U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-USA, INC.

DATE: APR. 27, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a wholesale distributor of food products, seeks to continue the Beneficiary's temporary employment as its operations director 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 California Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner resubmits the Beneficiary's job duty breakdown and contends that the Beneficiary will oversee four subordinate managers, who will assign all non-managerial job duties to their professional subordinates. The Petitioner also provides business documents, employee pay stubs for 2017, and an updated organizational chart to support the claim that the Beneficiary will be employed in a managerial position.

Upon *de novo* review, we find that the Petitioner has not overcome the ground for denial. Therefore, 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.*

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.

A. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial 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.

The Petitioner filed the Form I-129 on December 14, 2016 claiming nine employees. In a supporting letter, the Petitioner stated that the Beneficiary will have two "managerial executives" – a logistics director and a roasting specialist – as his direct subordinates, who would in turn oversee the work of four professional employees. In total, the Petitioner claimed that the Beneficiary would oversee a six-person staff comprised of "two senior-level managers and four middle-level managers," and that he would therefore be "insulated" from having to perform administrative tasks.

The Petitioner provided job descriptions for the logistics director and roasting specialist indicating that the former would manage product shipping and warehousing while the latter would focus on nut roasting, product crating and packaging, as well as inventory and quality control. The Petitioner also provided an organizational chart, which named five employees occupying the following positions: the company president, a quality control employee, the Beneficiary as operations director, and his two subordinates – a roasting specialist and a logistics director. The chart shows that the Beneficiary and the quality control employee are both directly subordinate to the president and occupy the same organizational tier within the hierarchy. Although the chart also shows that the logistics director would oversee a driver, no employee was named in that position. Likewise, the chart indicates that the roasting specialist oversees an undisclosed number of pickers, a roaster, and a maintenance employee; it does not, however, name any of these employees or indicate that these positions were sourced from outside the company as independent contractors. The chart does not depict any administrative or sales employees and names only five employees in total; this information is inconsistent with the petition, which indicates that the Petitioner claimed nine employees at the time of filing.

In a request for evidence (RFE), the Petitioner was instructed to provide, in part, an organizational chart and quarterly wage reports for the last three quarters in 2016 as well as the company's payroll summary, Forms W-2, W-3, and 1099 showing wages paid to all employees under the Beneficiary's control.

In response, the Petitioner provided another organizational chart showing the Beneficiary and the quality control employee at the same organizational tier and subordinate to the company's president. Although the new chart again shows the Beneficiary as overseeing a roasting specialist and a logistics director, it does not show the latter as overseeing anyone; it also names a roasting specialist and a roaster and indicates that the maintenance position and pickers will be sourced from an unnamed "temp agency." As the chart is undated, it is unclear when this staffing structure went into effect and whether it was in effect in December 2016 when this petition was filed.

The Petitioner also provided a state quarterly wage report for the fourth quarter in 2016. The report listed a total of five employees only two of which – the Beneficiary and the company's president – were employed for the entire quarter. The remaining three employees – the logistics director, the roasting specialist, and the quality control employee – were only employed by the Petitioner for five weeks of that quarter. In addition, the Petitioner provided its quarterly federal tax return for the fourth quarter in 2016, which indicates that the Petitioner paid wages to only two employees as of December 12, 2016, two days prior to filing the petition. This information is corroborated by the Petitioner's "Payroll Transactions by Payee" summary, which lists the Petitioner's employees from October 2016 to April 2017 and provides each employee's compensation and the date he or she was compensated. Although this wage summary indicates that the logistics director was paid wages in 2016 and 2017, it does not indicate that he was continually employed by the Petitioner, as the only wages he received in 2016 were in November and he did not receive wages again until March 2017. Likewise, the summary indicates that no wages were paid in December 2016 to the roasting specialist, or to the quality control employee; thus the Petitioner did not establish that it employed a logistics director, a roasting specialist, or a quality control employee at the time of filing. Although the new organizational chart lists a new roasting specialist, the six-month wage summary indicates that this individual did not start receiving wages until March 2017. The new chart also names a roaster; however, this individual started receiving compensation in February 2017. In light of this summary of wages paid from October 2016 to April 2017, it appears that the Beneficiary had no direct or indirect subordinates at the time of filing.

