U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-US LLC

DATE: AUG. 31, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a provider of IT services and solutions, claims to be a new office[1] and seeks to temporarily employ the Beneficiary as "Managing Director & Sr. Account Executive" 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: (1) it has a qualifying relationship with the Beneficiary's employer abroad; (2) the Beneficiary was employed abroad in a managerial or executive capacity; (3) the Beneficiary's proposed position would be in a managerial or executive capacity within one year of the petition' approval; and (4) it secured sufficient physical premises to house its office.

On appeal, the Petitioner submits a statement disputing the denial. The Petitioner asserts that its response to the request for evidence (RFE) properly addressed concerns regarding its qualifying relationship with the Beneficiary's employer abroad as well as the Beneficiary's former and proposed employment. Although the Petitioner stated that it would provide a supplemental legal brief within 30 days of filing the appeal, the record does not contain evidence of any further submissions. Therefore, we will consider the record complete as presently constituted.

Upon *de novo* review, we will withdraw the Director's finding regarding the Petitioner's physical premises, which was based on an erroneous determination that the Petitioner did not provide requested information regarding the square footage of its office premises. We will also withdraw the Director's finding that the Petitioner's "new office" would not support a managerial or executive

[1] The term "new office" refers to an organization which has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). Although the Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, and at other times in the record that it was established in 2016, the record shows that it was in fact established as a New York limited liability company in March 2015, and that it started doing business in the United States in September 2015 pursuant to a contract with [redacted] Invoices show that the Petitioner began providing services to [redacted] on a regular basis on September 14, 2015. Therefore, the Petitioner did not qualify as a new office as of October 19, 2016, when it filed the petition.

position within one year. The Director's analysis of the Beneficiary's proposed position was based on a misapplication of regulatory requirements that pertain only to petitions involving new offices. *See* 8 C.F.R. § 214.2(l)(3)(v). In light of our finding that the Petitioner was not a new office at the time of filing, the facts presented should not have been assessed within the scope of these "new office" regulations. As the Director's analysis was flawed, the determination regarding the Beneficiary's U.S. employment must be withdrawn. However, the record as presently constituted does not establish that the Petitioner would employ the Beneficiary in a managerial or executive capacity as of the date of filing. The Petitioner would have to demonstrate that it meets this requirement if it pursues this matter further.

Notwithstanding our withdrawal of two of the Director's findings, we find that the Petitioner has not submitted sufficient evidence to overcome the two remaining grounds for denial. We will therefore 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.*

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, must include evidence that the petitioner will employ the beneficiary in an executive or managerial capacity, including a detailed description of the services to be performed. The evidence must also show that the beneficiary has at least one continuous year of full-time employment abroad with a qualifying organization, in an executive or managerial capacity or a position involving specialized knowledge, within the three years preceding the filing of the petition.

II. QUALIFYING RELATIONSHIP

The first issue to be addressed in this decision is whether the Petitioner established that it has a qualifying relationship with the Beneficiary's employer abroad. To establish a "qualifying relationship" under the Act and the regulations, a petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The Director found that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer. The Director focused on the lack of evidence showing that the foreign entity made a capital contribution in exchange for a 51% ownership share of the Petitioner.

The Director also pointed to the Petitioner's inconsistent claims regarding its ownership. Specifically, the Director observed that in its initial support letter, the Petitioner claimed that [redacted] the Beneficiary's employer in Pakistan, owns 51% of the U.S. entity and that the Beneficiary owns the remaining 49%, while the operating agreement lists the Beneficiary as directly owning 51% of the Petitioner with [redacted] owning the remaining 49%. The Director also noted that the Beneficiary's fund contribution was not proportional to his claimed majority ownership when compared to the fund contribution of the claimed minority owner. On appeal, the Petitioner submits a letter contending that the creation of a qualifying relationship "is not dependent upon the financial contributions of the principals."

