MATTER OF R-P-T-P-, INC.

DATE: APR. 24, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a "safety wear" manufacturing and distribution firm, seeks to extend the Beneficiary's temporary employment as its "Distribution Center Operations Supervisor" 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 Petitioner did not submit sufficient evidence to establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner submits additional evidence and a brief disputing the basis for denial. The Petitioner asserts that, while the Beneficiary may perform some non-qualifying duties, he primarily manages an essential function of the petitioning company.

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 position involving 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, executive, or specialized knowledge capacity. *Id.* The evidentiary requirements for filing an L-1 classification petition are located at 8 C.F.R. § 214.2(l)(3).

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. 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.*

## II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director found that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition. However, the Petitioner does not claim that the Beneficiary is an executive. Therefore, we restrict our analysis to whether the Beneficiary will be employed in a managerial capacity.

The Petitioner claims that the Beneficiary's position involves management of an essential function as well as supervision of subordinate personnel. 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. The term "function manager" applies generally when a beneficiary does not primarily supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *Id.* We will consider whether the Beneficiary meets the criteria for both "function manager" and "personnel manager" below.

### A. Function Manager

When examining the managerial capacity of the Beneficiary, we will look first to the Petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Based on the statutory definition 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 the Form I-129 L Classification Supplement, the Petitioner divided the Beneficiary's duties into three different sections. The Petitioner stated he would allocate 50% of his time to the following:

> Responsible for daily [m]anaging of all warehouse activities to ensure efficient allocation of resources and compliances [*sic*] with policies and procedures; [m]onitor and review employees' work activities through individual meetings and group meetings . . . ; [d]elegate and advise employees on work procedure and practices; [m]otivate, develop, and mentor employees for improved performance. Oversee other personnel activities including interviewing job applicants, new employee orientation & training, performance counseling and discipline including termination; [m]ay attend outside meetings such as company group meetings and training seminars for both information sharing and learning purposes; [m]ay at times visit other facilities to assist in start-up operations, evaluate current procedures and assist in operational improvements; [f]acilitate all forklift training and administer OSHA certification tests with all warehouse associates and maintain records accordingly.

The Petitioner stated that an additional 40% of the Beneficiary's time will be spent on these duties:

> On a daily basis, supervise and delegate work assignments to operational staff; [c]onsult with [the d]istribution [m]anager as needed; [m]anage and control daily warehouse activities including cycle counts, equipment maintenance, and problem solving as needed; [s]erve as liaison to Core's IT department for scan gun and CORE/MAS maintenance; [a]rrange shipment form warehouse as directed, including providing instruction to warehouse staff; [w]ork with management to develop improvements in production and safety procedures, proper strapping, etc.

Finally, the Petitioner stated the Beneficiary would devote 10% of his time to the following:

> Seek constant improvement, more efficient initiatives in the work processes; [p]erform special projects and other miscellaneous duties as assigned by management; [f]ollow up to complete any assigned work; [m]aintain high ethical standards in the work place; [r]eport all irregular issues and problems to manager for solution; [m]aintain good communication with Team Leaders, staff members, and outside contacts; [c]omply with all company policies and procedures; [r]esponsible for maintaining a clean safe working area.

In addition, the Petitioner provided the Beneficiary's résumé in which the Beneficiary stated that he is responsible for supervising warehouse personnel, importing-exporting raw material process,

receiving finished goods, and inventory control and quality audits. The Beneficiary also listed the following duties as part of his position in the United States:

- Warehouse personnel [s]upervisor
- Assign and review activities to be performed by warehouse personnel
- Customer order fulfillment review and analysis
- Review order status and due dates report
- Work directly with manufacturing facility on product shortages
- Shipping [r]eport [s]chedule for [c]ustomer [s]ervice [e]xecutives
- Expedite [o]rder [s]hipment upon [c]ustomer[']s request
- Confirm shipments are scheduled with transportation carriers
- Coordinate and [s]upervise [p]roduct [e]mbroidery process
- Supervise and prepare [m]aterials for outsourcing suppliers
- Person of contact for manufacturing facility
- Finish [p]roduct [i]nventory [c]ontrol and [a]nalysis
- Coordinate [c]ycle counts and accurate inventory
- Supervise process material being send [*sic*] to manufacturing facility
- Maintain [f]inish [g]oods [i]nventory [o]rganized
- Assign [b]in [l]ocations to product being received

