U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-N-C-, INC.

DATE: APR. 25, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which markets chemicals manufactured by its foreign parent company, seeks to continue the Beneficiary's temporary employment as its business development manager 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 Petitioner would employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred by focusing on the size of the Petitioner's staff rather than the Beneficiary's managerial authority, and by not taking into account support from the Petitioner's foreign parent entity.

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.*

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it would employ the Beneficiary in a managerial capacity. The Director did not claim that it seeks to employ the Beneficiary in 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.

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.

When examining the managerial or executive 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.

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 Petitioner has specified that it seeks to employ the Beneficiary as a function manager.

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 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). In this instance, the Petitioner has asserted that the Petitioner will manage the core functions of supply chain and business development. The record, however, does not establish that the Beneficiary will primarily manage those functions or act at a senior level with respect to those functions.

A. Duties

The Petitioner's foreign parent company stated that the Beneficiary has five areas of responsibility, condensed below:

- Streamlining tolling operations. He oversees the chemical manufacturing processing of materials . . . [and] has the authority to represent the company when dealing with tolling, processing, and warehousing facilities in several states. . . .
- Building relations and ensuring commercialization of key accounts in Latin America. . . .
- Overseeing inventory management to ensure the smooth supply chain in key regions. He monitors the activities of teams of inventory and warehouse contract personnel . . . assures that there are no shortages . . . [and] oversees the analysis of inventories . . . .
- Managing Latin America regional sales . . . . He sets short-term sales goals and . . . has the responsibility to maintain sales volume, product mix, and appropriate selling prices. . . .
- He oversees the identification, development, and evaluation of marketing strategies . . . , initiates market research studies and analyzes the findings; and oversees the conducting of economic and commercial studies to identify potential new markets for detergent, paper, and textile segments.

A May 2015 agreement between the Petitioner and named the Petitioner as "Marketing Service provider." The agreement indicated that the Petitioner would provide services such as identifying customers, promoting products, and arranging for storage and shipping.

Some of the Petitioner's responsibilities under the agreement, quoted below, relate to further processing of DNL's products:

- Identify companies that can dissolve products from into quality liquids to ship to customers.
- [The Petitioner] shall market and sell "Products" as either finished liquids, powders, or take the "Products" powders shipped by and have the "Products" diluted to its finished quality specifications given [to the Petitioner] from

Although the Beneficiary's job description indicated that he "oversees chemical manufacturing," it is not evident that the Petitioner's involvement in manufacturing goes beyond arranging for the dissolution and dilution of products. It is also not evident that the Beneficiary would have managerial authority over this third-party processing. The specifications for that processing originated

from [redacted] not from the Petitioner, indicating that the Petitioner's responsibility is limited to locating third parties able to meet [redacted] specifications.

When the Director asked for more details, the Petitioner's then attorney of record asserted that the Beneficiary manages an essential function because:

1. He implements the policies & strategies pertaining to Sales, Marketing & Supply chain of [redacted] products in the US market which include but are not limited by following
   i) Marketing Strategy
   ii) Pricing Strategy
   iii) Supply & Storage of products
   iv) Dilution of powder products (Tolling facilities)
   v) Preparing & achieving the targeted sales budget for Americas (North & Latin America)
2. Beneficiary acts as Senior Management
   i) Provide subject matter expertise of American market & intelligence to [redacted]
   ii) Expertise to perform operational task – Strategic location for storage & dilution, competitor mapping, pricing for [redacted] India, maintaining optimum inventory to reduce overhead cost
   iii) Market development activity to ensure identification & commercialization of new business accounts
   iv) Influencing Pricing, Marketing & dispatch decisions at highest levels for parent company

Counsel asserted that the Beneficiary's "[d]aily activities are as following" [*sic*]:

a) Key Accounts & customer follow-ups regarding the material under testing, technical discussions, scheduling & planning trial dates
b) Reviewing customer pricing weekly due to constant changes in RM procurement
c) Dispatch planning with [the Dispatch/Logistics executive, Commercial Paperwork/Invoicing senior executive] & plant team
d) Forecasting for the monthly dispatches, giving out schedules to corporate & plant team
e) Technical discussions for the right kind of product to be tested with [the distributor's] accounts managers
f) Providing price approvals to [the distributor's] managers
g) Approving & reviewing the freight on day-to-day basis if there is a change in customers['] demand

Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. In this instance, the Petitioner has not submitted sufficient evidence to show that the Beneficiary's activities in the listed areas rise to the level of managerial capacity.

