U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-E-G- LLC

DATE: AUG. 30, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a bus company, seeks to temporarily employ the Beneficiary as its administration manager 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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that: (1) the Beneficiary had one continuous year of qualifying employment abroad during the three years preceding the filing of the petition; (2) the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity; and (3) the Beneficiary has been employed abroad in a managerial or executive capacity.

The matter is now before us on appeal. On appeal, the Petitioner asserts that the Director did not sufficiently consider the Petitioner's response to a request for evidence (RFE).

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.* 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. ONE YEAR OF CONTINUOUS EMPLOYMENT ABROAD

The Director found that the Beneficiary did not have the required minimum length of qualifying employment abroad. To qualify as an intracompany transferee, a beneficiary must have been

employed abroad continuously for one year during the three years before the petition filing date, by the petitioner or a qualifying related entity. 8 C.F.R. § 214.2(l)(1)(ii)(A).

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 do not interrupt the continuity of qualifying foreign employment, but that time cannot count toward the beneficiary's required period of employment abroad. *Id.*

The Petitioner's foreign affiliate stated that it employed the Beneficiary "from August 12, 2016 to the present." August 12, 2016, fell on a Friday. Copies of pay receipts show a slightly later date, Monday, August 15, 2016. The Petitioner filed the petition 413 days later, on October 2, 2017.

U.S. government records show that the Beneficiary entered the United States on 57 different days during the time of his employment abroad.[1] The Beneficiary entered as a B-2 nonimmigrant visitor for pleasure. In the RFE, the Director advised the Petitioner that these brief visits did not interrupt the continuity of the Beneficiary's employment, but time spent in the United States cannot count toward the required continuous year of employment abroad. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A).

In response, the Petitioner did not dispute the records of the Beneficiary's entries into the United States. The Petitioner stated that the Beneficiary frequently travels on business to [redacted] Mexico, near the U.S. border. The Petitioner asserted that, during these trips, the Beneficiary "sometimes crosses . . . into [redacted] Texas or he'll occasionally come to our [redacted] location." The Petitioner provided no evidence or information regarding the length of the Beneficiary's visits.

The Director denied the petition, stating that the Beneficiary had accrued less than 365 days of qualifying employment, because days when the Beneficiary was in the United States cannot count toward his employment abroad. On appeal, counsel for the Petitioner states that, "on many occasions," the Beneficiary "returned to Mexico . . . within hours after crossing into the U.S." Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. In this instance, counsel does not provide corroborating evidence or cite the source of this information.

The Petitioner, on whom the burden of proof rests, does not document the length of the Beneficiary's visits to the United States. (The available records show the Beneficiary's entries but not most of his departures.) Likewise, the Petitioner does not show that the Beneficiary worked in Mexico on the days when he traveled into the United States. Payroll records are not dispositive on this point, because the foreign entity pays the Beneficiary a fixed salary rather than an hourly wage.

[1] The Director cited 60 entries, but on a few occasions the Beneficiary entered twice on the same day.

The Petitioner adds that "some entries were on the weekends." Records show 12 weekend entries. The Petitioner does not show when the Beneficiary returned from these visits, and therefore there is no affirmative evidence that the Beneficiary returned later during those same weekends. Likewise, in the absence of a documented work schedule, it is not evident that the Beneficiary would have been off on those weekend days. The available evidence simply does not tell us enough about the Beneficiary's many trips to the United States to establish that they did not prevent him from accruing a continuous year of full-time employment abroad.

The Director also stated that, if the Beneficiary worked for the Petitioner during his visits to the United States, then he violated his B-2 nonimmigrant status, which did not authorize him to work in the United States. On appeal, the Petitioner condemns "baseless accusations that beneficiary has been working for petitioner in violation of his immigration visa." The Director did not make any definitive finding that the Beneficiary violated his B-2 status; the Director simply observed that, *if* the Beneficiary had worked directly for the Petitioner in the United States, *then* such work would have violated his status. The Petitioner raised this possibility with its ambiguous assertion that the Beneficiary occasionally traveled to a U.S. work site and, while there, performed job-related functions such as "conferences."

For the reasons discussed above, the Petitioner has not met its burden to establish that the Beneficiary accrued one year of continuous, full-time employment with a qualifying organization abroad.

III. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director found that the Petitioner did not establish that it will employ the Beneficiary in a managerial capacity. (The Petitioner does not claim that the Beneficiary will be or has been employed 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.

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. 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.

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.

