U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9316174

Date: AUG. 31, 2020

Appeal of California Service Center Decision

Form I-129, Petition for L-1A Manager or Executive

The Petitioner, a biotechnology company, seeks to employ the Beneficiary as vice president of product under the L-1A nonimmigrant visa classification for intracompany managers and executives. See Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the California Service Center denied the petition. The Director concluded that, contrary to the Act and Department of Homeland Security regulations, the Petitioner did not demonstrate the Beneficiary's employment abroad in the claimed managerial capacity or the company's intention to employ him in the United States in the same, claimed capacity.

The Petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will dismiss the appeal.

I. L-1A MANAGERS AND EXECUTIVES

An L-1A petitioner must establish that it or its parent, branch, affiliate, or subsidiary employed a beneficiary abroad in a managerial, executive, or specialized knowledge capacity for at least one continuous year during the three years before his or her application for admission to the United States. 8 C.F.R. § 214.2(l)(1)(ii)(A). An L-1A petitioner must also intend to employ a beneficiary in the United States in a managerial or executive capacity. 8 C.F.R. § 214.2(l)(3)(ii).

II. EMPLOYMENT ABROAD

The term "managerial capacity" means employment where an employee primarily: 1) managed the organization or a department, subdivision, function, or component of it; 2) supervised and controlled the work of other supervisory, professional, or managerial employees, or managed an essential function within the organization or a department or subdivision of it; 3) had authority to hire and fire or recommend those as well as other personnel actions, or, if no other employee was directly supervised, functioned at a senior level within the organizational hierarchy or with respect to the function managed; and 4) exercised discretion over the daily operations of the activity or function for which the employee had authority. Section 101(a)(44)(A) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B).

The definition of managerial capacity recognizes both "personnel managers" and "function managers." The Petitioner does not assert the Beneficiary's management of an essential function abroad or his proposed management of one in the United States. We will therefore consider the Beneficiary's employment abroad and in the United States only as a personnel manager. A personnel manager must have primarily supervised and controlled the work of other supervisory, professional, or managerial employees. Section 101(a)(44)(A)(2) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). "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; 8 C.F.R. § 214.2(l)(1)(ii)(B)(4).

A petitioner must show that a foreign position met all four elements of the definition of "managerial capacity." A petitioner must also demonstrate that a beneficiary primarily engaged in managerial duties, as opposed to operational activities. See Family Inc. v. USCIS, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining the managerial nature of a position abroad, we consider the description of the job duties, a foreign entity's organizational structure and the nature of its business, the presence of other employees to relieve a beneficiary from performing operational duties, the duties of a beneficiary's subordinate employees, and any other factors indicating the nature of the position.

Here, the Petitioner asserts that its parent company has continuously employed the Beneficiary in China in a managerial capacity since the foreign entity's establishment in 2015. Since March 2018, the Beneficiary has served as the parent's chief operating officer (COO).

Letters from the parent company's chief executive officer (CEO) indicate that the Beneficiary's duties abroad as COO included supervising and controlling others' work. For example, duties related to "design[ing] and implement[ing] business strategies, plans and procedures," which took 30% of the Beneficiary's time, included "meet[ing] regularly" with subordinates "to communicate the project progress, assign tasks and follow up the performance." Also, duties regarding analyzing internal operations and identifying areas for process enhancements, which took 15% of his time, included communicating with subordinates on work procedures and enhancements. As the Director found, however, the descriptions of the Beneficiary's job duties abroad do not demonstrate his primary performance of managerial duties. The job duty descriptions do not detail how much time the Beneficiary spent managing others, and they do not demonstrate that he primarily supervised and controlled others' work.

On appeal, the Petitioner provides a table showing how the Beneficiary's duties abroad correspond to the elements of the definition of the term "managerial capacity." The Petitioner argues that the table shows that all the Beneficiary's duties relate to one or more elements of the term's definition. But the Petitioner's table indicates that the Beneficiary spent only 5% of his time supervising and controlling the work of other supervisory, professional, or managerial employees. Thus, contrary to the requirements of a personnel manager, the table does not demonstrate that the Beneficiary primarily supervised and controlled the work of others.

