U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-D-A-G- LLC

DATE: AUG. 9, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an importer and distributor of [redacted] seeks to continue the Beneficiary's temporary employment as its operational manager 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 Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial capacity under the extended petition.

On appeal, the Petitioner states that the Beneficiary will control the company's operations and exercise his discretionary authority in developing the company's management practices and policies. The Petitioner also states that the Beneficiary currently oversees five employees.

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. 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.*

[1] The instant petition seeks to continue employment of a beneficiary who came to the United States to open a new office. The term "new office" refers to an organization which has been doing business in the United States 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 no more than 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 Director found that the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial capacity.[2]

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. In addition, "[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.*

A. Staffing

In the instant matter, the Director's primary reason for denial was based on a finding that the Petitioner did not establish that the Beneficiary's subordinates are managers, professionals, or supervisors. Therefore, while we will address the Beneficiary's job description below, we will first

[2] The Petitioner does not claim that the Beneficiary would be employed in an executive capacity.

examine the Petitioner's organizational structure, the duties of the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the Beneficiary's actual duties and role in the business.

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*).

Here, the Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, claiming seven employees and a gross income of $370,233. The Petitioner provided an organizational chart that depicts a general manager at the top of the staffing hierarchy with the Beneficiary and one other employee – a marketing manager – positioned at the next tier of the hierarchy as the general manager's subordinates. The chart also depicted an administrative assistant, two sales representatives, and a warehouse specialist as the Beneficiary's subordinates. We note that the Petitioner's 2016 quarterly federal tax return for the third quarter indicates that the Petitioner had no more than six employees at the time of filing, which is inconsistent with the Petitioner's original claim in the petition. The record as presently constituted does not resolve this inconsistency with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As such, it is unclear which one of the seven positions listed in the chart was vacant at the time of filing and how the vacancy affected the Petitioner's ability to relieve the Beneficiary from having to carry out its daily operational and administrative tasks.

We further note that the record does not establish that the administrative assistant, two sales representatives, and warehouse specialist, whom the organizational chart depicted as the Beneficiary's subordinates, possess educational credentials that are consistent with those of professional employees.

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." Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The

possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity.

The Director analyzed each of the Beneficiary's subordinates' duties and educational credentials and concluded that the evidence does not establish that the Beneficiary would primarily perform managerial duties that involve overseeing supervisory, professional, or managerial employees.

We agree with the Director's finding. The employee job descriptions that were provided in response to the RFE indicate that the administrative assistant and warehouse specialist require two years of experience while the sales associates require no experience at all. The Petitioner did not indicate that any of the Beneficiary's subordinates require a bachelor's degree and the organizational chart submitted in support of the petition did not depict them as overseeing other employees. Although the RFE response contains the Petitioner's updated organizational chart, which indicates that the Petitioner hired additional employees and created new positions that altered the Petitioner's organizational hierarchy, the Petitioner is required to 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). Here, the record does not show that, at the time of filing, the Petitioner had a staffing hierarchy where the Beneficiary would oversee the work of supervisory, professional, or managerial employees, as required of a personnel manager. Section 101(a)(44)(A)(ii) of the Act. We note that overseeing a staff that is comprised of non-supervisory, non-professional, and non-managerial employees does not satisfy the statutory requirements of managerial capacity.

Alternatively, 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a 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 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 sufficient evidence to demonstrate that the Beneficiary manages an essential function. The Petitioner has neither identified an essential function with specificity nor established which of the Beneficiary's job duties are consistent with managing an essential function.

B. Duties

When examining the managerial capacity of the Beneficiary, we also 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).

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 a supporting document, the Petitioner listed eleven of the Beneficiary's key responsibilities. In its subsequent response to the Director request for evidence (RFE), the Petitioner provided a nearly identical list of duties and responsibilities, supplementing that information with time allocations based on the Petitioner's phase of operations over the course of the upcoming year.

The Petitioner claimed that the Beneficiary would implement and manage operational plans and assist the general manager in developing strategic plans for operations. The Petitioner did not define its "operational plans" within the context of its import and distribution business, nor did it specify the types of tasks involved in assisting the general manager with "strategic plans" or provide examples of "strategic plans" to convey an understanding of the nature of the Beneficiary's activities.

The Petitioner also claimed that the Beneficiary would manage the Petitioner's financial and budget activities, but did not specify any actual tasks associated with this broad job responsibility. Moreover, the Petitioner's appeal brief contains a list of "technical skills" that the general manager is required to have in order to carry out the duties of his position. The list states that the general manager, not the Beneficiary, will manage the Petitioner's financial resources, which includes making discretionary decisions about how finances will be allocated.

The Petitioner was equally vague in stating that the Beneficiary would manage "general operations" as they relate to sales and services, providing no explanation as to the specific components involved in "general operations" or the Beneficiary's specific role with respect to sales and services. Although the Petitioner stated that the Beneficiary would consult with the general manager and the foreign entity regarding its operations, it did not explain the nature of the Beneficiary's input or explain why the Beneficiary would contact the parent entity when the general manager is in charge of the operations. Likewise, the Petitioner did not specify the underlying job duties associated with long-range planning and developing strategies and directing market research. The Petitioner did not state what business data the Beneficiary considers in making such strategies or specify who provides the Beneficiary with the necessary data or who actually conducts the market research.

Further, while the Petitioner claimed that the Beneficiary will direct the "efficacy of wholesale, export[,] and distribution activities" and "dissemination of technical support," it did not elaborate on the level of the Beneficiary's involvement in the sales-related activities or state who provides the technical support associated with the products sold. Without information as to the individual(s) carrying out the

underlying operational tasks, it is unclear whom the Beneficiary would be directing. Reciting the 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).

Lastly, the Petitioner did not establish that negotiating contracts for the sale of its merchandise or hiring, training, and managing staff are managerial job duties within the context of this organization. Despite referring to the staff whom the Beneficiary would hire, train, and manage as "professionals," as discussed above, the record does not corroborate this claim. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

On appeal, the Petitioner contends that the Beneficiary currently supervises five employees and is thereby "responsible for managing the company." Although the Petitioner states that the Beneficiary will continue to "oversee compliance with commercial, logistics, and environmental aspects to its products and services" as well as "establish agreements with strategic business partners," it claims that the Beneficiary's "core duties" are "more related to the management of the current and prospective employees," who will continue to relieve the Beneficiary from having to primarily perform non-managerial, operational job duties.

We find that the Petitioner's statements do not overcome the Director's findings. Namely, the Petitioner does not elaborate on the previously provided job description and it neither claims nor provides evidence to show that the Beneficiary's subordinates are supervisory, professional, or managerial employees. As previously noted, assertions must be supported by relevant, probative, and credible evidence. *Chawathe*, 25 I&N Dec. at 376. Further, while the Petitioner claims that the Beneficiary will hold weekly meetings to evaluate prospective employees, this duty does not establish that the Beneficiary will be employed in a managerial capacity. Despite the implied discretionary authority that is inherent to making hiring decisions, it is unclear how this authority alone is sufficient to establish the Beneficiary's performance of primarily managerial duties, particularly when the hiring function is performed with respect to non-supervisory and non-professional subordinates.

Due to the lack of evidence establishing the actual tasks the Beneficiary would perform we cannot conclude that his duties would be primarily of a managerial nature.

III. CONCLUSION

In light of the various deficiencies catalogued above, the Petitioner has not established that it would employ the Beneficiary in a managerial capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of A-D-A-G- LLC*, ID# 484061 (AAO Aug. 9, 2017)