U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-USA INC.

DATE: APR. 17, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a real estate development and building materials company, seeks to continue the Beneficiary's temporary employment as its chief executive officer and president 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 Vermont Service Center denied the petition, concluding that the record did not establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition. The Director also determined that the Petitioner did not demonstrate that it is doing business as defined by the regulations.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary qualifies as a personnel manager supervising professional subordinates and that he acts as a function manager overseeing an essential function of the organization.

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 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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period July 1, 2016, until June 30, 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).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The first issue to address is whether the Petitioner has established that the Beneficiary will act in a managerial capacity under the extended petition. The Petitioner does not claim on appeal that the Beneficiary will be employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in a managerial capacity.

The Director concluded that the duty descriptions of the Beneficiary's subordinates were overly vague and did not sufficiently demonstrate that they would act in supervisory or professional capacities. On appeal, the Petitioner states that the Beneficiary supervises professional subordinates and contends that she manages an essential function of the organization.

"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.

Beyond the required description of a beneficiary's job duties, 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 business and its staffing levels.

A. Duties

Based on the definitions of managerial 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 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.

In a support letter, the Petitioner indicated that it "is dedicated to the investment, development, and management of residential and commercial real estate projects." In support of the petition and in response to the Director's request for evidence (RFE), the Petitioner submitted a duty description explaining the Beneficiary's duties during the previous year. The Petitioner stating that he devoted his time to hiring, firing, and other personnel actions, delegating responsibilities to his department managers, approving or disproving their findings as to real estate, building materials, and marketing programs, and "deal[ing] with specific problems by utilizing both business resources in order to quickly access product user feedback." Further, the Petitioner stated that the Beneficiary has been responsible for overseeing the company's "marketing and promotion activities," including establishing and improving "the Company's existing business, marketing management, administrative and financial policies." Lastly, the Petitioner indicated that the Beneficiary has spent a portion of his time interacting with companies and participating in real estate and construction business and management conferences.

The Petitioner stated that, under the extended petition, the Beneficiary would devote 20% of his time to the "realization of business objectives," organizing and implementing annual business and financial plans, and supervising department managers. The Petitioner also stated that the Beneficiary would be responsible 15% of the time for "formulating the development [of] business strategy," deciding "on-long term development goal[s] for the next 5 to 10 years," and reviewing and approving "annual business objectives." The Petitioner further explained that the Beneficiary would spend 10% of his time on examining and approving financial matters and another 15% establishing and improving "the unified, high-efficiency organization system and work system" and presiding over the department meetings of his subordinates. Moreover, the Petitioner indicated that the Beneficiary would spend 15% of his time arranging "the daily affairs of the Company," "handling major events and incidents," and implementing "company policies and regulations." Lastly, the Petitioner explained that the Beneficiary would be responsible 15% of the time for reviewing and approving operations, investments, partnerships, and objectives, and another 10% coordinating and guiding the company's different departments, as well as identifying and improving on "the loopholes and problems."

In contrast to the aforementioned duties setting forth various vague managerial functions, the Petitioner's supporting evidence indicated that the Beneficiary was significantly involved in non-qualifying operational level tasks as of the date of the petition. For instance, the Petitioner submitted documentation reflecting that the Beneficiary was tasked with paying the company's rent. A timeline setting forth specific duties performed by the Beneficiary and his subordinates indicated that he performs several non-qualifying operational level tasks, such as his direct involvement in offers to purchase residential properties, his visitation of several properties and land for sale, the creation of labels and business cards, and attending meetings with builders. The Petitioner provided little evidence that the Beneficiary is delegating these operational level tasks to his claimed department managers; indeed, the submitted timeline appears to reflect his involvement with nearly all operational matters of the business. The Petitioner submits offers it made to purchase real estate; however, they include only the Beneficiary's name and make no reference to the Petitioner or the Beneficiary's subordinates.