The Director issued a request for evidence (RFE) advising the Petitioner that the initial evidence was insufficient to establish that it would employ the Beneficiary in a managerial capacity. The Director offered the Petitioner an opportunity to resolve this evidentiary deficiency by submitting, in part, a statement containing a more detailed list of the Beneficiary's job duties and the percentage of time he would allocate to each job duty and explaining how the Beneficiary would meet each prong of the four-prong definition of managerial capacity.

In response, the Petitioner provided a letter stating that "timely shipment of customer orders is the most essential function" and further claiming that the Beneficiary will perform an essential function of the business and manage "a key component of the organization, supervise[] other employees, [have] the authority to hire and terminate subordinate employees, and exercise[] a great deal of discretion on the day[-]to[-]day operations of the [d]istribution [c]enter." The letter also contained a job description that divided the Beneficiary's duties into three categories – supervisory duties requiring 50% of his time, warehouse coordination duties requiring 40% of his time, and "[m]iscellaneous and other" duties requiring 10% of his time.[1]

The Petitioner also provided two organizational charts – one depicting a broader view of the entire organization and the other depicting a more specific view of the Petitioner's distribution center staffing. The latter chart, dated August 2016, shows a distribution center manager in the senior position with the Beneficiary as his direct subordinate. Two operations team leaders, one responsible for shipping and the other for embroidery, report to the Beneficiary and are depicted as

[1] The job duties within each category were identical to those contained in the original job description, stated above.

supervising eight workers who perform shipping, receiving, embroidery and quality control tasks. In addition, the Petitioner provided brief job descriptions for all distribution center employees, noting that the distribution center manager oversees all distribution activities, including budget, building maintenance, personnel staffing, and operations, while the Beneficiary oversees 10 "operators" in the day-to-day shipping, receiving, and inventory process.

In denying the petition, the Director determined that the evidence did not establish that the Beneficiary would be employed in a managerial capacity. The Director observed that the Beneficiary's job description indicates that he would perform both managerial and non-managerial job duties and further determined that the Petitioner did not demonstrate that the Beneficiary's primary duties would be managerial in nature.

On appeal, the Petitioner restates prior claims regarding the Beneficiary's role in managing "a key component" and supervising employees and reiterates that the Beneficiary has the authority to hire and fire employees and exercise discretion over the daily activities of the organization's distribution center. The Petitioner also restates the job description that was submitted in response to the RFE and provides another job description reflecting additional tasks that the Beneficiary has performed since the position of the distribution center operations manager became vacant in September 2015.

While we acknowledge the Petitioner's submission of additional job duties associated with the position of distribution center operations manager, we find that such information is irrelevant in the matter at hand. The Petitioner filed the instant petition in June 2016, approximately eight months after it claims the Beneficiary's superior departed from his position. If the Petitioner had intended for the Beneficiary to assume the position of distribution center operations manager rather than that of distribution center operations supervisor, it could have indicated as such when it filed the petition. However, it did not do so and, instead, indicated that the Beneficiary's proposed position is that of supervisor of distribution center operations. Therefore, the record does not establish that the Petitioner intended for the Beneficiary to take over and perform the job duties of the distribution center operations manager under the extended petition.