In the denial decision, the Director commented on the wage evidence, finding that at the time of filing, the Petitioner did not have a sufficient support staff to relieve the Beneficiary from having to carry out its various administrative and operational functions and thus it would not be able to employ the Beneficiary in a managerial capacity.

On appeal, the Petitioner disputes the Director's decision, claiming that the Beneficiary "will directly manage four managers," and specifying their position titles as logistics manager, quality control manager, roasting manager, and mechanical engineer. Although we acknowledge the Petitioner's submission of a new organizational chart to support this new claim, 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). We note that the previously submitted organizational charts and supporting statements indicated that the Petitioner's hierarchical structure at the time of filing was different from the current structure in that the organization did not include an engineering position or indicate that the quality control position was either subordinate to the Beneficiary or that this position was that of a manager.

Moreover, as we noted above, the Petitioner's wage payment summary and 2016 fourth quarterly federal tax return indicate that the petitioner had only two employees – the Beneficiary and the company's president – at the time this petition was filed. It is therefore unclear who, if not the Beneficiary, was available to carry out the job duties that would otherwise be assigned to the quality control and logistics employees. We further note the absence of sales and administrative employees. It is therefore unclear who, if not the Beneficiary, was available to process invoices, market and sell the Petitioner's products,

keep inventory, and carry out the various other operational and administrative duties that may be required of a wholesale distribution business.

While no beneficiary is required to allocate 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, 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 overall lack of a support staff at the time of filing indicates that the Petitioner was not able to relieve the Beneficiary from having to allocate his time primarily to carrying out the non-managerial tasks that are critical to ensure its continued daily function.

Although the Petitioner contends that the Beneficiary would oversee managerial and professional employees, the record does not support this claim; rather, the record indicates that the Beneficiary had no subordinates to oversee at the time of filing. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Here, the Petitioner has not provided sufficient evidence to support the claim that at the time of filing it was adequately staffed with managers or professional employees for the Beneficiary to oversee. Moreover, the Petitioner had no lower-level employees to relieve the Beneficiary from having to primarily devote his time to the organization's operational and administrative functions at the time of filing.

B. Duties

Next, we will discuss the duties to be performed by the Beneficiary. We note that 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 its initial cover letter, the Petitioner provided a job duty breakdown, which indicated that Beneficiary will distribute his time as follows:

- 20% performing operations management, which would involve establishing and overseeing the implementation of policies and procedures, creating plans to manage "personnel requirements," implementing policies for optimal profitability, "interface[ing] with senior-level executives," and approving policies and procedures for finance, marketing, business development, customer service, operations, accounting, IT, and human resources;
- 10% directing operational policies and procedures associated with finance, marketing, business development, customer service, operations, accounting, IT, and human resources, coordinating quality assurance, managing the development of operational policies by relying on operations and organizational research to develop new products and expand the business, "direct[ing] the performance of panning, forecasting, and resource allocation," and "direct[ing] the monitoring of quality, quantity, cost. And efficiency of the Company's products";

- 12% overseeing personnel scheduling and operations research modeling, which would require assessment of the Petitioner's technical needs and identifying personnel who can meet those needs, resolving scheduling problems, and overseeing scheduling changes and schedule compliance to "ensure that daily personnel allocation is completed";
- 12% directing product purchasing and sales, selecting vendors and managing vendor relations, directing purchasing negotiations, and overseeing the purchase of materials required for product distribution;
- 12% directing inventory management by determining inventory levels based on projected product requirements, coordinating product orders with product demand, and managing the process of receiving products and scheduling merchandise delivery to customers;
- 8% managing and approving budgets, analyzing "budget variances," and making recommendations for fiscal cuts;
- 7% managing and overseeing the execution of initiatives by directing personnel and resource allocation for projects, analyzing progress of a project, determining "senior-level staffing requirements and assignments," and making presentations at trade shows and seminars;
- 7% managing transportation, which includes directing transportation logistics, coordinating purchasing, inventory, and distribution requirements, and choosing modes of transportation;
- 7% directing distribution logistics, which includes managing product distribution and directing distribution of wholesale products by managing timing and transportation; and
- 5% managing senior-level personnel through hiring, training, evaluating, and promotion of "senior-level managers."

