U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-, INC.

DATE: DEC. 12, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a seller and exporter of automobile and automobile parts, seeks to continue the Beneficiary's employment as its "General Manager/Chief Operations Officer" 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 Vermont Service Center denied the extension petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity.

On appeal, the Petitioner submits a brief claiming that the Beneficiary is and would continue to be employed in an executive capacity or, alternatively, that she fits the criteria of a function manager. The Petitioner contends that the Beneficiary does not have to oversee professional, managerial, or supervisory employees because she manages the company's sales department, which is a critical component of the operation.

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.*

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity.

The statute defines the term "managerial capacity" as an assignment in which an 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; has the authority to hire and fire or recommend those as well as other 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 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*).

The statute defines an "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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) 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.

A. Staffing

USCIS reviews the totality of the record when examining a beneficiary's claimed managerial or executive 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.

In its Form I-129, Petition for a Nonimmigrant Worker, the Petitioner claimed five employees and stated that it was established in 2007. The Petitioner indicated that the Beneficiary's responsibilities include "overall supervision of purchasing and marketing employees" and provided a supporting letter claiming that the Beneficiary recruited "all essential staff" to support the U.S. operation. The initial supporting evidence includes an organizational chart, which shows that of the three positions that comprise the sales and marketing department only the sales manager position was filled in that department, while all three positions that comprise the purchasing and product research department were vacant.

The Petitioner provided job descriptions for the filled sales manager position and the sales manager's subordinates – the shipping, purchasing, and sales clerk positions – all three of which were vacant. While the sales manager's job description indicates that this position is assigned some supervisory duties with respect to the sales clerk, the sales clerk position was vacant at the time of filing. Therefore, the sales manager was not actually managing anyone at the time the petition was filed and there were no supervisory duties carried out by him or her. Further, the record lacks evidence that the sales manager position requires educational credentials beyond a high school diploma and therefore it cannot be deemed a professional position.[1] *See* section 101(a)(44)(A)(ii) of the Act. The record lacks sufficient evidence to establish that the sales manager, who was the Beneficiary's only subordinate at the time of filing, was either a managerial or professional employee given that the sales manager had no subordinates of her own and did not require a bachelor's degree to meet the requirements of her position.

The Petitioner also provided job offer letters showing that it filled three vacant clerk positions in February 2017. However, 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). As the petition was filed in October 2016 and all three job offers were extended in 2017, the new hires are not relevant for the purpose of establishing that the Petitioner was eligible for the immigration benefit sought at the time of filing. Likewise, the updated organizational chart depicting the newly hired employees is irrelevant as well. The Petitioner also complied with a request for evidence (RFE) regarding wage reports. The wage report for the 2016 third quarter (during which the petition was filed) shows that the Petitioner had five employees – the company president, vice president, a secretary, the Beneficiary, and a sales manager as the Beneficiary's only subordinate – at the time of filing. The Petitioner did not state who was performing the purchasing, logistics, product research, sales, and marketing tasks. In fact, the positions that would presumably be assigned these tasks were vacant at the time the petition was filed.

[1] 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."

The Petitioner contends on appeal that it is in the process of expanding "this new division of the company" and that additional employees will be hired as the need for such employees arises. However, the Petitioner's claims regarding the new hires are insufficient to overcome the basis for denial. As previously noted, eligibility must be based on the facts and circumstances that existed at the time of filing and cannot be based on the Petitioner's projections or expectations of business growth. Here, the record shows that the Petitioner was established in 2007 and thus had been in existence for approximately nine years at the time this petition was filed; yet, the organization's staffing is indicative of a company that is in an early phase of development, as multiple positions were vacant. This staffing scheme leads us to question who, if not the Beneficiary, was assisting in the performance of operational tasks assigned to the purchasing, logistics, product research, and marketing positions, which were shown as "pending" at the time of filing.