Meanwhile, on appeal, the Petitioner provides several reports written by the Beneficiary it asserts were submitted to the foreign employer's leadership. Again, these reports indicate that the Beneficiary is intimately involved with all of the company's property acquisition activities, including visiting properties and land, formulating land development proposals, acquiring permits, planning construction, and calculating margins on property purchases and sales. Once again, the Petitioner provides little supporting evidence to demonstrate that the Beneficiary was relieved of these tasks by his subordinates. The Petitioner also submits considerable documentary evidence reflecting the Beneficiary's performance of these operational duties as of May 2017 when it filed the petition.

In sum, the submitted duty description and documentation suggests that the Beneficiary is, and will be, responsible for many operational aspects of the business, and it has provided few examples and little evidence to substantiate that he will delegate these tasks to subordinates. The evidence does not indicate that the Beneficiary would be relieved from performing non-qualifying operational tasks and that he would primarily spend his time managing a function or delegating operational tasks to subordinates. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial capacity. *See. e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Here, the Petitioner does not adequately document what proportion of the Beneficiary's duties would be managerial functions and what proportion would be non-qualifying. As noted, evidence on the record indicates that the Beneficiary is directly involved in the property evaluation and acquisition aspects of the business, while his formal duty descriptions include few of these operational tasks. The record indicates that the Beneficiary intermingles his higher level managerial duties with a number of non-managerial tasks. This lack of clarity is important because, as we have discussed, the record includes substantial evidence reflecting the Beneficiary's performance of non-qualifying operational tasks that do not fall directly under managerial duties as defined in the statute. For this reason, we cannot determine whether the Beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

To the extent the Petitioner references qualifying managerial tasks in the Beneficiary's duty description, these are vague and do not convey his actual day-to-day tasks or establish that he would devote his time primarily to them. The Beneficiary's duty description includes several general duties that could apply to any manager acting in any business or industry and they do not provide insight into the actual nature of his qualifying tasks. The Petitioner provides few examples and little supporting documentation to demonstrate the Beneficiary's performance of managerial level duties.

For instance, the Petitioner does not sufficiently describe or document financial business plans and policies he established during the first year, marketing and business policies he created, company policies he established or improved, hiring plans he developed, personnel changes he made, responsibilities he assigned to his subordinates, or business and management conferences in which

he participated. Likewise, with respect to the Beneficiary's proposed duties under the extended petition, the Petitioner has not outlined in detail his managerial tasks, such as objectives he would "realize," development strategies he would formulate, long-term goals he plans, major financial matters he would approve, organizational and work systems he would establish and improve, major events and incidents he would handle, or "loopholes and problems" he would resolve. The Beneficiary's duties also reference activities not clearly relevant to the Petitioner's business operations, such as collecting "product user feedback" and formulating "high efficiency organization and work systems." 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).

We acknowledge that the Petitioner has submitted evidence indicating that the Beneficiary has been involved with the company's decision making regarding real estate purchase and investment activities. However, as we have noted, these activities are suggestive of the Beneficiary's primary involvement in all operational aspects of the business, and the Petitioner has not sufficiently articulated or documented managerial duties the Beneficiary would perform on a daily basis. For instance, the decision to offer to purchase a property reflects a single managerial decision, but does not provide insight into the nature of any managerial duties the Beneficiary would perform on a regular and ongoing basis. In fact, the Petitioner did not purchase property, or invest in any real estate projects, until after the date of the petition in May 2017. This further indicates that the Beneficiary was primarily involved in non-qualifying operational tasks at the time of filing.

Even though the Beneficiary holds a senior position within the organization, the fact that he will manage the business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. Section 101(A)(44)(A) of the Act. 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; however, the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial in nature.

B. Staffing and Operations

The Petitioner submitted an organizational chart reflecting that the Beneficiary oversees six subordinates including directors of administration and marketing departments, directors of legal and financial departments (staffed by an outside attorney and accountant), as well as a "representative of California" and a head of "oversea education." Further, the chart indicated that the California representative supervises a project management employee. There were also at least nine positions in the chart which had not yet been filled, including an office employee and human resources employees reporting to the head of the administration department, a position identified as "BD," a customer service employee and a planning and marketing department employee subordinate to the head of the marketing department, a construction team and "outsourcing business," beneath the

California representative, and a student information manager and "communication and cooperation" employee subordinate to the overseas education employee.

On appeal, the Petitioner contends that the Beneficiary acts as personnel manager supervising other managerial and professional employees. 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*).

