U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-I-S- INC.

DATE: AUG. 30, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner,[1] which is engaged in the retail, wholesale, and import/export of minerals, seeks to temporarily employ the Beneficiary as its "manager" under the L-1A nonimmigrant classification for intracompany transferees.[2] 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: (1) the Beneficiary has been employed abroad in a managerial or executive capacity; (2) the Beneficiary will be employed in the United States in a managerial or executive capacity; and (3) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer.

On appeal, the Petitioner submits additional evidence and asserts that the Director overlooked evidence establishing the qualifying relationship between the U.S. and foreign entities, as well as evidence demonstrating that the Beneficiary has been and would be employed in a managerial capacity.

Upon *de novo* review, we will dismiss the appeal as the Petitioner has not established that the Beneficiary would be employed in the United States, or that she has been employed abroad, in a managerial capacity. However, we will withdraw the Director's determination with respect to the qualifying relationship between the Petitioner and the Beneficiary's foreign employer.[3]

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[1] The Petitioner identified itself on the Form I-129, Petition for a Nonimmigrant Worker, as [redacted] The record reflects that these company names refer to two separate legal entities. Where asked to indicate its Federal Employer Identification Number (FEIN) on the petition, the Petitioner provided the FEIN for [redacted] Accordingly, we consider this entity to be the petitioning U.S. employer.

[2] The Petitioner stated on the Form I-129 that the Beneficiary is coming to the United States to open or to be employed in a "new office." The term "new office" refers to an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). Neither the Petitioner, which was established in 2011, nor its subsidiary [redacted] meet the definition of a new office. The Petitioner has been directly doing business in the United States for several years, and the limited liability company, although established in 2017, is part of an organization that has been doing business in the United States through its parent company for more than one year.

[3] The Petitioner has clarified the issues addressed by the Director and established that it is an affiliate of the Beneficiary's

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. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The first issue to be addressed is whether the Petitioner established that it will employ the Beneficiary in a managerial capacity in the United States. The Petitioner does not claim that the Beneficiary would be 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 assessing the managerial nature of an offered position, we examine a petitioner's description of the job's duties. *See* 8 C.F.R. § 214.2(l)(3)(ii) (requiring an L-1 petitioner to submit "a detailed description of the services to be performed"). 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 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 a business.

A. Job Duties

Based on the definition of managerial capacity, the Petitioner must first show that the Beneficiary performs 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 *primarily* engage in managerial or executive 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 at 1533.

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foreign employer based on common majority ownership by the same individual. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(*1*).

At the time of filing, the Petitioner stated that the Beneficiary will be employed "as a show manager of the showroom and sale department" of its subsidiary's office located at [redacted] in [redacted] Arizona.[4] In a supporting letter, the Petitioner stated that she would allocate 80% of her time to the following duties:[5]

- Taking decision and act for all administration matters in place of the Owner Manager
- Hire or dismiss the appropriate staff
- Staff supervision
- Discretion to resolve customer complaints and disputes
- Exercise discretion over the day-to-day operation of the show and sales department

The Petitioner indicate that the remaining 20% of the Beneficiary's time would be spent as follows:

- Create and participate to the presentation of an internal policy
- Analyze the performance and probability of sales
- Ensure the effectiveness of the promotion
- Project the sales provision according to the trend of the market
- Develop and regularly evaluate the success plan
- See the opportunity of new business favorable with our project
- Apply the new procedures, set up together with the owners[,] the rules for the new markets
- Define the work of each of [her] subordinates
- Identify, evaluate and develop the market strategy
- Study aspects of financial market to launch activities in the United States
- Determine the budget to develop the [o]ffice

In a request for evidence (RFE), the Director advised the Petitioner that the description lacked adequate detail regarding what the Beneficiary would be doing on a day-to-day basis. The Director instructed the Petitioner to provide an expanded job description explaining the specific tasks the Beneficiary will perform and the percentage of time to be spent on each task. As discussed further below, the RFE also instructed the Petitioner to provide evidence related to its staffing levels, organizational structure, and any subordinate employees to be supervised by the Beneficiary.