A. Duties

The Petitioner stated that the Beneficiary's position would include the duties summarized below:

- Create work schedules
- Implement reward and recognition programs
- Review administrative processing procedures and make recommendations to the regional director
- Oversee and manage financial accountability
- Supervise and evaluate the work of supervisors and team leaders
- Hire and fire subordinates within the administration department
- Make daily decisions on the activities and functions of managers and their subordinates

In the RFE, the Director stated that the Beneficiary's job description was too vague to establish whether the Beneficiary's duties would be primarily managerial, executive, or neither. The Director asked for additional details and the "approximate percentage of time devoted to each task."

In response, the Petitioner rearranged the original job description to conform to the four elements of the statutory definition of managerial capacity, with minimal substantive revisions. The Petitioner did not provide specific time estimates for individual tasks, as requested. Instead, the Petitioner stated that all the listed activities would collectively occupy 90% of the Beneficiary's time, with the remainder "spent generating reports, and conducting/scheduling meetings or personally handling miscellaneous matters (i.e., customer complaints, vendor's phone calls, etc.)."

The Director denied the petition, finding that the Beneficiary's job description "in large part . . . simply paraphrase[d] statute for an L-1A manager." On appeal, the Petitioner maintains that it "has provided sufficient documentation and a detailed explanation as to each of the four requirements for meeting the managerial capacity at the U.S. Entity." The record does not support this assertion. After the Director first requested additional details, the Petitioner submitted what it said was a more detailed job description, but we can find no significant new details in the revised job description.

By itself, the assertion that the Beneficiary will oversee the work of subordinates tells us little about how the Beneficiary will exercise that oversight; the same is true for describing the activities of a department, and asserting that the Beneficiary will oversee that department. As far as describing the Beneficiary's oversight, the Petitioner stated, for example, that the Beneficiary will create work schedules, recognize achievements, create policies, and review procedures. The Petitioner did not show how these activities will make significant, ongoing demands on his time, and did not comply with the Director's request to specify how much time the Beneficiary "devoted to each task."

For the above reasons, the Petitioner did not provide enough information to show that the Beneficiary's intended position would be primarily managerial in nature.

B. Staffing

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. 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 Petitioner has not claimed that the Beneficiary will manage an essential function.

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 referred to some of the Beneficiary's prospective U.S. subordinates as "managers/supervisors," but did not claim or establish that any of them qualify as professionals. The Petitioner stated that the Beneficiary would supervise three managers and their subordinates. The information provided is summarized below.

> Accounting Manager, $48,000/yr.
> Responsibilities: Oversee preparation and analysis of accounting records and financial reports
> Subordinate: Bookkeeper
>
> Sales Manager, $40,000/yr.
> Responsibilities: Oversee sales division, prepare market analyses, provide sales strategies, create programs to recognize and reward sales achievements, establish and

implement sales-related approaches
Subordinates: 3 Sales Representatives

Operations Manager, $35,000/yr.
Responsibilities: Establish efficient routes, establish policies to increase efficiency, comply with budget
Subordinates: Logistics Technician, Clerks (unspecified number)

The Director requested job descriptions for all the Beneficiary's subordinates, to determine whether any of them qualify as managers, supervisors, or professionals. The Petitioner's response repeated the job descriptions for the three highest-level subordinates, adding brief descriptions for the remaining positions.

In the denial notice, the Director acknowledged that there were two levels of subordinate employees, but concluded that the Petitioner had not provided sufficient information to establish that the Beneficiary's intended higher-level subordinates hold positions "that could be primarily managerial or supervisory in nature."

On appeal, the Petitioner states that the Director "has failed to review or refuse[d] to adequately address the documents that [were] submitted . . . such as petitioner's detailed letter, detailed organizational chart, and pay record[s]." The payroll documents establish the employment of the workers, but not that they hold primarily supervisory or managerial positions.

The Petitioner asserts that the Director unreasonably requires "a complete encyclopedic job description" for every subordinate position. The Petitioner, here, overstates what the Director required. The Director did not require long, detailed job descriptions, but the Petitioner must still establish that the activities of the lowest-level employees warrant dedicated managerial or supervisory oversight. For instance, the Petitioner asserts that the accounting department consists of an accounting manager with one subordinate (a bookkeeper). The Petitioner has not established that the oversight of this one subordinate involves enough work to constitute the accounting manager's primary responsibility. It cannot suffice simply to assert that the bookkeeper maintains financial and payroll records, and that the accounting manager oversees that work.

Based on the deficiencies discussed above, the Petitioner has not established that it will employ the Beneficiary in a primarily managerial capacity in the United States.

