U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7790484

Date: DEC. 4, 2019

Certification of California Service Center Decision

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

The Petitioner, a car dealership, seeks to continue the Beneficiary's temporary employment as its finance 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 California Service Center initially denied the petition without a written decision. We remanded the matter to correct this error, and the Director issued a written decision, indicating that the record did not establish, as required, that it will employ the Beneficiary in the United States in a managerial or executive capacity. The Director certified the decision to us for review.[1]

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will affirm the certified denial.

I. LAW

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.*

II. ANALYSIS

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in the United States in a managerial or executive capacity. The Petitioner does not claim that the Beneficiary will be employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in a managerial capacity.

[1] Although not required, the Petitioner's response includes a second Form I-290B, Notice of Appeal or Motion.

"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.

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.

When examining the claimed managerial 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. If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, we 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.

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.

The Petitioner initially provided the following list of the Beneficiary's responsibilities:

- Manage the short and long term financial planning of the business
- Establish general guidelines which must be followed and execute[d] by employees
- Review financial transactions and monitor budget to ensure efficient operations
- Ensure expenditures stay within budget limitations
- Develop pricing strategies with the goal of maximizing the firm's profits or share of the market while ensuring the firm's customers are satisfied
- Oversee product development or monitor trends that indicate the need for new products and services
- Review and approve annual budget, quarterly, semi-annual and annual Financial Statements to be presented to the President and General Manager
- In general "run the business finances" for the corporation

Parts of the above job description appear, verbatim, in the Summary Report for Marketing Managers on O*NET, a database of job information sponsored by the Bureau of Labor Statistics.[2] The Beneficiary, however, is not a marketing manager.

Asked to provide a more detailed job description, the Petitioner submitted a longer list of duties and the approximate percentage of time the Beneficiary devotes to each:

- Develop a strategic plan to advance the company's mission and objectives and to promote revenue, profitability, and growth as an organization; 12%
- Oversee the entity operations to insure cost-effective management of resources; 8%
- Plan, develop, and implement strategies for generating resources and/or revenues for the company[;] 10%
- Recommends yearly budget and prudently manages organization's resources within those budget guidelines according to current laws and regulations; 9%
- Approve company operational procedures, policies, and standards; 10%
- Review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions; 8%
- Evaluate performance of managers for compliance with established policies and objectives of the company and contributions in attaining objectives; 8%
- Identify new opportunities and ideas for the company and implement them to increase overall sales and profitability; 5%
- Review reports of daily sales activities and provide necessary recommendations for improvements; 3%
- Hire and fire employees including sales force and office personnel[;] 2%
- Meet with managers once a month to discuss past 30 days activities/sales, review goals and objectives and encourage feedback and ideas from manager for future growth and productivity; 2%
- Search for opportunities of business expansion; 10%
- Oversee product development or monitor trends that indicate the need for new products and services; 3%
- Develop pricing strategies with the goal of maximizing the firm's profits or share of the market while ensuring the firm's customers are satisfied; 10%

The Director found the Beneficiary's job description to be "overly broad and general." The Director also found some of the Beneficiary's claimed duties to be inconsistent with the company's organizational structure. The Director cited the following examples:

- The Beneficiary purportedly has hiring and firing authority over sales staff, but the sales staff are subordinate to the purchases and sales manager, not to the Beneficiary;
- The job description refers to "product development," with no explanation as to what products a used car dealership develops; and
- The Beneficiary purportedly "evaluate[s] performance of managers," but the organizational chart does not list multiple managers under the Beneficiary's authority.

[2] The report is available at https://www.onetonline.org/link/summary/11-2021.00 (last visited Nov. 6, 2019).

Beyond the Director's examples, other elements of the decision imply authority over sales, despite the presence of a purchases and sales manager who does not report to the Beneficiary. Other listed elements, such as planning strategies to increase revenue and seeking opportunities to expand, appear to suggest a degree of authority over the entire company, inconsistent with the Beneficiary's stated position in the organizational hierarchy.

The Petitioner's organizational chart showed the following positions subordinate to the Beneficiary:

- Assistant Manager, with one subordinate:
  - Title Clerk
- Finance Assistant
- Services Assistant, with five subordinates:
  - Detailing Services (three employees)
  - Automotive Services (two employees)

Although the organizational chart showed subordinates below the assistant manager and the services assistant, the job descriptions for those two positions did not show supervisory or managerial responsibilities. Instead, the services assistant's main duties involved customer service, such as answering customers' questions, explaining product features, and resolving complaints. The assistant manager's duties involved "[i]nvoicing and collection, file keeping, analyz[ing] financial information and prepar[ing] financial reports." The approximate hours assigned to each of these duties left no further time for supervisory or managerial responsibilities. The lack of those responsibilities indicated that the Beneficiary is essentially the first-line supervisor of all the employees listed on his section of the organizational chart. First-line supervision can qualify as managerial, but only if the employees supervised are professionals, and the Petitioner did not show that these subordinate positions are professional.