In terms of direct evidence of the Beneficiary's activities, the Petitioner submitted printouts of email conversations, showing that the Beneficiary engaged in activities such as:

- Notifying a distributor of difficulties securing raw materials
- Discussing sample testing with its distributor
- Modifying delivery arrangements
- Checking the status of a claim for damages
- Recommending products based on customer inquiries
- Requesting and providing price quotes
- Notifying customers that new inventory was in stock

We note that the Beneficiary's appointment letter indicated that he "shall be reporting to the 'Business Development Head,'" implying that he reports to a higher official whose own authority is limited to business development. The Petitioner did not explain how this hierarchy is consistent with the Beneficiary, rather than the Business Development Head, acting at a senior level with respect to the business development function.

Denying the petition, the Director acknowledged the email printouts, but stated that those messages did not show that the Beneficiary acted primarily at a managerial level. On appeal, the Petitioner asserts that it has demonstrated that the Beneficiary "implements the policies and strategies pertaining to Sales, Marketing & Supply chain of [redacted] products in the US market," and "acts as Senior Management" as indicated in counsel's RFE response letter.

The record indicates that the Beneficiary is authorized to make managerial-level decisions on behalf of the Petitioner, but the evidence is not sufficient to show that the Beneficiary's position is *primarily* managerial. The email printouts and other evidence indicate that the Beneficiary performs lower-level tasks involving sales and customer service, and the Petitioner has not shown that other employees relieve the Beneficiary from performing those tasks. Therefore, the Petitioner has not shown that the Beneficiary has managerial discretion over the function's day-to-day operations without primarily performing those operations.

B. Staffing

1. U.S. Staffing

When the Petitioner filed the petition in June 2018, it claimed two employees in the United States. Pay receipts from March 2018 named the Beneficiary and two other employees, but the Beneficiary did not show what the other employees did for the company. Also, state and federal quarterly income tax returns indicated that the Petitioner had only two employees in April and May 2018, and one employee in June 2018.

In the denial notice, the Director found that the Petitioner had not shown how the other employees relieve the Beneficiary from having to primarily perform operational tasks. The Director also noted

that, according to the quarterly tax returns, the Petitioner had only one employee (presumably the Beneficiary) at the time of filing.

On appeal, the Petitioner states the "U.S. office operates with minimum employees, ranging from 1 to 3; however . . . the Beneficiary manages all Business Development functions." The Petitioner has not fully explained what the other employees did when they were there, or who performs those tasks when the Beneficiary is the only employee.

The Petitioner asserts that the Director relied too much on the small size of the Petitioner's staff. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa petition for classification as a multinational manager or executive. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for us to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *See e.g., Family Inc.*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner also has not established that it had three employees at the time of filing, rather than the one employee shown on contemporaneous tax records. The Petitioner's staffing is material to the petition, and the Petitioner's inclusion of incorrect material information on the petition form is not a minor technicality. By signing the petition form, the Petitioner attested to its accuracy and truthfulness. Incorrect information on that form necessarily reflects on the Petitioner's credibility.

2. Foreign Support

Counsel for the Petitioner asserted that the Beneficiary "relies on support from parent company employees" in six departments:

- Quality Control: Assistant Manager
- Dispatch/Logistics: Executive
- Commercial Paperwork/Invoicing: Senior Executive
- Plant Production: Two Executives
- Pricing: Executive Assistant and Pricing Analyst to the President
- Technical Support: Senior Manager

In the denial notice, the Director stated that the Petitioner did not explain how the foreign entity supports the Beneficiary on a daily basis in the areas listed above.

On appeal, the Petitioner asserts:

> [T]he organization as a whole has the resources to facilitate [the Beneficiary's] work in the United States. The Petitioner does not argue that the Beneficiary is the superior of the seven workers abroad that help him carry out his duties. The Petitioner does maintain that these workers coordinate their efforts to support his work . . . . Thus, Petitioner submits that the Director did not properly weigh the duties performed by the seven foreign staff located abroad.

The record contains no direct evidence to show in what way, and to what extent, the listed foreign employees support the Beneficiary's work. The Petitioner did not establish "the duties performed by the seven foreign staff located abroad," and therefore the Petitioner did not allow the Director an opportunity to weigh that information. The sales agreement between [redacted] and the Petitioner imposed certain obligations on [redacted] such as to ship goods to the Petitioner, insure those goods while in transit, and reimburse the Petitioner for expenses. The agreement, however, did not indicate that the Beneficiary or any employee of the Petitioner would have managerial authority or discretion over any aspect of [redacted] business.

The sales agreement did, on the other hand, require the Petitioner to promote, market, and sell [redacted] products; locate inventory storage sites; receive and respond to customer service calls; and other specified functions which are operational rather than managerial. The Petitioner has not shown who, other than the Beneficiary himself, performs these operational tasks when the Beneficiary is the Petitioner's only employee.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it would employ the Beneficiary in a managerial under the extended 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 D-N-C-, Inc.*, ID# 2940448 (AAO Apr. 25, 2019)