The Petitioner's response to the RFE did not include the requested detailed description of the Beneficiary's proposed job duties. The Petitioner submitted an organizational chart for its U.S. operations which briefly listed her duties as:

- Manage the showroom;
- Responsible of the administration;
- Manage the employees; and

[4] The Petitioner submitted an expired residential apartment lease for this location, which identifies one of the Petitioner's owners as the tenant. Neither the Petitioner nor its U.S. subsidiary is a party to the lease, which states that the tenant was authorized to use the premises solely as a private residence.

[5] The Petitioner also submitted a separate "Job Description" document which listed the same duties with a slightly different time allocation.

- Take part in US shows.

The Petitioner indicated on the organizational chart that the Beneficiary would be the manager of its [redacted] location at [redacted] Arizona, but it did not explain this change in her proposed work location.

On appeal, the Petitioner asserts that it met its burden of proof because it submitted at least one of the items requested in the RFE with respect to the offered U.S. employment, specifically, the organizational chart. The Petitioner also maintains that its response included a letter describing how the Beneficiary would be employed in a managerial capacity in the United States. However, the referenced letter was intended to establish that the Beneficiary's position abroad was in a managerial capacity. The letter vaguely states that she would perform similar duties in the United States, but this claim was not sufficiently explained given that the Petitioner indicates that the Beneficiary oversees over 100 people abroad, including subordinate supervisors or managers. The Petitioner has not submitted evidence of any employees in the United States working either directly for the Petitioner or for its subsidiary, therefore the general claim that her duties would be the same as those she performed abroad is not sufficient.

The Petitioner has not addressed the Director's concerns regarding the Beneficiary's unexplained change in work location. Given that the Petitioner indicates that Beneficiary will be managing one of its claimed showroom locations, it is reasonable to expect the Petitioner to consistently identify and document the location of that site. Further, we note that the Petitioner claimed at the time of filing that it plans to operate five [redacted] branches, but the supporting evidence reflected that only two of the five locations identified were intended for commercial use while the others are residential properties. These facts are relevant because the Petitioner stated that it had filed L-1A petitions on behalf of multiple beneficiaries and indicated that each individual would manage a separate [redacted] location. If the Petitioner had only two commercial locations, then it is unclear that it actually has four or more job openings for showroom managers.

The Petitioner has also not provided additional details regarding the Beneficiary's proposed job duties on appeal. We agree with the Director's conclusion that the position description provided for the Beneficiary is insufficient to establish what she will actually do on a day-to-day basis, and does not meet the Petitioner's burden to provide a detailed description of the proposed employment. The duties are stated in vague terms and do not provide insight into the nature of her expected daily tasks. For example, we cannot determine that the Beneficiary's responsibilities to "act for all administration matters," "see" business opportunities, "ensure the effectiveness of the promotion," forecast and analyze sales, evaluate the "success plan," study the market, or resolve customer complaints would involve tasks that are primarily managerial in nature. Reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will 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). Here, the Petitioner has not provided the necessary detail or an adequate explanation of the Beneficiary's proposed activities in the course of her daily routine.

We acknowledge the Petitioner's stated intent to place the Beneficiary in the most senior position at one of its claimed subsidiary locations, where she may exercise some discretion over day-to-day

activities and supervise any employees hired. However, the Petitioner must also establish that higher level managerial responsibilities would primarily occupy the Beneficiary's time and to make this determination, we review the totality of the evidence. The Beneficiary's discretionary authority is only one of several factors we consider in determining whether the Petitioner would employ her in a qualifying capacity.

B. Staffing and Organizational Structure

The Petitioner indicated on the Form I-129 that it has two employees and gross annual income of $1,636,519. The Petitioner stated that its subsidiary, [redacted] was not yet doing business but had five sites "opened" in the United States. These five sites were described as: a showroom in [redacted] California; a leased house in [redacted] California; a purchased house located in [redacted] Arizona; a leased apartment in [redacted] Arizona (initially identified as the Beneficiary's intended worksite); and an office located in [redacted] As noted, the Petitioner indicated that it had filed L-1A petitions on behalf of four of its foreign affiliate's employees with the intention of having them manage these locations.

The Petitioner did not submit an organizational chart or any evidence of wages paid to employees at the time of filing. A business plan for the [redacted] subsidiary indicated each of its retail locations would have separate "wings" or departments focused on [redacted] tourism, handicrafts, foods and beverages, and industrial stones, with each department staffed by an "associate" and additional employees.

