conclude that four subordinate sales staff would sufficiently relieve the Beneficiary involvement in other administrative and operational aspects of the Petitioner's import and wholesale business.

The Petitioner states that the company expects to continue its growth would potentially have to close if the Beneficiary's status is not extended. Even though the enterprise is in a preliminary stage of organizational development, the Petitioner is not relieved from meeting the statutory requirement that it establish that the Beneficiary's duties were primarily managerial or executive at the time the extension is sought. If the business does not have the necessary staffing to sufficiently relieve the Beneficiary from performing operational and administrative tasks, the Petitioner is ineligible by regulation for an extension.

On appeal, the Petitioner contends that the Beneficiary's position has all the necessary elements of a managerial or executive position, but does not elaborate. As explained above, these broad statements are not sufficient to meet the Petitioner's burden. We agree with the Director's determination that the evidence is insufficient to establish that the Beneficiary will be employed in a managerial or executive capacity.

III. DOING BUSINESS

As the Petitioner did not demonstrate eligibility for this petition and our determination on the issue discussed above is dispositive of the appeal, we need not fully address other issues we have observed. With that said, we wish to inform the Petitioner of one additional issue that should be addressed in any future proceeding. Specifically, there are some unexplained discrepancies in the

Petitioner's financial and business documentation which raise questions as to whether it was doing business during the previous year. *See* 8 C.F.R. § 214.2(l)(14)(ii)(B).

The Petitioner submitted a copy of its federal tax return showing over $600,000 in sales for the year ended August 31, 2015, but it did not provide evidence documenting any individual business transactions, such as customs documentation or sales invoices, for its shoe business. In response to the RFE, the Petitioner submitted an exhibit labeled "business records." This exhibit included commercial invoices and customs documents relating to another [redacted] New York company called "[redacted]" and show that it imported paper napkins, cups and plates from Australia and China. None of the documents mention the Petitioner or appear related to its claimed wholesale shoe business, and the Petitioner did not explain any relationship it might have with [redacted] In addition, the Petitioner's bank statements for 2015 do not show sufficiently high deposits to reflect gross sales of $600,000. For these reasons, the tax return alone is insufficient to demonstrate that the Petitioner was doing business for the previous year.

IV. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of W-L-Z-S- Corp.*, ID# 321941 (AAO Apr. 7, 2017)