U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF BLTB-A- INC.

DATE: APR. 13, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a plastic materials and products importer and exporter, seeks to continue the Beneficiary's temporary employment as its marketing and sales manager 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 California Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner submits additional evidence and asserts that the Director placed undue emphasis on the small size of the company in determining that the Beneficiary will not perform primarily managerial duties. The Petitioner asserts that the Beneficiary will manage "the essential function of brand development and marketing."

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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period April 26, 2016, until April 25, 2017. 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). This evidence must demonstrate that the beneficiary will be employed in a managerial or executive capacity, as defined at sections 101(a)(44)(A) and (B) of the Act, under the extended petition.

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The sole issue to be addressed is whether the Petitioner established that the Beneficiary will be working in a managerial capacity. The Petitioner did not claim that the Beneficiary would be employed in an executive capacity; therefore, our analysis will address only the Petitioner's claim that the Beneficiary's proposed position would be in a managerial capacity.

"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.

When examining the managerial 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 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). Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) examines 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

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.

The Petitioner provided a statement of the Beneficiary's duties at the time of filing. After the Director informed the Petitioner that its statement was insufficient, the Petitioner resubmitted essentially the same job description, but added the percentage of time the Beneficiary would spend on each area of responsibility:

- Report to the President/Acting President about our company's marketing and sales performance and manage the entire Marketing and Sales Department including developing policies and goals, overseeing the planning, development and execution of all the company's business and marketing and sales budget, strategies, and activities (35%).
- Review the department's marketing operations and strategy and set up and define marketing and sales policies, procedures, and goals to ensure operations are running efficiently and smoothly and to generate revenue by increasing sales through successful marketing, and signing business deals and sales contracts directly with customers and other companies for our company (35%).
- Delegate and control the works of the subordinates in the marketing and sales department. Delegate all the routine, day-to-day, and non-managerial tasks to subordinates for them to carry out the tasks and the needed services to achieve the goals. Review their works for compliance with established policies and objective[s] of the department. Evaluate their performance and exercise discretion to hire, dismiss, or promote/demote based on their performance (15%).
- Exercise discretion over the day-to-day marketing department's operations and ensure the company's marketing and sales strategy are properly implemented within the company's budget (10%).
- Attend conferences and meet with other companies' executives to establish network and explore potential opportunity for marketing our company's products and services in the U.S. and international market (5%).

We agree with the Director's determination that this description does not provide sufficient insight into the nature of the Beneficiary's day-to-day duties. The description conveys the Beneficiary's authority over the sales and marketing department, but is too broad and repetitive to clarify how the Beneficiary would spend his time on a regular basis. For example, the Petitioner indicated that the Beneficiary spends 35% of his time managing the entire department, including development of its policies and goals, another 35% of his time "reviewing" the department's operations and defining its policies procedures and goals," and 10% of his time "exercising discretion over" the department's day-to-day operations. All of these responsibilities appear to overlap and the description does not identify the specific tasks that will occupy the Beneficiary's time. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The Petitioner has not provided any detail or explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves will 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).

The Petitioner did not provide any concrete examples of policies, strategies, or goals the Beneficiary would develop and implement in support of its claim that he would spend his time primarily focused on higher-level planning and decision-making responsibilities associated with the company's sales and marketing department. In fact, the only specific tasks the Petitioner did mention, apart from hiring and training staff, included networking at industry conferences and signing sales contracts, duties which are more indicative of an employee who performs sales and marketing tasks. The Beneficiary's attendance at industry conferences is the only function he performs that the Petitioner corroborated with supporting evidence.

On appeal, the Petitioner submits a revised job description indicating that the Beneficiary will allocate 35% of his time to "marketing strategy," 40% of his time to "business development," 15% of his time to personnel related duties, including hiring, training and coaching, and 10% of his time to "project management." The new description is just as broad as the earlier description, and contains numerous references to the Beneficiary's development of policies, goals, strategies, and pursuit of business opportunities, without providing additional details regarding the specific tasks he will perform on a regular daily basis.