Further, the Petitioner alters its original claim, indicating that managers who were employed by the foreign parent entity "were communicating" with the Beneficiary so that she was effectively "supervising these employees" in addition to those she was claimed to have been supervising in the United States. However, the Petitioner has not established that "communicating" with employees of the foreign entity is synonymous with supervising those individuals. The Petitioner also did not address the logistical hurdles of exercising managerial control over employees who are located thousands of miles away from the Beneficiary; nor did the Petitioner state precisely what managerial duties the Beneficiary performed with respect to the foreign entity's employees.

Further, the Petitioner did not provide evidence to establish that it compensated the foreign entity's employees for tasks they purportedly carried out for the benefit of the U.S. subsidiary. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Moreover, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). We question the Petitioner's omission of multiple employees from the organizational chart, which was presumably submitted to show the Petitioner's staffing composition at the time of filing. It is unclear why the Petitioner chose not to have this information reflected in the original organizational chart and why it did not include the position titles and job descriptions of the foreign employees it claims the Beneficiary has been overseeing. If, as the Petitioner now claims, the foreign entity's employees were part of its organization all along, it should have provided us with an organizational chart that accurately reflected its entire staffing composition. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The Petitioner has not provided sufficient evidence to support its new claim regarding the Beneficiary's supervision of employees who work for its foreign parent entity.

Further, while we do not question the Beneficiary's level of discretionary authority, which the Petitioner emphasizes on appeal, we find that this factor must be considered alongside other evidence, including the Beneficiary's job duties, which we will discuss below, and the scope of the

organization. In doing so, we take into account the reasonable needs of the organization noting that a company's size alone may not be the only factor in denying a visa petition for classification as a multinational manager or executive. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the nonmanagerial or nonexecutive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, the reasonable needs of a petitioner will not supersede the requirement that the beneficiary must be "primarily" employed in a managerial or executive capacity, which is unlikely when that petitioner lacks the staffing composition to relieve its beneficiary from having to allocate the majority of her time to non-qualifying duties. *See* sections 101(a)(44)(A) and (B) of the Act.

In the present matter, the Petitioner did not establish that its subordinate staff at the time of filing was sufficient to relieve the Beneficiary from significant involvement in the day-to-day operations of its sales and export business. As such, the Petitioner has not adequately supported its claim that the Beneficiary performs primarily managerial job duties or that its organization has a reasonable need for a managerial employee who would spend her time primarily managing the company or its managerial, professional, or supervisory staff. For the same reasons, we also find that the Petitioner has not established that the Beneficiary would primarily direct the management of the organization or focus on the broad policies and goals of that organization, as required of someone that is employed in an executive capacity.

B. Duties

When examining the managerial or executive capacity of the Beneficiary, we also 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).

Based on the statutory definitions of managerial and executive 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 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 1533.

In its supporting cover letter, the Petitioner stated that the Beneficiary had been running the organization, recruiting its "essential staff," and promoting the company among U.S. suppliers. The Petitioner claimed that the Beneficiary has expanded its export trade in Thailand and is working on doing the same in South Africa where she seeks to "open up more markets."

As discussed above, while the Petitioner's organizational chart depicts the Beneficiary as overseeing a purchasing and product research department and a sales and marketing department, only one out of six

positions – that of sales manager – was actually filled at the time of filing. It is therefore unclear which "essential staff" the Beneficiary hired.

In the RFE, the Petitioner was instructed to provide a detailed description of the Beneficiary's proposed job duties demonstrating that she would be employed in a managerial or executive capacity. In response, the Petitioner stated that the Beneficiary functions as a manager and executive and provided a company-generated job description stating that the purpose of the Beneficiary's position is to supervise and motivate "all staff" in the purchasing and product research and in the sales and marketing departments. The Beneficiary's duties were said to include the following:

- Designing and implanting business plans and strategies for "streamlining [the] new business operation" of selling and exporting U.S. vehicles;
- Setting performance goals and establishing policies to "promote [the] company's culture and vision;
- Overseeing daily operations, focusing on managing the staff in the product and research and in the sales and management departments;
- Participating in "expansion activities such as investments, acquisitions, corporate alliances and public relations"; and
- Analyze data to evaluate the company's performance and reporting her findings to the company president;
- Managing the company's global supplier database, negotiating agreements, and resolving conflicts.

