U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF EM-T-, LLC

DATE: APR. 26, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a trucking company, seeks to temporarily employ the Beneficiary as its "Administrative Manager/Owner" under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) § 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 an executive or managerial capacity.

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner did not establish, as required, that: (1) it has a qualifying relationship with the Beneficiary's employer abroad; (2) the Beneficiary has at least one continuous year of employment abroad with a qualifying organization within the three years preceding the filing of the petition; (3) the Beneficiary was employed abroad in a managerial or executive capacity; and (4) the Beneficiary's proposed U.S. employment would be in a managerial or executive capacity.

On appeal, the Petitioner challenges the denial, asserting that it is a "new entity"[1] and that it meets all eligibility requirements. The Petitioner contends that the Director "seems to confuse managerial and executive" and asks that we apply the statutory definition of managerial capacity to our analysis of the Beneficiary's proposed position.[2]

Upon *de novo* review, we will dismiss the appeal because the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial or executive capacity; however, we will reserve the remaining three issues as the Petitioner has not satisfied a fundamental element

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[1] 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). Although the Petitioner describes itself as a "new entity," when asked whether the Beneficiary was coming to the United States to open a new office at Section 1, No. 12 of the L Classification Supplement, the Petitioner check the "No" box. As the Petitioner did not claim "new office" status at the time of filing, the regulations that pertain to a "new office" do not apply to the facts presented herein.

[2] In a response to the Director's request for evidence (RFE), the Petitioner expressly stated that the Beneficiary's proposed employment would be in an executive capacity. However, as the Petitioner now claims that the Beneficiary would be employed in a managerial rather than an executive capacity, only the Petitioner's most recent claim will be addressed in this decision.

of eligibility, which requires it to establish that the Beneficiary will work in a managerial or executive capacity.

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 capacity, or involved 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.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The only issue to be addressed in this decision is whether the Petitioner provided sufficient evidence to establish that the Beneficiary would be employed in a managerial capacity. As the Petitioner's initial claim at the time of filing and its most recent claim on appeal indicate that the Beneficiary would be employed in a managerial capacity, we will not include a discussion of whether the proposed employment would be 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.

Beyond the required description of a beneficiary's job duties, U.S. Citizenship and Immigration Services (USCIS) examines the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the business and its staffing levels.

A. Duties

In a support letter, the Petitioner stated that the Beneficiary would be employed in a managerial position, indicating that the Beneficiary's job duties would include the following: ensure that

customer concerns are researched and resolved; stay current with applicable laws and regulations; work through subordinates to direct and coordinate activities in the operations department; supervise staff in making repairs and maintaining the vehicles, facility, and equipment; assign tariff classifications to subordinates and set operational policies and standards; ensure staff compliance with policies and procedures, safety rules, contracts, and government regulations; develop criteria, application instructions, procedural manuals, and contracts for government transportation programs; and collaborate with staff "to formulate order."

In an RFE the Director determined that the original job description was insufficient to establish that the Beneficiary would be employed in a managerial capacity. The Director instructed the Petitioner to provide a more detailed job description listing the Beneficiary's typical daily managerial duties and the percentage of time he plans to allocate to each activity.

In response, the Petitioner provided a job description claiming that the Beneficiary would be employed in an executive capacity. With the exception of omitting the claim that the Beneficiary would "continue to ensure that customer problems are researched and corrected," the new and previously submitted job descriptions were identical. The Petitioner did not individually list the Beneficiary's job duties or assign percentage increments to specify the portion of time he would devote to typical managerial duties. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In the denial decision, the Director acknowledged the prior submissions of two job descriptions and found that the Petitioner did not adequately describe the Beneficiary's job duties, noting that certain elements of the job description did not state actual duties, but rather paraphrased portions of the statute. The Director concluded that the Petitioner did not provide sufficient information to show how the Beneficiary would allocate his time and thus it did not establish that the Beneficiary would primarily perform managerial duties.

On appeal, the Petitioner contends that the Beneficiary will assume the role of 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).

In the present matter, beyond stating that the Beneficiary would assume the role of a function manager, the Petitioner does not further pursue this claim or provide any evidence or information to

support it. The Petitioner does not identify the specific function the Beneficiary would manage or provide a detailed description of duties explaining how he would manage that function. Further, despite being instructed to provide a more detailed job description, the Petitioner did not comply with this request; with the exception of the omitted element concerning the Beneficiary's claimed oversight of the Petitioner's customer service element, the Petitioner provided a new job description that was almost undistinguishable from the one originally submitted. The Petitioner did not explain the reason for omitting this element from the new job description or state who within its organization would oversee customer service issues when they arise. The Petitioner must resolve this ambiguity in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Although the Petitioner also claims that the Beneficiary will oversee and coordinate with the company's staff and "management," it does not state who comprises the "management," identify the operational tasks underlying the essential function that the Beneficiary is claimed to manage, or establish that the Beneficiary will refrain from allocating his time primarily to the performance of these underlying operational tasks. The fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. Sections 101(A)(44)(A) of the Act. While a beneficiary may exercise discretion over a petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, these managerial elements alone do not establish that the beneficiary will primarily allocate his or her time to duties of a managerial nature. As indicated earlier, a detailed job description is critical to an analysis of a beneficiary's claimed managerial employment. Reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. The actual duties themselves 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).