In the denial notice, the Director acknowledged that, according to the organizational chart, two of the Beneficiary's subordinates have subordinates of their own. The Director found, however, that the Petitioner had not established that those individuals are primarily managers or supervisors.

In response to the Director's certified decision, the Petitioner submits a third version of the Beneficiary's job description. The newest job description is not simply a revision or refinement of prior submissions. Rather, it is markedly different in several ways. For example, the new description includes no mention of developing a strategic plan, overseeing the entity's operations, or approving company procedures, policies, and standards—activities previously claimed to occupy 30% of the Beneficiary's time. Other previously-claimed activities such as product development and pricing are also absent from the new job description.

The Petitioner also submits new job descriptions for the Beneficiary's subordinates, along with tax documentation to confirm their employment. As with the Beneficiary's new job description, the new descriptions submitted for the subordinate positions differ in significant ways from the earlier versions. For example, the services assistant's new job description indicates that she spends 30% of her time coordinating license plate registrations and renewals and 10% of her time scheduling maintenance and repairs, neither of which appeared on the earlier version. The minimum educational requirement for

the finance assistant position has changed from a bachelor's degree to a "High School Diploma or GED."

Counsel for the Petitioner states: "upon review with new counsel, Petitioner and Beneficiary discovered errors in the previous descriptions of their duties . . . . The error in the previous description was due to drafting errors." It is significant that, while the Petitioner's latest submission includes a new statement from the Petitioner, that statement makes no reference to "drafting errors" in earlier submissions. Therefore, the Petitioner's new statement does not corroborate counsel's narrative as to why the significant changes in job descriptions coincided with the hiring of a new attorney. Also, 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)).

The president and general manager of the petitioning entity signed a number of related documents, including the conflicting job descriptions. That official has not directly addressed the issue or explained why the new job description is more credible than the earlier versions. The Petitioner has not resolved this discrepancy in the record with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

A petitioner cannot offer a new position to a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities, at this late stage of the proceeding. A petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to applicable requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Therefore, we will give no weight to the new job descriptions.

With respect to the earlier job descriptions, counsel seeks to address some of the specific points raised by the Director. Concerning the earlier reference to "product development," counsel states:

> Petitioner's statement should be considered broadly within the financial sense of it. Thus, Petitioner's reference to oversight of products or services should be interpreted as to monitor newer financial products and/or services, e.g. new credit and insurance programs, brokerage services, etc., both in an effort to provide customers with a better shopping experience and identify new market strategies that lead to growth.

Counsel's assertion is speculative, general, and uncorroborated by the record. The earlier job description referred not to "oversight of products or services," but specifically indicated that the Beneficiary "[o]versee[s] product development." The record does not show that the petitioning entity develops "credit and insurance programs [or] brokerage services." The Petitioner did not attest to counsel's interpretation of the above language, and the new job description does not refer to product development at all.

Counsel states that the Director "improperly concluded that the Beneficiary only oversighted [*sic*] one position titled 'Assistant Manager.' . . . But . . . the Beneficiary actually oversees three other employees." The Director, however, did not state that the Beneficiary has only one subordinate.

Rather, the Director found that the Beneficiary has only one subordinate *with a managerial title*. This observation is relevant in the context of the claim that the Beneficiary would "evaluate the performance of managers." Two paragraphs later, the Director acknowledged the other positions identified as subordinate to the Beneficiary.

Counsel maintains that the Petitioner "supervises three other employees who in turn supervise other employees." Organizational charts in the record consistently indicate that only two of the Beneficiary's subordinates (the services assistant and the assistant manager) have subordinates of their own. The various job descriptions submitted for those two employees show substantial operational duties, and even the new job description for the services assistant does not show any time allotted for supervisory duties. The new job description for the assistant manager includes three items that could be construed as relating to supervision of subordinates:

- Oversee day-to-day operations and work of lower-level staff; 15%
- Ensure compliance [with] company's policies and standards; 10%
- Monitor and provide feedback to managed staff to effect improvements in organizational goals; 10%

Apart from the credibility issues already discussed, the above items from the new job description are vague and repetitive. The Petitioner, for instance, does not explain the difference between "overseeing" and "monitoring" subordinates, and the phrase "ensure compliance" describes a goal without saying what the employee does to achieve that goal. Furthermore, the organizational charts in the record consistently indicate that the assistant manager's only subordinate is the title clerk. Therefore, the scope of any supervisory responsibilities would be limited to a small part of the Petitioner's business, and the Petitioner has not shown how the supervision of one title clerk could occupy a significant fraction of the assistant manager's time.

For the reasons discussed above, the Petitioner has not established that it seeks to employ the Beneficiary in a managerial capacity under the extended petition.

ORDER: The petition is denied.