U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S- LLC

DATE: APR. 15, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a distributor of lime (mineral products derived from limestone), seeks to temporarily employ the Beneficiary as managing director of its new office[1] 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 California Service Center denied the petition, concluding that the record did not establish, as required, that the new office would support a managerial or executive position within one year after approval of the petition.

The matter is now before us on appeal. On appeal, the Petitioner asserts that the Director did not fully consider the evidence and information submitted in support of the petition.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). 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 submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope

[1] The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the new office would employ the Beneficiary in a managerial capacity within one year after approval of the petition. Therefore, we need not discuss the requirements of an executive 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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 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. The term "function manager" applies generally when a beneficiary's managerial capacity derives not from supervising or controlling a subordinate staff, but instead from primarily 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 this instance, the Petitioner has specified that it seeks to employ the Beneficiary as a function manager.

Based on the statutory definition of managerial capacity, the petitioner must first show that the beneficiary would 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 would be *primarily* engaged in managerial 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 examining the claimed 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, 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 and its staffing levels.

During its first year of operations, the Petitioner intends to employ the Beneficiary as its managing director, plus three others:

- Operations Manager
- Commercial Sales Manager
- Administrative Assistant

The Petitioner also indicated that it would hire a sales representative during the second year.

The Petitioner submitted a table, signed by the company's operations manager, purporting to identify the tasks that the Beneficiary would perform over the course of a 44-hour work week. The table divided the proposed duties into four main categories:

Task	Hours
Marketing tasks	14
Supervision of matters of accounting	2
Management of compliance with law and policies of the Florida Division of Restaurants and Hotels	4
Sales tasks	24

In addition to "[m]anagement of compliance with law and policies of the Florida Division of Restaurants and Hotels," the "Sales tasks" portion of the table indicated that, for two hours per week, the Beneficiary would "[c]reate a directory of contact information and database of hotels' representatives [redacted] hotels) to support our company in offering our business products and services." The Petitioner did not explain why a distributor of mineral products would need to interact with hotels and comply with hotel-related regulations.

The Petitioner's business plan included job descriptions for the managing director and the other employees. The business plan's description for the managing director did not match the description discussed above. The business plan description does not mention hotels, but it does include several other responsibilities that are absent from the other version of the job description, such as the following examples:

- Develop requirements and budgets for the firm and special projects.
- Maintain staff by recruiting, selecting, orienting, and training employees.
- Establish the frequency, and most economical and efficient shipping method by selecting appropriate container and packs items to ensure safe delivery.

Packing items for shipment is not a managerial task, and its presence in the job description raises questions similar to those raised by the other description's references to the hotel industry.

We acknowledge that, during the first year of a new office's operation, a manager or executive may perform additional operational startup tasks. In such a case, it may be permissible for the managing director to temporarily be responsible for order packing, while awaiting the arrival of other employees to assume that task on a permanent basis. But in this instance, the Petitioner has not identified any current or future employees who would be responsible for packing items for shipping.

If, on the other hand, the company will not be involved in packing and shipping because the foreign parent company will perform that task, then packing tasks should not be in anyone's job description at the U.S. company, let alone that of the managing director. Either way, the presence of the packing reference in one version of the Beneficiary's job description raises serious questions that the Petitioner has not answered.

The managing director's job description referred to "working with the Board" and "the overall operation and effectiveness of the corporation." The Petitioner is not a corporation, and it does not have a board of directors. Rather, it is a limited liability company, managed by its two members. The Beneficiary is one of those members, and the other is the foreign parent company (of which the Beneficiary owns the plurality of shares).

The job description also referred to managing "multiple vendors" and "[a]ssisting with the development of new products for businesses." These references appear to be incompatible with the Petitioner's stated purpose, which is to distribute products developed and manufactured by a single source — the foreign parent company.

The job description also indicated that the position requires a "degree in Mining Engineering, Business Administration or other related field." The Beneficiary's degrees are in pharmacy and food science; her own résumé referred to her as a pharmacist. Therefore, the Petitioner's own business plan suggests that the Beneficiary is not qualified for the position.