The Petitioner also argues that it submitted documentary evidence demonstrating the managerial nature of the Beneficiary's duties. The evidence included copies of weekly updates to the Beneficiary from subordinates and his schedule from a week shortly before the petition's filing. These materials, however, do not document long enough periods to demonstrate that the Beneficiary primarily

supervised and controlled the work of others. Thus, the Petitioner's arguments on appeal do not demonstrate the managerial nature of the Beneficiary's job duties abroad.

As the Director also found, the record contains discrepancies regarding the Beneficiary's foreign subordinates. A letter from the CEO and the initial organizational chart of the parent company indicate the Beneficiary's direct supervision of three vice presidents (VPs) who purportedly managed the respective departments of products, technology development, and operations. But the chart and its accompanying documentation indicate that, at the time of the petition's filing in February 2019, the parent had not hired the VPs of products and operations. In addition, in response to the Director's written request for additional evidence (RFE) in October 2019, a new CEO letter and organizational chart indicate the Beneficiary's supervision of different employees and departments. Like the initial evidence, the materials in the RFE response reflect the Beneficiary's supervision of a VP of operations. But the RFE materials also show the Beneficiary's supervision of: a director of investment and financing management; a director of accounting; a supervisor of corporate planning; and a manager of corporation information. At the time of the Director's decision, the Petitioner had not explained the inconsistencies regarding the number and job titles of the Beneficiary's foreign subordinates. See Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

On appeal, the Petitioner states that, shortly before it responded to the RFE, its parent company restructured. The Petitioner therefore contends that the second chart reflects the parent's organizational changes. The Petitioner, however, must establish that the Beneficiary worked abroad in the claimed managerial capacity before the petition's filing. See, e.g., 8 C.F.R. § 214.2(l)(3)(iv) (requiring a petitioner to submit "[e]vidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge") (emphasis added). Contrary to this requirement, the second organizational chart lists subordinates the Beneficiary supervised after the petition's filing.

The Petitioner's submission of the post-filing organizational chart also casts doubt on the relevancy of the initial chart and the initial description of the Beneficiary's job duties abroad. Rather than describing the Beneficiary's employment abroad during a one-year period before the petition's filing, the Petitioner's initial evidence may describe his position only at the time of the petition's filing. The record does not establish that the initial chart and job-duty description accurately describe the Beneficiary's COO position from his start in March 2018 until the petition's filing in February 2019.

In addition, the Petitioner has not described the Beneficiary's employment abroad during the entire, requisite, one-year period. As proof of the Beneficiary's continuous term of foreign employment, the Petitioner submitted copies of salary statements from June 2017 through June 2018 and his labor contract from August 2015 through September 2018. As previously indicated, however, the Beneficiary did not begin working as COO in China until March 1, 2018, and the petition was filed less than one year later on February 15, 2019. Thus, the Petitioner has not submitted required evidence of the Beneficiary's position(s) with the parent company before March 1, 2018 to demonstrate working abroad as a manager for the requisite one-year time period. Further, USCIS records show that, between March 1, 2018 and February 15, 2019, the Beneficiary visited the United States a total of 125 days. The Beneficiary's time in the United States cannot count towards his one year of foreign employment. See 8 C.F.R. § 214.2(l)(1)(ii)(A) (stating that, although not interruptive of a

beneficiary's one year of continuous employment abroad, visits to the United States "shall not be counted toward fulfillment of that requirement"). Thus, even if the Petitioner had established the parent's employment of the Beneficiary in a managerial capacity as COO (which it didn't), the Petitioner would not have established his possession of the required one year of employment abroad in the claimed managerial capacity.

For the foregoing reasons, the Petitioner has not established the Beneficiary's possession of at least one year of prior continuous foreign employment in the claimed managerial capacity. We will therefore dismiss the appeal and affirm the petition's denial.

III. PROPOSED U.S. EMPLOYMENT

The Director found that the Petitioner did not describe the Beneficiary's proposed U.S. job duties specifically enough to establish the claimed managerial nature of the offered position of VP of product. See 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) (stating: "Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations").