The Petitioner does not provide sufficiently detailed duty descriptions for the Beneficiary's subordinates to demonstrate that they act in managerial or professional capacities. For instance, the Petitioner states that the head of the company's administrative department is tasked with directing and coordinating "supportive services within the Company," "developing business relationships with future suppliers and construction companies," and ensuring "reliable cost control." These submitted duties are overly vague and do not provide sufficient detail as to the managerial or professional nature of the head of administration position, such as support services he coordinates or business relationships he develops. In addition, the Petitioner provides an offer letter submitted to the claimed head of the administration department listing his proposed title as "administrative assistant," which undermines the Petitioner's claim that this employee was hired as a department manager.

Likewise, the Petitioner states vague duties for the claimed head of the marketing department such as evaluating "the Company's marketing strategy" and gathering "information on market trend[s] and develop[ing] and analyz[ing] them to compile reports" for the Beneficiary. Again, the Petitioner provided few details regarding this employee's actual duties. In fact, a job description submitted for the Beneficiary refers to head of the marketing department and states that she is primarily engaged in operational level tasks such as visiting and evaluating properties with the Beneficiary. There is little indication she would be acting as a manager of a separate marketing department as of the date of the petition. Indeed, a number of real estate documents in the record list the head of marketing as a real estate agent, leaving question as to whether she is acting as the Petitioner's fulltime director of marketing as asserted. In addition, the Petitioner provides little information or explanation as to the stated "overseas education" and "non-real estate business development" sections specified in his duties. The Petitioner also indicates that the Beneficiary oversees independent contractors operating a legal and financial department; yet it submits little detail or documentation as to the activities of these claimed independent contractors, including how often they are engaged, to substantiate that they are running departments within the company's organizational chart as claimed. Overall, there is little supporting documentation substantiating that the Beneficiary supervises department managers who have discretion over their separate departments.

The provided organizational chart further reflects that the "representative of California" supervises a project management employee. However, the Petitioner does not submit sufficient job descriptions for either position to show that they are managerial or professional in nature. In addition, a submitted offer letter provided to the project management employee states that she reports to the Beneficiary, not the stated California representative.

Other discrepancies in the record leave question as to Petitioner's staffing levels. The Petitioner submitted an IRS Form 941 from the fourth quarter of 2016 and corresponding state wage documentation indicating that it paid three employees $18,333.32 in wages during that quarter. However, a corresponding 2016 IRS Form 1120 U.S. Corporation Income Tax Return reflects that the Petitioner only paid $14,422 in "compensation to officers," but no "salaries and wages."[2] At the time of filing in May 2017, the Petitioner had a total of six employees on its payroll – the Beneficiary, the administration department head, the marketing department head, a part-time employee who was not identified on the organizational chart, the California representative, and the project manager. By July 2017, the staff consisted of a total of four employees – the Beneficiary, the administration and marketing department heads, and the California representative. The Petitioner nevertheless resubmitted the same organizational chart showing six employees without explaining how it was functioning with the loss of one-third of its staff.

As noted, the Petitioner contends that the Beneficiary's subordinates act as professionals thereby qualifying the Beneficiary as a personnel manager. 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."

The Petitioner has not corroborated its claim that the Beneficiary supervises professional subordinates. The Petitioner states on appeal that "the evidence submitted does in fact establish that [the Beneficiary's] subordinates are professionals who possess Bachelor's degrees in fields directly related to the work they perform." However, the Petitioner does not explain or document these degrees or explain how they are directly related or required for the subordinate positions. Indeed, as discussed, the Petitioner has submitted vague duty descriptions for the Beneficiary's subordinates that do not demonstrate the professional nature of these positions and supporting evidence indicates that these positions are not professional in nature, but administrative and operational. As such, the Petitioner has not established that the Beneficiary oversees professional subordinates as necessary to qualify him as a personnel manager.

[2] We acknowledge that the Petitioner submits an amended IRS 1120 on appeal, but there is no indication that this discrepancy was remedied pursuant to this amendment.

On appeal, the Petitioner also contends that the Beneficiary acts as a function manager. 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).

