U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T- INC.

DATE: AUG. 9, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which sells plumbing supplies, seeks to continue the Beneficiary's temporary employment as its president 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 it will 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 submits additional evidence and asserts that the Director erred by finding that the Beneficiary did not qualify as a personnel manager or function manager.

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. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner does not claim that it will employ the Beneficiary in an executive capacity. Therefore, we restrict our analysis to whether the Petitioner will employ the Beneficiary in a managerial 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.

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.

Based on the statutory definitions 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.

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. Duties

The Petitioner listed the Beneficiary's responsibilities in the United States as follows, with the approximate time dedicated to each duty:

- Establish business policies, goals and plans according to resolutions adopted by the board of directors of the parent company and implement (20%);
- Fully manage U.S. company's operations, establish and implement regulations and systems, reform solutions and measures (15%);
- Propose the organizational chart of the U.S. company; appoint and dismiss company employees; establish a healthy and unified working team (10%);
- Put forward the business concept of the U.S. company, determine the basis direction of corporate culture, create an excellent working atmosphere, cultivate

the sense of belonging[] among company employees to improve company unity (20%);
- Coordinate among departments to resolve problems, contradictions, issues among departments (10%);
- Responsible for selecting and identifying the U.S. company's investment projects and reviewing its operating expenses (10%);
- Responsible for maintaining the U.S. company's overall financial outcomes with the right to distribute and allocate resources (15%).

A separate version of the job description added that the Beneficiary spends 5% of his time managing the company's other affairs, but the above percentages already add up to 100%.

The submitted job description lacks important details. For example, the Petitioner did not explain how implementing regulations and systems differs from implementing policies, goals, and plans. This is important because the Petitioner listed them as separate responsibilities. Also, the Petitioner did not explain what tasks the Beneficiary would perform to put forward the company's business concept and steer its corporate culture. The record does not show that the Petitioner has enough investment projects to demand a significant share of the Beneficiary's time. Instead, the record indicates that the Petitioner continues to rely on large cash infusions from the foreign parent company to fund the Petitioner's own operations, which indicates that the Petitioner is not yet in a position to make significant investments of its own. And at the time of filing, the Petitioner indicated that the Beneficiary had only six subordinate employees; it is not evident that he would need to spend several hours per week, on average, resolving conflicts between departments.

The Director found that the Petitioner had not provided enough information to show the Beneficiary's day-to-day duties. On appeal, the Petitioner asserts that the Beneficiary has authority over personnel matters and the company's day-to-day operations. The Director did not dispute that the Beneficiary has the required *degree* of control over the company, but the Petitioner did not show that the Beneficiary's duties are *primarily* managerial.

The Petitioner states: "the Beneficiary managed the research and product development of its Original Equipment Manufacturer . . . plumbing products." The record contains references to and indicates that the Petitioner registered the name as a trademark, but none of the Petitioner's employees' listed job duties include research, development, or manufacturing. The Petitioner asserts, on appeal, that "[e]ight employees in China" handle product research and development." An organizational chart submitted on appeal includes a manufacturing company in China that did not appear on the chart submitted originally. The Petitioner has not established that the Beneficiary supervises the manufacture (as opposed to the purchase and resale) of plumbing supplies.

It is significant that the Beneficiary himself, in his capacity as the company's president, did not mention in a five-page letter submitted with the initial filing. The initial submission included an product catalog, linking the Petitioner with the brand, but the record does not

document the company's involvement with the manufacture (as opposed to marketing) of [redacted] products.

The Petitioner's business plan, submitted initially, mentions [redacted] briefly, but it does not indicate that the parent organization or any affiliated company manufactures the products sold under that name. Instead, the business plan refers to an "in-depth survey of various . . . factories" to identify "the proper product suppliers." The multi-year business plan indicated that product development would begin in 2018, after the petition's October 2017 filing date, and even then provided minimal information about where and how this development would occur.

At issue is not whether the Beneficiary runs the petitioning company; the record establishes as much. Instead, the question is whether the Beneficiary's managerial functions are primary or secondary. The Petitioner has repeatedly submitted variations of the same job description, which is deficient for reasons already discussed.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, we must take 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 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 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) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*4*). If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(*2*)-(*3*).