Moreover, the Petitioner's organizational chart submitted in response to the RFE indicates that the distribution center manager position was occupied as of August 1, 2016. As such, the chart is inconsistent with the Petitioner's current claim on appeal, which indicates that the position of distribution center manager has remained vacant since 2015. We also note that the Petitioner did not indicate in any of its supporting documents at the time of filing or in response to the RFE that the Beneficiary had assumed or would assume additional duties as the distribution center manager. The Petitioner has not resolved this anomaly with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Here, adding the job duties of another position to the Beneficiary's existing job description would be deemed a material change. Therefore, the only job duties we will consider in this proceeding are those associated with the Beneficiary's proposed position of distribution center operations supervisor.

Moving on to a discussion of the Beneficiary's job duties, we note that the Petitioner claimed in the RFE response, and now claims on appeal, that the Beneficiary will assume the role of a function manager. As noted, the term "function manager" applies generally when a beneficiary does not primarily 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, that petitioner must clearly describe the duties to be performed in managing the essential function, or more specifically, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function. See *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016). In this matter, the Petitioner has not provided evidence that the Beneficiary will manage an essential function.

First, we note that the Petitioner makes two competing claims by indicating that the Beneficiary "performs an essential function" within the Petitioner's business while also claiming that the Beneficiary "manages a key component of the organization," which is indicative of managing an essential function. The Petitioner explained that its "core business strategy" is focused on ensuring that customers receive their orders on time and that "timely shipping of customer orders" is its most critical function. As indicated above, one of the key requirements for demonstrating that a beneficiary manages an essential function is establishing that the beneficiary does not actually perform the underlying duties of that function. Thus, in order to establish the role of a function manager, the Beneficiary cannot both manage the essential function and perform the underlying duties associated with that function. While the Beneficiary may perform some operational or administrative tasks, the function manager must primarily manage the essential function. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988) ("[T]he employee's duties must be primarily at the managerial or executive level. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity."). The Petitioner's claim that the Beneficiary will "perform[] an essential function" is inconsistent with the claim that the Beneficiary will primarily manage that function.

Further, the Beneficiary's job description does not establish that the Beneficiary would primarily allocate his time to managing a function. Despite the Director's instruction to allocate the amount of time the Beneficiary would allocate to specific tasks, the Beneficiary's job description groups together multiple job duties to which the Petitioner assigned a single percentage of time, thereby leaving us without any means of determining how much time the Beneficiary would allocate to each job duty within the group.

On appeal, the Petitioner contends that conducting "simple math" is sufficient to arrive at a specific percentage of time that would be allocated to each job duty. However, the Petitioner's reference to "simple math" is based on the assumption that the Beneficiary would spend the same amount of time

performing each job duty within a given category so that in order to determine each duty's specific time allocation we should divide the overall percentage of time by the number of job duties in a particular category. The Petitioner does not, however, provide any basis for claiming that this formula applies to the listed job duties, as there is no evidence in the record to suggest that all duties within a given category would be assigned the same time component. Therefore, we cannot assume that managing warehouse activities in the "supervisory" category would consume the same amount of the Beneficiary's time as, for instance, monitoring employee activities or delegating duties and advising employees on work procedures, which are all in the same category. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

In addition to the lack of specific time allocations, the job description itself appears to allocate more than half of the Beneficiary's time to personnel supervision duties, thereby indicating that such duties are not merely incidental to managing a function, but rather are key aspects of the Beneficiary's proposed position. More specifically, in reviewing the duties that comprise the "supervisory" category, most of the listed duties – with the exception of attending meetings and training seminars and visiting other facilities to assist with start-up operations – involve overseeing or training employees. Likewise, while the "warehouse coordination category" is not on its face indicative of personnel management, this category also contains job duties related to managing personnel, including supervising and delegating work to "operational staff" and "providing instruction to warehouse staff."

Further, despite indicating that the "warehouse coordination" category includes managing and controlling daily warehouse activities, which is indicative of managing a function, the Petitioner did not clarify what actual tasks the Beneficiary would perform to establish how he would manage and control warehouse activities. The category "Miscellaneous and Other" also contains various ambiguities as to the specific tasks the Beneficiary would perform. Namely, the Petitioner stated that the Beneficiary would perform "special projects and other miscellaneous duties," "complete any assigned work," and "[m]aintain high ethical standards." However all three phrases are vague and do not specify the actual underlying tasks the Beneficiary would perform. 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). As such, reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient and does not satisfy the regulatory requirement for a detailed description of the Beneficiary's daily job duties. Moreover, the Beneficiary's job description does not establish that his primary concern would be managing and controlling warehouse activities to ensure timely product delivery.