IV. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

The Petitioner asserted that its foreign affiliate employs the Beneficiary as its administration manager. The Director found that the Petitioner had not established that this foreign employment, like the intended U.S. employment, was in a primarily managerial capacity.

A. Duties

The English translation of the foreign employer's description of the Beneficiary's duties abroad is largely identical to the description of his intended duties in the United States, as summarized above. Asked for more details about the Beneficiary's foreign duties, the Petitioner acknowledged that the Beneficiary's "managerial duties [at] our foreign affiliate are very similar to the duties required for [the U.S. position]." As noted earlier in the decision, the minimally revised job description shed little light on the nature of the Beneficiary's work and did not establish the time devoted to individual tasks. As was the case with the U.S. subordinates, the foreign entity indicated that the Beneficiary spent 90% of his time on the generally described responsibilities.

In the denial notice, the Director noted that the record lacks not only details about the Beneficiary's duties, but also documentary evidence that he had performed the general tasks described. On appeal, the Petitioner states:

> It appears that the Service failed to review the foreign entity's organizational chart, pay records of workers under beneficiary's supervision, and the detailed letters explaining beneficiary's managerial duties and percentage (90%) spent therein . . . . I strongly believe that petitioner and beneficiary have submitted sufficient evidence of managerial capacity abroad.

The Petitioner does not explain how the submitted materials overcome the Director's findings. When the Director requested additional details about the Beneficiary's duties, the foreign entity provided largely the same job description, with the individual elements rearranged. The assertion that the bulk of the Beneficiary's duties collectively occupy 90% of his time does not show the time devoted to each task as the Director requested.

B. Staffing

Between an organizational chart submitted initially and job descriptions submitted in response to the RFE, the Petitioner provided the following information about the Beneficiary's subordinates abroad:

> Operations Manager
> Responsibilities: Oversee establishment of efficient routes, establish policies to increase efficiency, comply with budget
> Subordinates: Operators, Analysts, Clerks
>
> Marketing Media Manager
> Responsibilities: Oversee marketing strategies
> Subordinates: Assistants, General Clerk
>
> Logistics/Safety Manager
> Responsibilities: Oversee compliance with regulatory safety standards

Subordinates: Information Analysts

Accounting Manager
Responsibilities: Oversee preparation and analysis of accounting records and financial reports
Subordinates: Clerk, Bookkeeper

Sales Manager
Responsibilities: Oversee sales division, prepare market analyses, provide sales strategies, create programs to recognize and reward sales achievements, establish and implement sales-related approaches
Subordinates: Sales Representatives

5 Terminal Managers
Responsibilities: Oversee terminals and staff, report to the Beneficiary daily
Subordinates: Not specified

The Director found that, although the Beneficiary's subordinates had subordinates of their own, the Petitioner had not sufficiently demonstrated that the upper-level subordinates qualify as managers, supervisors, or professionals.

On appeal, the Petitioner states: "The mere[] fact that a degree is not required for the individuals who work under beneficiary does not mean that that particular worker . . . is not a professional or manager." The lack of a degree requirement, however, is directly relevant to the question of whether a given position is professional. *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." All these positions require at least a bachelor's degree.

A position can be primarily managerial or supervisory without a degree requirement, but the burden is on the Petitioner to establish the nature of the position. With respect to the Beneficiary's immediate subordinates abroad, the Petitioner largely described the functions of their departments and asserted that the subordinates oversee those departments and their respective personnel. To assert, for instance, that the accounting manager "oversees [the] entire accounting division" indicates the level of that person's responsibility, but does not tell us about the duties or tasks that the position entails. The accounting manager has two subordinates – a clerk and a bookkeeper – and the Petitioner has not shown that those two positions warrant full-time oversight and supervision by a dedicated employee, such that the accounting manager's own position does not predominantly involve accounting functions and related tasks.

The foreign staff that the Beneficiary oversees is larger than the staff of the petitioning U.S. entity, and therefore it is more plausible that some of the Beneficiary's immediate subordinates are, themselves, primarily supervisors or managers, but plausibility alone cannot meet the Petitioner's burden of proof. Despite the Petitioner's protestations that it has submitted ample evidence, the Petitioner has documented little more than evidence that it has employees.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary was employed in a managerial or executive capacity abroad.

V. CONCLUSION

The Petitioner did not establish that the Beneficiary has been, and will be, employed in a primarily managerial capacity. The Petitioner also did not establish that its foreign affiliate employed the Beneficiary for at least one continuous year during the three years prior to the filing date.

ORDER: The appeal is dismissed.

Cite as *Matter of E-E-G- LLC*, ID# 1448542 (AAO Aug. 30, 2018)