While we agree with the Petitioner's assertion and find that the Petitioner provided sufficient evidence to document the Beneficiary's and [redacted] monetary contributions towards their respective ownership interests, we find that the Petitioner has not provided sufficient evidence to show that it has a qualifying relationship with the Beneficiary's employer abroad. Despite the Petitioner's repeated statements that it is a subsidiary of the foreign entity, the Petitioner's operating agreement and evidence of fund contributions show that the Beneficiary, rather than the foreign entity, directly owns 51% of the Petitioner. The Petitioner's claim that the Beneficiary is also the majority owner of the foreign entity therefore indicates that the Petitioner's qualifying relationship claim is based on the definition of "affiliate" rather than the definition of "subsidiary."

The term "affiliate" is defined in relevant part, as (1) one of two subsidiaries both of which are owned and controlled by the same parent or individual, or (2) one of two legal entities owned by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. 8 C.F.R. § 214.2(l)(1)(ii)(K). Accordingly, in order to establish that the ownership schemes of the Petitioner and the foreign entity are consistent with an affiliate relationship, the Petitioner would have to establish that the Beneficiary is the majority owner of the foreign entity.

Although the Petitioner provided sufficient evidence to establish that the Beneficiary is more likely than not its majority owner, the same cannot be said of its evidence pertaining to ownership of the foreign entity. Despite submitting a supporting statement where the Petitioner named the Beneficiary as the sole owner of the foreign entity, the Petitioner's RFE response contains letters on the foreign entity's letterhead identifying [redacted] alongside the Beneficiary as the entity's "Managing Director [and] Co-Founder." The RFE response also includes the foreign entity's corporate documents, which identified the Beneficiary and [redacted] as "members" of the foreign entity. These documents contradict the Petitioner's claim that the Beneficiary is the sole owner of the foreign entity. The Petitioner has not submitted evidence to resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As the Petitioner in this matter has not provided sufficient credible supporting evidence establishing who owns the foreign entity, we cannot conclude that the Petitioner has a qualifying relationship

with the Beneficiary's employer abroad and on the basis of this finding, the instant petition cannot be approved.

III. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director also found that the Petitioner did not establish that the Beneficiary was employed abroad in a managerial or executive capacity.

The Act defines "managerial capacity" as 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.

The Act defines the term "executive capacity" as an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

A. Duties

When examining the managerial capacity of the 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 performed by the Beneficiary and indicate whether such duties were 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 was *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

In support of the petition, the Petitioner provided a cover letter claiming that the foreign entity provides IT solutions services and that the Beneficiary's experience working abroad resulted in his acquiring "executive/managerial knowledge" in IT products and services. Although the Petitioner did not expressly state that the Beneficiary's position abroad was in a managerial capacity, it claimed that the Beneficiary's work involved overseeing professional personnel, which is an element of the statutory

definition of managerial capacity. Section 101(a)(44)(A)(ii) of the Act. The Petitioner stated that the Beneficiary, in his role as the foreign entity's managing director, has been "responsible for all aspects of sales, management, and business relationships" and "developed, presented, and managed the implementation of innovative business solutions."

In response to the RFE, the Petitioner provided a statement claiming that the Beneficiary is responsible for the growth of the foreign entity in terms of profitability and market share. The statement indicates that the Beneficiary's other responsibilities include the following: holding daily meetings with the company's "senior management team" consisting of the "co-founder" of the foreign entity and two other employees; reviewing progress indicators, such as the number of customers and profits; visiting "strategic customers" to gain an understanding of how to help meet their technical and business needs; evaluating and implementing new sales and marketing strategies based on the Beneficiary's evaluations of the company's finances; discussing sales opportunities and identifying new solution offerings; and meeting with one of the senior team members to "find the right balance" of IT workers to increase profits and decrease costs.