Therefore, although the Beneficiary may make decisions about the company's sales and marketing activities, the record on appeal does not adequately show how his role requires him to spend his time primarily on the broadly defined managerial duties. The fact that the Beneficiary will manage a department of a business as its senior employee does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section 101(a)(44)(A) of the Act. Even though the Beneficiary may exercise discretion over the Petitioner's day-to-day marketing and sales operations and possess the requisite level of authority with respect to discretionary decision-making, a broad overview of his responsibilities is insufficient to establish that his actual duties would be primarily managerial in nature as of the date of filing.

B. Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS takes 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 stated that it had seven employees as of the date of filing on April 25, 2017. The Petitioner's initial organizational chart showed that the Beneficiary supervised a marketing & sales assistant and a sales employee The chart depicted an operations department with a similar structure (an operations manager who was on administrative leave, two operations assistants, and an assistant). The chart also showed separate administration and finance departments, each with no current employees.

In response to the RFE, in August 2017, the Petitioner submitted a revised chart and explained that there has been consistent staff turnover in its sales and marketing department. Specifically, the Petitioner stated that both and quit their respective positions on April 30, 2017, and

indicated that [redacted] and [redacted] who was reassigned from the operations assistant position to the sales role, currently held the assistant and sales positions. The Petitioner indicated that both positions subordinate to the Beneficiary are professional in nature, and provided evidence of educational credentials for current and former employees. The Petitioner stated that its total number of employees was six, and its organizational chart showed two vacancies in the operations department, along with three ongoing vacancies in the administration and finance departments.

The Petitioner stated that the marketing and sales assistant: carries out "all the routine, day-to-day and non-managerial tasks" delegated by the Beneficiary; supervises and trains the sales person, collects data on customers, competitors and the Petitioner's market; finds ways to discover prospective customers; provides sales forecasts; collects and analyzes data to evaluate marketing and sales goals; performs market research SWOT analysis; identifies market trends, pricing/business models, sales and methods of operation; evaluates current economic conditions; and recommends changes to the Beneficiary regarding sales techniques, procedures, or promotional efforts based on market research.

Further, the Petitioner stated that the sales employee performs "every day non-supervisory tasks," including presenting, promoting and selling the company's products to current and prospective customers, calling and visiting customers, establishing customer relationships, coordinating sales with other departments, tracking sales and status reports, and providing the marketing and sales assistant with reports on customers' needs and interests and on potential for new products and services.

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. 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." Section 101(a)(44)(A)(iv) of the Act. 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*).

In this matter, the Petitioner has not established that the Beneficiary is primarily a personnel manager. The Petitioner initially indicated that the Beneficiary will allocate 15% of his time to controlling the work of his subordinates and another 10% of his time to exercising discretion over department operations, but the remainder of his duties were described in abstract terms and did not convey how much time he would spend on personnel-related activities. The position description submitted on appeal indicates that substantially more of the Beneficiary's responsibilities involve supervision of subordinate staff, but the Petitioner did not provide an explanation for the revised duty description. Given that both descriptions account for 100% of his time, we are not in a position to determine which one more accurately reflects his actual duties.

Nevertheless, even if the Petitioner established that the Beneficiary's duties are primarily supervisory in nature, it would need to demonstrate that he would direct subordinate supervisory,

professional, or managerial employees. The Petitioner's organizational chart shows a three-tiered structure within the marketing and sales department; however, the record does not support a finding that the marketing and sales assistant holds a supervisory role. The Petitioner states that this position is responsible for "supervis[ing] and train[ing] Sales" but all other duties assigned to the position involve market research and analysis. In fact, the Petitioner stated that this employee is assigned to carry out "routine, day-to-day and non-managerial tasks." The evidence does not establish that the marketing and sales assistant holds a managerial or supervisory position.

The Petitioner also claims that the Beneficiary's subordinates hold professional positions. 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."

Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity. The sales staff member employed at the time of filing had a degree in teaching Chinese as a foreign language, and the individual who later assumed the sales role has a degree in Japanese tourism. The Petitioner has not shown that the sales position requires a bachelor's degree in a specific relevant area of study. The Petitioner also provided educational credentials for three employees who have held the marketing and sales assistant position. However, we cannot determine based on the information submitted whether a bachelor's degree is required to perform the "routine, day-to-day tasks" of the marketing and sales department.