Lastly, the Petitioner did not establish that the Beneficiary has discretion over the daily operations of the distribution center or that he functions at a senior level with respect to the distribution center. As indicated above, the Beneficiary's job description focuses on his discretion over personnel and personnel-related issues and does not specify which duties represent the Beneficiary's discretion over the day-to-day operations of an essential function. *See id.* Further, the distribution center's

staffing hierarchy shows that the Beneficiary is subject to oversight from the distribution center manager and therefore is not at a senior level within the department.

The Petitioner emphasizes that we should consider "the [B]eneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees with respect to the function managed, and the value of the budgets, products, or services that the beneficiary manages."

Here, while we have considered these factors, the record as a whole does not support a finding that the Beneficiary would be employed primarily as a function manager. The distribution center manager occupies the senior position in the hierarchy with respect to this function, and the Petitioner indicated that the distribution center manager oversees all distribution activities, including budget, building maintenance, personnel staffing, and operations, while the Beneficiary oversees 10 "operators" in the day-to-day shipping, receiving, and inventory process. This hierarchy further illustrates the Beneficiary's role as a supervisor, rather than as a function manager, within the distribution center department.

In light of the above, we find that the record does not establish that the Beneficiary would be employed in a position where he would manage an essential function of the organization.

B. Personnel Manager

As mentioned above, despite the Petitioner's claim that it would employ the Beneficiary in the capacity of a function manager, the Beneficiary's job description reflects that his primary focus would be on the supervision of subordinate personnel. Therefore, while we have considered the Petitioner's function manager claim, we will also consider whether the Beneficiary's proposed position would qualify as that of a personnel manager.

As noted, 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. Section 101(a)(44)(A)(iii) of the Act.

Based on the Beneficiary's placement within the distribution center's staffing hierarchy and the Beneficiary's list of job duties, we find that the Beneficiary's discretionary authority over his claimed subordinates is not at issue. Nevertheless, we find that the record lacks sufficient evidence to establish that the Beneficiary's subordinates are supervisory, professional, or managerial

employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *Church Scientology Int'l*, 19 I&N Dec. at 604.

The Director determined that the Petitioner did not establish that the Beneficiary's subordinate staff consists of supervisory, professional, or managerial employees. On appeal, the Petitioner states that it "does not dispute this finding because beneficiary is a function manager."

The record supports the Director's conclusion. While the distribution center's organizational chart indicates that the Beneficiary will oversee the work of two team leaders, whose positions the chart depicts as supervisory, the employee job descriptions that accompany the chart are vague and do not indicate that the team leaders would perform supervisory tasks. Furthermore, the Beneficiary's own job description does not indicate that his supervisory duties extend only to the team leaders; rather the job description indicates that the Beneficiary would be responsible for directly supervising the distribution center's entire operational staff.

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." Here, the employee list the Petitioner provided with the organizational chart indicates that no one within the distribution center's operational staff had above a high school level education. Thus, the Petitioner has not shown that the Beneficiary would oversee subordinate employees who are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Based on the totality of the record, while the Beneficiary may be instrumental in supervising the day-to-day shipping and receiving activities of the company, his duties are primarily focused on the first-line supervision of non-professional personnel, rather than the higher-level duties associated with the management of an essential function.

## III. CONCLUSION

For the reasons discussed above, the evidence submitted does not establish that the Beneficiary would be employed in a managerial capacity under the extended petition.

**ORDER:** The appeal is dismissed.

Cite as *Matter of R-P-T-P-, Inc.*, ID# 316267 (AAO Apr. 24, 2017)