In a further discrepancy, the Petitioner submitted a business card for its administrative manager, but the Petitioner's business plan and organizational chart did not show such a position or any plans to create or fill the position in the future.

The Director informed the Petitioner that additional information would be necessary to establish that the Beneficiary's intended position would qualify as managerial within one year after approval of the petition. In response, the Petitioner submitted the business plan version of the Beneficiary's job description, reformatted in the form of a table, indicating that the Beneficiary would spend 70% of her time "[m]anaging daily operations of the organization including the supervision of personnel, leadership, and making strategic decisions," and 30% on "[m]arketing and sales responsibilities."

The reference to the Beneficiary spending 30% of her time — 13.2 hours per week — on "[m]arketing and sales responsibilities" is not compatible with the other breakdown of duties, which indicated that the Beneficiary would spend 38 out of 44 hours per week — 86% — on "[m]arketing tasks" and "[s]ales tasks."

The Director denied the petition, stating: "it appears that the beneficiary will be primarily involved in the performance of routine operational activities of the entity rather than in the management of a function of [the Petitioner's] business."

On appeal, the Petitioner asserts that it has put forth a realistic business plan to market and sell "the products being manufactured by its parent firm," and that its "organizational structure . . . is very appropriate for a start-up enterprise in the US." The Petitioner contends: "The proposed beneficiary will primarily focus her responsibility in the performance of the subsidiary's high-level managerial duties," with "the primary responsibility of ensuring organizational effectiveness by providing leadership for the organization's operational functions." The Petitioner adds that the Beneficiary "[l]eads the work of shipping and receiving personnel performing related work."

The Petitioner, however, has no "shipping and receiving personnel," and its business plan shows no intention of hiring them during its first year of operations. The only projections for second- and third-year hiring relate to sales representatives. In this way, the appellate brief continues a pattern of inconsistent and contradictory information about the company's staffing.

The Petitioner asserts that the Beneficiary's involvement "in a variety of low activities" will be "during the first year only." The Petitioner has not provided a consistent picture of what those activities will be. As noted above, the Petitioner submitted two very different job descriptions for the same position, each containing highly questionable elements. These fundamental discrepancies cast doubt on the accuracy of those descriptions and the extent to which the Petitioner has actually defined the true duties of the position.

In the denial notice, the Director cited the percentage figures from the initial job description. The Petitioner protests that the "Director did not consider the . . . updated percentages of time" provided in response to the Director's request for evidence. The Director, however, did not state that the percentage figures were a key factor in the denial decision, such that the submission of different percentages would clear the way for approval of the petition.

The Petitioner, furthermore, does not explain why the percentages, and the underlying duties, are so different on the two tables. Calling one version "updated" does not resolve the issue, because the Petitioner must establish eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998) (a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to requirements). Furthermore, the percentages that the Petitioner calls "updated" on appeal are on a signed document dated May 2018, which is the same month that the Petitioner filed the petition, even though the Petitioner did not submit that document until three months later. Apart from those percentages, the job description on that document matches the business plan version submitted with the initial May 2018 filing.

The Petitioner asserts that it need only establish eligibility by a preponderance of the evidence, meaning that its assertions are "probably true" or "more likely than not." This is true; however, the discrepancies in the Petitioner's submissions, necessarily reflect on the likelihood that the Petitioner's assertions are true. Unresolved material inconsistencies may lead us to reevaluate the reliability and

sufficiency of other evidence submitted in support of the requested immigration benefit. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

These discrepancies call into question the extent of the Petitioner's actual planning for its business activity. This shortcoming is especially significant in the context of a new office petition, in which a petitioner must provide details about its planned first year of operations. The inconsistencies in the job descriptions and business plan cast doubt on the extent to which the Petitioner has made *bona fide* plans and preparations for its new U.S. office. Based on these inconsistencies, the Petitioner has not established that its new office could support a managerial or executive position within one year after approval of the petition.

III. 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 S- LLC*, ID# 2938793 (AAO Apr. 15, 2019)