On appeal, the Petitioner emphasizes that the Beneficiary "will continue to be responsible for the essential function of brand development and marketing" with authority over his "sales and marketing teams." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

Here, although sales and marketing functions are essential to the organization, the Petitioner has not established that the Beneficiary will primarily manage the function, rather than perform non-qualifying sales and marketing duties. The Beneficiary does not supervise sales and marketing

"teams" as claimed on appeal. In fact, the Petitioner appears to have difficulty keeping the two subordinate positons in the department staffed, as both of the Beneficiary's subordinates left within days of filing and the Petitioner indicates that it had to transfer an operations department employee to the sales position. As noted the Petitioner indicates that the assistant position performs mainly market research duties, which would leave a single sales person responsible for all company sales in an office that is primarily a sales office. The Petitioner's claim that the two staff are sufficient to relieve the Beneficiary from performing non-managerial duties associated with sales and marketing is not adequately supported by the record, particularly as the Petitioner described the Beneficiary's claimed managerial duties in overly broad terms.

While performing non-qualifying tasks will not automatically disqualify a beneficiary as long as those tasks are not the majority of a beneficiary's duties, a petitioner still has the burden of establishing that a beneficiary will "primarily" perform managerial or executive duties. *See* section 101(a)(44) of the Act. Whether a beneficiary is "function" manager turns in part on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See Matter of Z-A-*, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016). Here, because of the overly broad description of the Beneficiary's duties, the Petitioner did not adequately document what proportion of the Beneficiary's duties would be managerial functions and what proportion would be non-managerial. Absent a clear and credible breakdown of the time spent by the Beneficiary performing specific tasks, we cannot determine what proportion of the duties would be managerial, nor whether the Beneficiary is primarily performing the duties of a function manager. *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The Petitioner cites to *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), and asserts that the Director erred by focusing on the size of the Beneficiary's subordinate staff and the small size of the U.S. company.[2] As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The Petitioner commenced business operations in 2015 and is engaged in the import and sales of "flexitank" containers and other plastic materials. The Petitioner indicates that it employs six to seven employees, but shows up to 11 positions on its organizational chart. The Petitioner acknowledges a high level of staff turnover in sales and marketing and shows up to five vacancies in administrative, operations, and finance roles in its organizational chart. The Petitioner has not indicated who was performing duties related to these unstaffed positions. In fact, at the time of filing, only one of four department manager positions was staffed. Based on the nature of the company, the Petitioner has not shown that it requires the Beneficiary to primarily perform the higher level marketing and business development functions attributed to him. Rather, it appears that

[2] The Petitioner also refers to non-precedent decisions addressing the same issue. These decisions were not published as a precedent and therefore do not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy.

the company's two senior staff (including the Beneficiary) would more likely than not be required to perform a variety of non-managerial duties necessary for the day-to-day operations of the company.

For the reasons discussed, the Petitioner has not established that it would employ the Beneficiary in a managerial or executive position under the extended petition.

III. QUALIFYING RELATIONSHIP

Although not addressed by the Director, we find that the Petitioner did not submit evidence to establish that it and the Beneficiary's foreign employer are still qualifying organizations, as required by 8 C.F.R. 214.2(l)(14)(ii)(A). The Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it is wholly owned by , located in China. The Petitioner's 2015 and 2016 tax returns (IRS Form 1120), indicate at schedule G that the company is wholly owned by an individual,

The record does not contain primary evidence of the ownership of the petitioner or the foreign entity to resolve this apparent inconsistency. Therefore, although the Petitioner established that the foreign entity continues to do business, it has not provided sufficient evidence of an ongoing qualifying relationship.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner did not establish that it will employ the Beneficiary in a managerial capacity under the extended petition or provided sufficient evidence of its qualifying relationship with the Beneficiary's foreign employer.

ORDER: The appeal is dismissed.

Cite as *Matter of BLTB-A- Inc.*, ID# 1129254 (AAO Apr. 13, 2018)