The Petitioner submitted an IRS Form I-9, Employment Eligibility Verification, dated April 2017, but did not provide evidence of wages paid to the individual named or evidence showing that he would work under the Beneficiary's supervision at the address listed on the petition. The employee was hired to work at the Petitioner's office at [redacted] in [redacted] and he joined the company prior to the establishment of the [redacted] subsidiary. According to the Petitioner's federal tax return, it did not pay any salaries or wages in 2016.

In the RFE, the Director advised the Petitioner that it would need to support its claim that the Beneficiary's position would be in a managerial capacity with "detailed documentation regarding the proposed subordinate positions." The Director further noted that the initial evidence was insufficient to establish that the Beneficiary would be relieved from performing non-qualifying duties.

Accordingly, the Director gave the Petitioner an opportunity to submit a detailed organizational chart or diagram, noting that it should: (1) list all employees who report to the Beneficiary by name, job title, summary of duties, education level and salary; (2) provide evidence of wages paid to employees such as the company's state quarterly wage report, payroll summary, and IRS Forms W-2 or 1099; and (3) provide copies of employment agreements for any newly hired employees to be managed by the Beneficiary. Further, as noted above, the Director also specified what was needed to overcome the deficiencies in the record with respect to the Beneficiary's job description.

On appeal, the Petitioner states that it submitted at least one of the documents requested in the RFE and that the Director therefore abused her discretion by denying the petition. While the Director did not instruct the Petitioner that it needed to submit every item listed, the burden remains on the

Petitioner to establish eligibility. 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 Director reviewed the organizational chart submitted in response to the RFE and explained why it was lacking in probative value.

First, the organizational chart indicated that the Beneficiary would be working at a different location than the one identified on the Form I-129, while the previously-identified work location did not appear on the organizational chart. In addition, the Petitioner did not provide evidence that the newly-identified [redacted] work location was staffed. The organizational chart indicated that each [redacted] location would employ an "assistant," "driver" and "workers" and provided very brief position descriptions as follows:: the assistant will "help during the installation of the materials / Do the secretarial works"; the driver will "take care of the pickup and the delivery of the materials"; and the "workers" will "unload containers / unpacking and packing."

As noted above, the Petitioner submitted a business plan indicating that each of the [redacted] locations would have four separate divisions specializing in the retail sale of different types of products, with each staffed by an "associate" and other staff. This structure was not reflected in the [redacted] proposed organizational chart. This ambiguity raises questions regarding the nature of the business, its intended staffing, and the Beneficiary's claimed supervisory duties. In addition, the record does not establish that the Petitioner or its subsidiary were staffed at the time of filing. 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).

Further, even if the Petitioner could rely on its inconsistent future hiring plans for its subsidiary, the limited information provided would not establish that the Beneficiary would be employed in a managerial capacity based on her supervisory duties. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act. Here, the Petitioner indicates that the Beneficiary would supervise employees, and has not articulated a claim that she will primarily manage an essential function of the organization. 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." *Id.*

The Petitioner's organizational chart, as noted, indicates that the Beneficiary would supervise an "assistant," "driver," and "workers," none of which were claimed to be supervisory or managerial positions. To determine 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 a subordinate employee. The Petitioner did not establish that the proposed positions of

assistant, driver, or "worker" would require a bachelor's degree. Even if we were to consider the company's vague hiring plans, the record indicates that the Beneficiary's role would be limited to first-line supervision of non-professional employees.

For the reasons discussed, the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial capacity.

III. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

We will briefly address the remaining issue of whether the Petitioner established that the Beneficiary has been employed abroad in a managerial capacity. The Petitioner does not claim that she has been employed in an executive capacity.

A. Job Duties

The Petitioner states that the Beneficiary has been employed by its foreign affiliate as "executive assistant and show manager" since 2007.[6] The Petitioner's initial description of the Beneficiary's position abroad closely resembled the description submitted for her proposed U.S. job, and, for the reasons discussed above, lacked sufficient detail regarding the nature of her specific daily tasks.

