U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-M-S- INC.

DATE: AUG. 25, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a candle wholesaler, seeks to employ the Beneficiary temporarily as its president 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 capacity.[1]

On appeal, the Petitioner asserts that the Director's decision was arbitrary and did not consider the reasonable needs of the U.S. 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 managerial or executive capacity, or in a position involving 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.*

An L-1A classification petition must be accompanied by evidence establishing that: the beneficiary has been employed abroad in a position that was managerial, executive, or involved specialized knowledge for at least one continuous year in the three years preceding the filing of the petition; the beneficiary is coming to work in the United States in a managerial or executive capacity for the same employer or a subsidiary or affiliate of the foreign employer; and, the beneficiary's prior education,

[1] The Petitioner states that the Beneficiary will be employed in a managerial capacity and does not claim that the offered position meets the requirements of an executive capacity.

training and employment qualifies 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 Director found that the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial capacity.

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. Further, "[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.*

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) 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.

A. Duties

When examining the managerial capacity of a given beneficiary, we will look first 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.

The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, claiming four employees and a net income of approximately $38,000. In a supporting cover letter, the Petitioner stated that 55% of the Beneficiary's time would be spent hiring, firing, and overseeing the general manager and overseeing the company's "overall performances . . . to ensure the completion of the annual business plans and the realization of the long[-]term development strategies." The Petitioner did not elaborate on the specific tasks and actions involved in overseeing the company's performance or discuss how often the Beneficiary would be required to make hiring and firing decisions with respect to the general manager's position. Although the Petitioner stated that the Beneficiary's proposed position would also involve mapping out its long-term goals, adjusting its organizational structure and management team, and reviewing the annual business and budget plans, these broadly stated responsibilities represent intermittent functions that the Beneficiary would address on an as-needed basis rather than specific daily tasks that would be part of his daily routine. The job description in the initial cover letter was vague and lacked sufficient information as to the specific functions the Beneficiary would actually perform on a daily basis.

In response to a notice of intent to deny in which the Director requested additional evidence to establish that the Beneficiary would be employed in a managerial or executive capacity, the Petitioner stated that the Beneficiary would be employed in a managerial capacity, which would require supervising the company's general manager. The Petitioner claimed that the Beneficiary will be "responsible for the general management of the entire company" and expanding the company by forging "external relationships" with businesses in Asian countries. The Petitioner reiterated the Beneficiary's original job description and stated that the Beneficiary's responsibility for hiring, firing, and overseeing the work of his subordinate general manager as well as making other staffing changes, adjusting the Petitioner's product line, and modifying the Petitioner's business and budget plans are all characteristic of someone who would be employed in a managerial capacity. The Petitioner claimed that at least 95% of the Beneficiary's time would be spent performing tasks of a managerial nature.

We note that other than clarifying that it intends to employ the Beneficiary in a managerial capacity rather than an executive capacity, the Petitioner's supplemental statement did not further explain the Beneficiary's specific job duties or the nature of those duties. Rather, the Petitioner relied on broad statements that focused on the Beneficiary's discretionary authority to establish that the Beneficiary be employed in a managerial capacity. We note, however, that 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).

In addition, the new statement included vague references to the Beneficiary's authority to adjust the Petitioner's staffing structure and "management team" without providing information as to who would comprise the "management team." In light of the Petitioner's explanation that the sales and marketing managers "are first-line employees" who carry out the Petitioner's operational tasks, despite their managerial position titles, it is unclear who, other than the general manager, would comprise a "management team." This ambiguous reference to a team that does not appear to have existed at the time this petition was filed detracts from the claim that the Beneficiary would primarily perform tasks that are of a managerial nature.

In denying the petition, the Director determined that the evidence does not establish that the Beneficiary would primarily perform managerial duties that involve overseeing managerial, supervisory, or professional employees, given that the Beneficiary only supervises one supervisory employee and has no other subordinates.

While it argues that the Director's conclusion is arbitrary, the Petitioner does not expand on the specific daily tasks the Beneficiary would perform to establish that the primary portion of his time would be devoted to managerial functions. The Petitioner also points out that the Director's analysis focused on the second prong of the definition of managerial capacity, which requires the Petitioner to establish that the Beneficiary supervises and controls the work of other supervisory, professional, or managerial employees. Section 101(a)(44)(A)(ii) of the Act. The Petitioner interprets the Director's silence with respect to the three remaining prongs as an indication that it provided sufficient evidence to meet those prongs. *See* sections 101(a)(44)(A)(i), (iii), and (iv) of the Act. We disagree with the Petitioner's assessment.