The same statement also listed various service delivery and client management duties, operational and functional duties, and technical duties that the Beneficiary shares with the foreign entity's "co-founder." The statement did not state how much time the Beneficiary has allocated to each duty in these three categories or explain whether the Beneficiary and the "co-founder" evenly distributed their time among the various activities, particularly non-managerial activities, such as serving as "[l]ead interface" in account service issues, developing new services and solutions, managing vendor contracts, interfacing with other vendors experts and project managers, conducting new technology research, managing inventory, developing ' and network methods and procedures, developing and managing network services architectural plans, reviewing technical literature, and attending training seminars. It is unclear how much time the Beneficiary has allocated to these non-managerial duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In denying the petition, the Director determined that the job description provided does not establish that the Beneficiary's employment abroad involved primarily managerial job duties.[2]

As discussed above, we find that the Petitioner provided a deficient job description that did not establish that the Beneficiary's time during his employment abroad was primarily allocated to tasks of a managerial nature. Although the Petitioner appealed the denial, it did not specifically address the Director's adverse finding with regard to the Beneficiary's employment abroad. As noted earlier, despite stating its intent to provide a legal brief after filing the appeal, there is no evidence

[2] The Director also made an adverse finding regarding the Beneficiary's employment abroad based on a review of information that is outside of the record. We hereby withdraw that finding.

that the Petitioner has supplemented the record with additional evidence or a legal brief. Therefore, the Petitioner has not overcome the Director's adverse finding.

Likewise, based on the above analysis and our finding that the Petitioner provided a deficient job description, we similarly cannot conclude that the Beneficiary was employed abroad in an executive capacity.

B. Staffing

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services 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. 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's initial supporting evidence included the foreign entity's organizational chart, which depicted the Beneficiary and [redacted] as managing directors placed at the top level within the hierarchy. Despite depicting a second staffing tier consisting of four positions – a sales and marketing position, a professional services position, a resource management position, and a finance and operations position – the chart depicts the Beneficiary and [redacted] in the respective positions of "resource management" and "finance and operations," thereby indicating that the Beneficiary and [redacted] are part of the "senior management team" that the Beneficiary is claimed to oversee. The Petitioner did not discuss or elaborate on this ambiguity, nor did it explain which of the Beneficiary's listed duties were performed in his capacity as resource manager and which were performed in his capacity as managing director.

We also note that the entire "senior management team," excluding the Beneficiary and [redacted] effectively consisted of two people – a sales and marketing employee and a professional services employee. Although the foreign entity's organizational chart depicts the professional services employee as a supervisor or manager overseeing two employees, the Petitioner did not clarify how the Beneficiary and [redacted] distributed the oversight of their two shared subordinates. At most, it appears that the Beneficiary may have shared supervisory responsibility over one supervisory

employee. The remainder of the chart depicts two software engineers subordinate to the professional services employee. In light of this organizational structure, the Petitioner's earlier reference to a "senior management team" is unclear and appears to be an inaccurate portrayal of the foreign entity's organizational complexity.

Although the Petitioner's RFE response included employee job descriptions, which indicated that the sales and marketing employee led a sales team, the organizational chart does not indicate that the foreign entity had such a team in place at the time of the Beneficiary's employment, thus indicating that the sales and marketing employee performed all sales and marketing functions of the organization. We further note that the record lacks evidence to show that the sales and marketing employee was either a supervisory or a professional position.[3] As stated earlier, the Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. 25 I&N Dec. 369, 376 (AAO 2010).

In denying the petition, the Director concluded that the foreign entity's organizational hierarchy lacked the complexity to elevate the Beneficiary to a positon that was higher than that of a first-line supervisor of non-professional employees. The Director also found that the record lacked evidence to show that the Beneficiary assumed the role of a function manager. Given that the Petitioner did not dispute the Director's finding or provide further evidence on appeal, and given our finding that the Beneficiary has been responsible for a number of non-qualifying duties related to service delivery, client management, and other operational and functional duties, we find that the Petitioner did not overcome this adverse conclusion.

IV. CONCLUSION

For the reasons discussed above, the evidence submitted does not establish that the Petitioner has a qualifying relationship with the Beneficiary's employer abroad or that the Beneficiary has been employed abroad in a managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of A-US LLC*, ID# 523125 (AAO Aug. 31, 2017)

[3] In evaluating whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."