As the Petitioner argues, however, it submitted a detailed description of the proposed duties from its CEO in response to the Director's RFE. See 8 C.F.R. § 214.2(l)(3)(ii) (requiring an L-1 petitioner to provide "a detailed description of the services to be performed"). The description provides additional information about the Beneficiary's proposed activities and how he would supervise subordinates. These details are not vague, general restatements of the elements listed in the regulatory definition of "managerial capacity." The Petitioner has therefore described the job duties of the offered position with enough specificity.

The Director also noted that the Petitioner's organizational chart indicates the company has not yet hired an engineering director, one of two employees whom the Beneficiary would directly supervise. The Director also found that the record did not confirm the Petitioner's employment of the Beneficiary's other proposed subordinate, the director of research and development (R&D), or the full- or part-time nature of his work. As the Petitioner argues on appeal, however, the record contained a copy of the R&D director's payroll record for September 2018, indicating the Petitioner's full-time employment of him that year. The record therefore supported the Petitioner's employment of one of the Beneficiary's proposed subordinates.

The Director also found insufficient evidence of the supervisory, professional, or managerial nature of the subordinate position of R&D director. See section 101(a)(44)(A)(ii) of the Act (defining the term "managerial capacity" to include supervision and control of the work of "other supervisory, professional, or managerial employees"). The Petitioner's organizational chart, however, shows the R&D director's supervision of two employees: a scientist; and a laboratory manager. Copies of payroll records and email messages also show the Petitioner's employment of the person designated in the chart as laboratory manager. The R&D position therefore appears to be supervisory in nature.

The Petitioner, however, has not demonstrated its ability to support the Beneficiary in the proposed, managerial capacity. The Petitioner's Form I-129 and organizational chart assert the company's

employment of six people. In response to the Director's RFE, however, the Petitioner's most recently provided federal payroll tax return indicates that, in the second quarter of 2019, the company employed only three people. See Matter of Ho, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record). The record does not indicate which three workers the Petitioner employed during that period. But the small number of employees casts doubt on the sufficiency of the Petitioner's staff to relieve the Beneficiary from having to perform operational tasks. A beneficiary need not supervise a minimum number of employees to qualify as a personnel manager. Section 101(a)(44)(C) of the Act. "[B]ut size is nevertheless a relevant 'factor in assessing whether [an organization's] operations are substantial enough to support a manager.'" Brazil Quality Stones, Inc. v. Chertoff, 531 F.3d 1063, 1070 (9th Cir. 2008) (citation omitted). We therefore do not improperly consider the Petitioner's size in determining the managerial nature of the offered position.

The Petitioner has not demonstrated adequate staffing to allow the Beneficiary to primarily perform managerial duties. Thus, in any future filings in this matter, the Petitioner must explain the discrepancy in its number of employees and submit additional evidence of its ability to support the proposed, managerial position.

IV. QUALIFYING RELATIONSHIP

Although unaddressed by the Director, the record also does not establish a qualifying relationship between the Petitioner and the Beneficiary's foreign employer. An L-1A petitioner must demonstrate that it and a beneficiary's foreign employer are "qualifying organizations." 8 C.F.R. § 214.2(l)(3)(i).

The Petitioner asserts that it is a wholly owned subsidiary of the company that employed the Beneficiary in China. See 8 C.F.R. §§ 214.2(l)(1)(ii)(I), (K) (listing a subsidiary and parent as qualifying organizations). The Form I-129 and copies of the Petitioner's stock certificate identify the purported parent by one name. But copies of the Petitioner's U.S. income tax returns for 2017 and 2018 identify the foreign entity by another. The record therefore does not establish the name of the Petitioner's purported parent or its qualifying relationship to the Petitioner. See Matter of Ho, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

Thus, in any future filings in this matter, the Petitioner must resolve the inconsistent names of its purported parent company and submit independent, objective evidence of a qualifying relationship between the entities.

V. CONCLUSION

The Petitioner has not demonstrated the Beneficiary's employment abroad in the claimed managerial capacity. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.