In the RFE, the Director informed the Petitioner that it provided an overly vague job description and did not explain how the Beneficiary would perform his assigned job duties. The Director instructed the Petitioner to list the Beneficiary's typical daily job duties and the percentage of time he would allocate to each duty.

In response, the Petitioner stated that the Beneficiary would spend all of his time directing "managerial-level executives" and "reporting oversight of analyses," developing and implementing corporate policies, coordinating projects with senior executives "worldwide," and "managing executive-level personnel." The Petitioner did not, however, specify any actual projects that were being worked on at the time of filing or identify any "senior executives" with whom the Beneficiary would coordinate the various aspects of these unknown projects. The Petitioner also neglected to explain how the Beneficiary would carry out the listed duties within the scope of an entity that employed only the Beneficiary and one other employee – the Beneficiary's superior – and had no subordinate staff at the time of filing to implement the policies the Beneficiary would create or execute the underlying duties he was supposed to monitor. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, although the Petitioner's statement contained a job duty breakdown, the content was identical to the job duty breakdown that was previously provided in the original supporting statement. The Petitioner did not provide additional information about the

Beneficiary's job duties to address the deficiencies that were noted in the RFE, nor did the Petitioner adequately explain how the Beneficiary would focus primarily on management and oversight within the scope of an organization that lacked a staff to carry out its operational and administrative tasks.

In the denial decision, the Director determined that the Petitioner provided a deficient job description that lacked sufficient information about the Beneficiary's actually duties. The Director also found that the Beneficiary would carry out a number of non-managerial tasks and that despite his senior level of authority, he would not primarily devote his time to managerial job duties.

We agree with the Director's assessment of the job description. Although the Petitioner provided a lengthy job description, it was often repetitive in its reference to the Beneficiary's oversight of the implementation of policies and his development of "policies and procedures for finance, marketing, business development, customer service, operations, accounting, information technology, and human resources." The Petitioner repeatedly used these and similar phrases to describe the Beneficiary's proposed position without providing substantive content or clarifying the Beneficiary's actual job duties.

The job description also uses ambiguous terminology, such as "direct" and "oversee," which indicates that the Beneficiary may have a high degree of discretionary, but does not adequately expound on the actions the Beneficiary actually carries out. Further, the Petitioner made numerous references to "senior-level" staff, which does not appear to have been part of the Petitioner's organization at the time of filing, as discussed in the above "Staffing" portion of this analysis. Therefore, while the job description indicates that the Beneficiary would only monitor others as they carry out the underlying operational and administrative tasks, it appears to offer invalid information when considered within the scope of an entity that lacked any support personnel at the time of filing. Although the Petitioner provided evidence of more staff being hired in 2017, as previously noted, all eligibility requirements must have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). Therefore, any organizational changes the Petitioner may have undergone since the filing of the petition would be irrelevant for the purpose of determining the Petitioner's eligibility *at the time of filing*.

In the present matter, we find that the Petitioner made broad and deficient claims about the Beneficiary's proposed job duties and provided insufficient evidence to show that it was able to relieve the Beneficiary from having to allocate his time primarily to non-managerial job duties at the time the petition was filed. Therefore, we cannot conclude that the Beneficiary would be employed in a managerial capacity under an extended petition.

III. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial capacity under an extended petition. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.

Cite as *Matter of T-USA, Inc.*, ID# 1041548 (AAO Apr. 27, 2018)