In response the RFE, the Petitioner submitted a letter from the foreign entity's "owner manager" who reiterated that the Beneficiary acts as both show manager and as the owner's executive assistant, and that she "manages 3 team leaders and 106 skilled workers." The letter provided a breakdown of the Beneficiary's duties, noting that she allocates 30% of her time to "executive assistant" functions, 40% of her time to "show manager" functions, and 30% of her time to making decisions and acting on administrative matters in place of the owner/manager herself.

We agree with the Director's conclusion that the Beneficiary's job description includes a number of non-managerial duties. For example, the Petitioner indicates that the Beneficiary's "executive assistant" duties include mainly operational and administrative tasks such as following up customer orders, following up purchase orders, communicating with customers, purchasing stones, performing quality checks in the workshop, and data entry tasks. Although the Petitioner indicated that her responsibilities as executive assistant include giving instructions to "team leaders," these staff are not shown as the Beneficiary's subordinates on the foreign entity's organizational charts, and most of the listed tasks are non-managerial.

Similarly, the duties the Beneficiary performs in her role as "show manager," as briefly described in the record, have not been shown to be primarily managerial in nature. The Petitioner states that she has a "weekly meeting with the Show Responsible" concerning "shows to participate" and "communication with show promoters" to make arrangements for booth sizes, booth fees, tables, badges, and material delivery and pickup, as well as travel planning, logistics and accommodations. Based on this description, the Beneficiary is significantly involved in the operational and administrative tasks necessary for the foreign entity to participate in trade shows. Although the job description submitted in response to the RFE suggested that the Beneficiary has the assistance of a

[6] The Beneficiary's recent foreign pay statements from 2018 identify her job title solely as "Show Manager."

"Show Responsible" employee to assist her in carrying out these duties, the initial organizational chart provided for the foreign entity did not identify a subordinate employee in this position, and, as discussed further below, neither organizational chart depicts the Beneficiary as having direct or indirect subordinate employees.

Based on the foregoing, the Petitioner has not established that the "show manager" and "executive assistant" responsibilities that are claimed to require 70% of the Beneficiary's time require her to perform managerial duties on a day-to-day basis. Whether a given beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that their duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the submitted breakdown of the Beneficiary's time indicates that her duties are more likely than not primarily non-managerial in nature.

B. Staffing and Organizational Structure

On appeal, the Petitioner states that the Director erred by relying "solely on the job description" and did not review the submitted evidence showing the staffing and structure of the foreign entity. The Petitioner now states that the Beneficiary supervises "over 30 employees including managers" whereas it previously stated that she supervises three "team leaders" and 106 skilled workers.

We note that the Director did in fact review the foreign entity's organizational charts, but determined that "based on the organizational charts, USCIS cannot determine that the beneficiary has direct subordinate employees, and if she does, it appears she is sharing the same subordinates with potentially three other positions." The Petitioner does not address this issue or attempt to clarify the foreign entity's reporting structure.

We have reviewed the two submitted organizational charts and note that neither one reflects that the Beneficiary has any subordinates, much less responsibility for up to 109 workers. Both charts indicate that a sales manager (or commercial director), an administrator, and the Beneficiary report directly to the Petitioner's owners. However, of these three employees, only the administrator is shown as having direct subordinates. Specifically, the charts show that the administrator directly supervises an administrative and financial officer, an assistant administrator, and two production department heads, each of whom supervises a foreman, team leaders, and workers at two different workshops.

We note that the position of "Show Responsible," which is referenced in the Beneficiary's own position description, did not appear on the initial organizational chart. In the chart submitted in response to the RFE, the Petitioner added this designation to the job title of one of the production department heads without explanation. The record does not include a description of this employee's actual job duties and therefore does not establish that they actually assist the Beneficiary with her trade show responsibilities.

Finally, as discussed, the Beneficiary's own position description indicates that she spends the majority of her time acting as an executive assistant to the foreign entity's owner, and making arrangements for the foreign entity to participate in trade shows. The job description does not reflect her supervision of the large number of subordinate employees that the foreign entity attributes to the position. The Petitioner has not submitted evidence on appeal to overcome the deficiencies addressed in the

Director's decision and has not established that the Beneficiary has been employed abroad in a managerial capacity.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of M-I-S, Inc.*, ID# 5195750 (AAO Aug. 30, 2019)