The Petitioner initially claimed seven employees, all full-time, in the United States. The Petitioner's organizational chart showed that the Beneficiary has authority over four departments:

Sales Department	Logistics & Purchase Department
Manager	Manager
Two Salespersons	Driver
Administrative Department	Financial Department
Secretary	[staffed by contractors rather than employees]

The Petitioner listed the responsibilities for the two managers, paraphrased below:

Sales Manager:

1. Implement the annual sales plan
2. Improve work flow
3. Collect customer demand information and developing the target market
4. Promote company products and giving feedback to the president
5. Participate in drafting market development strategy
6. Coordinate with the president for communication with key clients and implementing daily sales work

Logistics & Purchase Manager:

1. Arrange purchase orders, procurement, and deliveries
2. Research and negotiating with suppliers
3. Develop logistics management plan and expense budget
4. Design logistics system, coordinate management of storage and transportation
5. Assist in developing inventory plan
6. Organize orders, returns, and exchanges
7. Check receipts, organize account information and statistical information
8. Record transactions
9. Oversee security, report hazards, deal with emergencies

Both of the above-named managers appear to have operational responsibilities, such as promotion and taking product orders, that are not delegated to lower-level employees. The logistics and purchase manager has only one subordinate, a driver, whose duties mostly relate to product deliveries and vehicle maintenance. The Petitioner planned to hire additional staff in 2018 and 2019, but the Petitioner must establish eligibility at the time it filed the petition in October 2017. *See* 8 C.F.R. § 103.2(b)(1). This information, as well as the very low number of subordinates, calls into question the extent to which these individuals act as supervisors rather than as front-line employees.

In a request for evidence and again in the denial notice, the Director cited perceived discrepancies in the Petitioner's personnel documentation. The cited inconsistencies, however, do not appear to cast significant doubt on the company's staffing. (For instance, the Petitioner demonstrated that certain employees are named on some records, but not on others, because they had left the company.) The Petitioner submitted credible documentation relating to the employment of the individuals named on its organizational chart.

In response to the request for evidence, the Petitioner submitted slightly expanded versions of the job descriptions, and changed the driver's title to "warehouse keeper & driver." That individual's revised job description included new items relating to handling inventory, with other time percentages adjusted downward to account for the newly claimed responsibilities. The Petitioner did not establish who performed those newly described responsibilities at the time of filing.

The Petitioner's response also named employees in the "China Purchase Department" and "China Logistic Department." The Petitioner had not previously included these employees under the Beneficiary's authority. Also, the Petitioner did not explain how employees of the parent company in China, which makes condiments, relate to the work of the U.S. company, which sells plumbing supplies.[1] With no demonstrated connection between the activity of the two companies, the Beneficiary's continued authority over parts of the Chinese company cannot qualify him for U.S. immigration benefits.

The Director found that the Petitioner had not shown that the Beneficiary's immediate subordinates are primarily managers, professionals, or supervisors, and therefore the Beneficiary appeared to be a first-line supervisor of employees performing operational tasks.

To determine whether the 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 United States 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."

The Petitioner asserted that the managers and sales staff all hold college degrees. A profession, however, is defined not by the credentials of the employee, but by the minimum requirements of the position itself. The Petitioner must establish not only that the employees hold bachelor's degrees, but also that the positions require those degrees.

On appeal, the Petitioner submits excerpts from the *Occupational Outlook Handbook*, published by the Department of Labor's Bureau of Labor Statistics. The Petitioner asserts that the listings for sales managers, purchasing managers, logisticians, and financial managers demonstrate that the positions are managerial, professional, or both. These listings, however, are inherently generic, and do not necessarily conform to the positions at the petitioning company. For example, the listings indicate that sales managers have hiring authority, whereas the record indicates that the Beneficiary has personally handled personnel matters. The listings also indicate that many, but not all, sales manager positions require bachelor's degrees. Furthermore, the median salaries listed in the *Handbook* excerpts are substantially higher than the salaries that the Petitioner pays to its employees, which raises questions about those employees' level of responsibility compared to the positions described in the *Handbook*.