Despite providing an organizational chart that depicts the Beneficiary at the top of the company's organizational hierarchy, the Petitioner cannot establish that the Beneficiary would primarily manage the organization, have hiring and firing authority over its personnel, and possess discretionary authority over its daily operations without providing a detailed job description that delineates the Beneficiary's daily tasks. Without this detailed description, the Petitioner has not met its burden to establish that the Beneficiary will *primarily* perform higher-level duties consistent with the statutory definition of managerial capacity. Specifics are clearly an important indication of whether a beneficiary's duties are primarily managerial in nature; otherwise meeting the statutory definition would simply be a matter of reiterating the regulations. *Fedin Bros. Co.*, 724 F. Supp. at 1108. As indicated above, the Petitioner provided an overly general job description that lacked the necessary degree of detail about the actual tasks the Beneficiary would perform on a daily basis within the context of a candle sales operation. In light of this deficiency, we find that the Petitioner did not establish that the Beneficiary would primarily perform tasks of a managerial nature.

B. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the evidence when examining a beneficiary's claimed managerial capacity, including 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.

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. As indicated above, 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*).

In the present matter, the Petitioner claims that it would employ the Beneficiary in a managerial capacity where he would manage a single employee – the general manager – with a total support staff of four employees. It is unclear how the Beneficiary would allocate his time primarily to managerial tasks while having one employee as his only subordinate. Although the Petitioner points out that its operation "is still in the developing stage" and contends that it currently has no need to hire more than one supervisory position for the Beneficiary to manage, the Petitioner is not a new office and thus must establish its ability to support the Beneficiary in a primarily managerial position at the time of filing.[2] The record shows that the Petitioner was established in 2000 and had been under new majority ownership for over two years when it filed the petition. It is unclear why the Petitioner maintains that it is still at an early phase in its development.

Although the Petitioner claims that it plans to open another sales office and hire additional employees once this petition is approved, 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). In other words, eligibility in this matter cannot be based on projected staff increases, but rather must be determined based on the four-person staff that existed when the petition was filed. Therefore, while we consider the Petitioner's reasonable needs, which may not require multiple managerial or supervisory employees based on the organization's stage of development, the record lacks evidence to show that such needs would plausibly be met by the services of the Beneficiary as a personnel manager whose subordinate staff is comprised of a single employee.

Further, the Petitioner has not established that it had sufficient staff to relieve the Beneficiary from having to negotiate with vendors to source products and be directly involved in the logistics components of the operation, including securing proper channels and methods for shipping and receiving of merchandise. These, and possibly other, operational tasks are likely critical to the

[2] The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) defines a "new office" as an organization that has been doing business in the United States for less than one year.

success of the Petitioner's sales-based organization, yet the Petitioner has not provided evidence to establish how it plans to relieve the Beneficiary from having to be directly involved in these non-managerial functions. We note that the Petitioner's reasonable needs will not supersede the requirement that the Beneficiary must be "primarily" employed in a managerial capacity such that the non-managerial tasks would only be incidental to the proposed position. *See* section 101(a)(44)(A) of the Act.

In sum, although the Beneficiary may have the authority to hire and fire employees and take other personnel actions as a result of his top-level placement within the Petitioner's organizational hierarchy, the record does not establish that the Petitioner had the management structure in place at the time of filing to support the Beneficiary as a personnel manager whose time would be primarily spent overseeing the work of supervisory, professional, or managerial employees and performing other managerial functions.

Further, the Petitioner's statements on appeal urging us to focus on its reasonable needs rather than the size of its support staff are not persuasive, as the Petitioner did not establish that it had sufficient support personnel at the time of filing to relieve the Beneficiary from allocating his time primarily to performing the organization's non-managerial functions. As noted above, the Petitioner has not provided information to show who would perform the operational duties previously cited. Without this critical evidence, we cannot exclude the possibility that the Beneficiary himself is directly involved in primarily operational tasks based on the Petitioner's current needs.

Alternatively, the term "function manager" applies generally when a beneficiary does not primarily 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). Here, the Petitioner has not claimed or provided evidence to demonstrate that the Beneficiary would manage an essential function. Therefore, it has not established that the Beneficiary would assume the role of a function manager.

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

ORDER: The appeal is dismissed.

Cite as *Matter of I-M-S- Inc.*, ID# 525557 (AAO Aug. 25, 2017)