In the present matter, the Petitioner does not specify the actual tasks the Beneficiary would perform in the course of his daily routine. For instance, the Petitioner does not clarify how the Beneficiary would oversee "current regulations" concerning hazardous shipments, employee safety, and freight classifications, nor is it apparent that industry regulations change frequently enough such that staying "current" requires the Beneficiary's time on a daily, weekly, or even monthly basis. The Petitioner also neglects to identify the specific activities of the operations department; it is therefore unclear what tasks the Beneficiary performs in order to direct and coordinate the activities of that department.

Further, the Petitioner claims that the Beneficiary will "supervise his staff" to ensure proper repairs and maintenance is completed and that he will "manage[] workers in assigning tariff classifications." However, the Petitioner again does not explain how the Beneficiary would carry out his supervision and management of employees, nor does it state precisely how much time the Beneficiary would devote to these personnel management job duties. Likewise, the Petitioner vaguely claims that the Beneficiary will monitor operations and manage policies and procedures; it does not, however,

provide detailed information about the specific underlying tasks associated with these vague job duties to allow for a meaningful understanding of the specific actions the Beneficiary would carry out on a daily or weekly basis.

Lastly, both job descriptions stated that the Beneficiary will "develop criteria, application instructions, procedural manuals, and contracts for federal and state transportation programs." However, the Petitioner does not provide sufficient information to establish that these duties are managerial in nature, as opposed to operational or administrative tasks. While no beneficiary is required to devote 100% of his or her time to managerial-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. 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 or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988). In the present matter, the Petitioner has not assigned time increments to the Beneficiary's listed duties. As such, we are unable to determine who much of his time would be allocated to managerial versus non-managerial functions.

In sum, we find that the Petitioner has not provided sufficient detail or explanation of the Beneficiary's proposed employment. Therefore, it has not adequately supported the claim that the Beneficiary would assume the role of either a function or a personnel manager.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS takes into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

As indicated earlier, 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 claimed that it had 13 employees at the time of filing. Although the Petitioner claims on appeal that the Beneficiary will assume the role of a function manager, as discussed above, it has not provided sufficient evidence to support this claim. In fact, the Petitioner provided an organizational chart depicting the Beneficiary as head of an organization with a subordinate staff that

consists of a "supervisor," a yard supervisor/forklift operator, and ten truck drivers. It is unclear who, if not the Beneficiary, would actually oversee the Petitioner's non-supervisory and non-professional personnel.

In the RFE, the Director observed that the Petitioner did not provide information about the job duties or educational credentials of the Beneficiary's subordinates and found that the record lacked evidence to show that his subordinates are managerial, professional, or supervisory employees.

In a response letter, the Petitioner stated that the Beneficiary would "work closely with the company's supervisor" in his proposed position. The Petitioner also provided a five-year business plan, which states that the Beneficiary "manages every employee." The business plan states that the Beneficiary's subordinates include an operations supervisor and a yard supervisor. It indicates that the operations supervisor is responsible for finding sales leads and "making sure [the] truck drivers have all that's necessary to complete a job." The business plan states that the yard supervisor is responsible for operating forklifts and making local deliveries. Although both subordinates have supervisory position titles, their respective job duties do not indicate that either employee's position is supervisory in nature; nor does either employee's job description indicate that he assumes a professional position where a baccalaureate degree is required.[3]

Further, the Petitioner did not provide information establishing who, if not the Beneficiary, would follow up on the operations manager's sales leads, nor did it explain who carries out the operational and administrative office functions, such as, for example, issuing invoices, collecting payments from customers, answering phones, and addressing customer inquiries and complaints. Although the business plan indicates that the Petitioner will hire a part-time sales representative "in the short term," this position had not been filled at the time this petition was filed. 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). Thus, any hiring projections, such as those noted in the business plan, are not relevant for the purpose of determining whether the Petitioner had the ability to support the Beneficiary in a managerial capacity at the time the petition was filed. As noted earlier, only an employee who "primarily" carries out tasks of a managerial nature can be deemed as someone who is primarily employed in a managerial capacity. *See, e.g.*, sections 101(a)(44)(A) of the Act. Here, the Petitioner has not established that it was adequately staffed and could relieve the Beneficiary from having to primarily devote his time to the organization's operational and administrative functions at the time of filing.

Finally, the Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in a managerial capacity. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS 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-

[3] *See* 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").

managerial operations of the company or a company that does not conduct business in a regular and continuous manner. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, the Director did consider these relevant factors and properly questioned how the Petitioner would support the Beneficiary in a managerial capacity within the scope of a two-person support staff that is comprised of non-supervisory and non-professional employees.

III. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that it would employ the Beneficiary in a managerial capacity, as claimed. As this element is fundamental to establishing eligibility and the Petitioner has not met this threshold requirement, we will not address the three remaining grounds that the Director cited in the denial decision.

ORDER: The appeal is dismissed.

Cite as *Matter of EM-T-, LLC*, ID# 1143417 (AAO Apr. 26, 2018)