[1] It bears mentioning that, in its initial "new office" petition on the Beneficiary's behalf, the Petitioner stated that the company's intended purpose was to import and sell condiments manufactured by the foreign parent company. Thus, the Petitioner's documented activity selling plumbing supplies is demonstrably at variance with the business plan described in the initial, approved petition, and in meeting minutes, dated March 2014, included in the present petition.

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). The Director found that the Petitioner had not established that the Beneficiary is a function manager. On appeal, the Petitioner argues that a function manager can supervise subordinate employees. The issue is not whether the Beneficiary has subordinates, but rather the extent to which the Beneficiary's duties amount to management rather than the performance of operational tasks. As discussed above, the record establishes the Beneficiary's authority but simply does not tell us enough about the Beneficiary's daily tasks to meet the Petitioner's burden of proof.

The Petitioner has not established that it will employ the Beneficiary in a managerial capacity under the extended petition.

III. CONTINUITY OF EMPLOYMENT ABROAD

Beyond the Director's decision, the Beneficiary's employment and travel history raise an issue fundamental to the Beneficiary's eligibility for the classification sought.

The beneficiary of an L-1A petition must have been employed abroad by a qualifying employer continuously for one year within three years preceding the time of the filing of the petition. 8 C.F.R. § 214.2(l)(1)(ii)(A). Here, the Petitioner filed the petition in October 2017. It filed earlier petitions on the Beneficiary's behalf in October 2014 and October 2015.

The Petitioner stated that the Beneficiary "worked for the Parent Company from December 2008 until he was dispatched by the Parent Company to further his study in the U.S. in June 2012." At that time, the Beneficiary entered the United States as an F-1 nonimmigrant student. There is no claim, and no evidence, that he worked for any qualifying organization in the United States or abroad between June 2012 and October 2014, when the Petitioner filed its first Form I-129 petition on his behalf.[2] Study in the United States is not employment abroad.

[2] Given these dates, the Petitioner's two prior petitions on the Beneficiary's behalf should not have been approved. The Director revoked the approval of a prior petition, based, in part, on this interruption in the Beneficiary's employment.

The regulation at 8 C.F.R. § 214.2(l)(ii)(A) requires the Beneficiary to have been employed abroad continuously for one year by a qualifying organization during the preceding three years. Time spent in the United States interrupts the continuity of foreign employment, except for brief trips for business or pleasure and periods spent in lawful status for a qualifying U.S. employer. *Id.* The Beneficiary's studies in the United States do not meet either of these requirements. As an F-1 student, the Beneficiary was in the United States to study, not to work for the Petitioner or any related entity. Also, the time he spent in the United States was neither brief nor for business or pleasure (which would be covered by a B-1 or B-2 visa, rather than an F-1 student visa).

The Beneficiary's studies interrupted his qualifying employment abroad. The petitioning U.S. employer did not exist until July 2014, more than two years after the Beneficiary stopped working abroad, and therefore he was already disqualified for L-1A status by the time the Petitioner filed its articles of incorporation. An interruption in employment lasting more than two years, whether that interruption occurred in the United States or abroad, is inherently disqualifying. *Cf. Matter of S-P-, Inc.*, Adopted Decision 2018-01 4 (AAO Mar. 19, 2018).[3] The Beneficiary, who has not worked abroad since June 2012, cannot qualify for L-1A status until he accrues at least one more continuous year of employment abroad in a capacity that is managerial, executive, or involves specialized knowledge.

IV. CONCLUSION

The Petitioner did not establish that it will employ the Beneficiary in a managerial capacity. Also, the Beneficiary cannot qualify under the present petition, because his studies in the United States interrupted his employment abroad for more than two years.

ORDER: The appeal is dismissed.

Cite as *Matter of T- Inc.*, ID# 1471713 (AAO Aug. 9, 2018)

[3] *Matter of S-P-* concerns an immigrant petition for a multinational manager or executive, but the reasoning is the same because the immigrant classification, like the nonimmigrant classification, requires one year of qualifying experience in the three years preceding either the filing of the petition or the beneficiary's relevant entry into the United States.