The Petitioner has not demonstrated that the Beneficiary would act as a function manager under the extended petition. First, we note that 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). To qualify as a function manager a Beneficiary need not have subordinates. However, the Petitioner must establish that the Beneficiary is primarily devoted to qualifying managerial duties, but his stated duties and the supporting evidence do not support that he was primarily relieved of these tasks as of the date of the petition. As we have discussed, the evidence indicates that as of the date of the petition, the Beneficiary was substantially devoted to evaluating properties and making offers to purchase them. The Petitioner has documented few managerial duties performed by the Beneficiary and it has submitted little supporting documentation indicating that he is delegating non-qualifying tasks to his subordinates. In addition, the Petitioner has not clearly articulated the function the Beneficiary manages. The evidence reflects that the Beneficiary is merely seeking out potential real estate investments, not managing a clearly defined function within the greater organization.

As discussed, the Petitioner submits a duty description and supporting evidence indicating that the Beneficiary would be involved in nearly all of the operational matters of the business and it has submitted little evidence to indicate that he will delegate operational tasks to subordinates. In addition, the Petitioner has not demonstrated that the Beneficiary would be supervising managerial or professional subordinates as of the date of the petition, or that his claimed subordinates would relieve him from performing non-qualifying operational duties. As such, the evidence does not demonstrate that the Beneficiary would act in a qualifying managerial capacity.

III. DOING BUSINESS

The Director also denied the petition concluding that the Petitioner did not establish that it is doing business as defined by the regulations. The Director pointed to the Petitioner's apparent lack of revenue and the fact that its only transactions had taken place after the date of the petition.

At the time a petitioner seeks an extension of the new office petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires it to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous

provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii)(H)

The Petitioner submitted a 2016 IRS Form 1120 indicating that the company had earned no revenue during that year, despite being in operation since July 2016. Otherwise, in support of the petition and in response to the RFE, the Petitioner provided little evidence that it was continuously providing goods and services and earning revenue. In fact, the Petitioner submitted bank records and other supporting documentation reflecting that the only source of income for the company was investment funds transmitted from the Beneficiary's personal bank account, including transfers of $90,000 in April 2016 and $1.3 million in December 2016. Although the Petitioner submitted offers it made to purchase properties prior to the date of filing, the evidence indicates that it had purchased real estate in July and August 2017, invested in a limited liability company in August 2017, and signed a letter of intent related to the potential acquisition of stock in another limited liability company in June 2017, all after the date of petition. This evidence did not demonstrate that the Petitioner was doing business regularly, systematically, and continuously at the time it filed the petition.

However, now on appeal, the Petitioner submits documentary evidence it states establishes that it has been regularly providing services to the foreign employer and invoicing it for its real estate investment activities. The Petitioner provides an amended IRS Form 1120 from October 2017 indicating that it earned $90,000 in revenue during 2016, and as noted, it provides invoices reflecting that it earned over $180,000 billing the foreign employer for its services. Likewise, the Petitioner submits asserted correspondence with the foreign employer reflecting the Beneficiary requesting approval of his investment plans and amounts, most postdating the petition. Evidence establishing the Petitioner's business activities after the date of the petition is not probative in demonstrating that the company was doing business at the time of filing or for the previous year.

Further, we do not find this evidence submitted on appeal credible. First, the Petitioner questionably submitted no evidence of invoices to the foreign employer and correspondence related thereto prior to appeal. It is notable that there was no discussion of the Petitioner invoicing the foreign employer for services or consistently requesting its approval on all investment matters prior to appeal. Indeed, the provided documentation indicates that the Beneficiary is providing investment funds to the Petitioner from his personal bank account. These discrepancies leave question as to the Petitioner's assertion that it was regularly invoicing the foreign employer for services prior to the date of the petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Therefore, we do not find the evidence submitted on appeal persuasive in demonstrating that the Petitioner was doing business as required by the regulations as of the date of filing. For this additional reason, the appeal must be dismissed.

IV. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in a managerial under the extended petition or that it was doing business for the previous year.

ORDER: The appeal is dismissed.

Cite as *Matter of J-USA Inc.*, ID# 1096404 (AAO Apr. 17, 2018)