We find that the Director correctly questioned how the Beneficiary would perform primarily managerial duties when her entire support staff is comprised of a single subordinate employee. We also agree with the Director in finding that the Petitioner does not have staff to collect data for the Beneficiary to analyze or prepare a database for her to manage, and that the evidence does not establish that the Beneficiary would primarily perform managerial or executive duties.

In light of our prior observations pertaining to the Petitioner's original organizational chart and the overall lack of a support staff within the two departments the Beneficiary is said to manage, we find that the record does not demonstrate that the Beneficiary would allocate her time primarily to duties associated with overseeing the work of supervisory, professional, or managerial employees. Despite the managerial position title of the Beneficiary's only subordinate, the record does not establish that the sales manager had subordinates of her own or that she assumed a managerial or supervisory position with respect to anyone in the organization. The sales manager's educational credentials also indicate that her position was not that of a professional employee.

We agree with the Petitioner that a function manager does not have to manage supervisory, professional, or managerial subordinates; however, the Petitioner did not provide sufficient evidence to establish that Beneficiary would assume the role of a function manager.

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. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G-Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

Although the Petitioner provided an organizational chart showing that the Beneficiary would oversee two departments within the company, this is not synonymous with specifically identifying an essential function. Moreover, the Petitioner has not provided sufficient evidence to show who would perform the underlying tasks of the two departments the Beneficiary is said to manage. Given that the Petitioner did not have employees to perform the purchasing, shipping and logistics, or research functions of the purchasing and research department or the marketing functions of the sales and marketing department, the record does not establish that the Beneficiary would primarily manage, as opposed to actually perform the duties of, an essential function. Based on the lack of employees to perform the underlying duties of the two departments headed by the Beneficiary at the time of filing, we have reason to believe that the Petitioner did not have the ability to support the Beneficiary in a position where she would allocate her time primarily to managing an essential function.

We also find that the Petitioner provided an overly broad job description that does not adequately delineate the actual tasks the Beneficiary would carry out in the course of the Petitioner's daily operation. 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). In the present matter, the Petitioner does not clarify what actual tasks would be involved in designing and implementing business strategies or what it means to "streamlin[e] new business operations." The Petitioner also does not specify how the Beneficiary would formulate the basis for setting the company's performance goals, specify the activities that show how she would "[o]versee daily operations," or explain how she plans to "lead[] employees to maximum performance" when the two departments the Beneficiary heads were virtually devoid of employees.

Likewise, the Petitioner did not clarify the Beneficiary's specific role with respect to investments, acquisitions, and corporate alliances or explain how these elements relate to the sale and export of automobiles and automobile parts. While it is plausible that the Beneficiary would be tasked with evaluating the company's performance and reporting her findings to the company's president, it is unclear who would provide the Beneficiary with the data necessary to form the basis of an evaluation. Lastly, the Petitioner's claim that the Beneficiary would manage its global supplier database requires further information to establish the creator of the database and the tasks that are involved in the database management. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; as previously indicated, the regulations require a detailed description of the Beneficiary's daily job duties. Here, the Petitioner has not provided sufficient detail or explanation of the Beneficiary's activities in the course of their daily routine.

In sum, the record indicates that at the time of filing the Petitioner did not have a supervisory, professional, or managerial staff for the Beneficiary to manage. Alternatively, the record does not show that the Petitioner had the staffing to relieve the Beneficiary from having to primarily carry out the underlying tasks of the two departments she is claimed to manage such that she could either: (1) assume the role of a function manager where she would primarily manage an essential function or (2) be elevated to an executive position in which she would primarily direct the management of the organization or its major components and focus on the organization's goals and policies. The Petitioner also provided a deficient job description that does not disclose the Beneficiary's actual job duties and thus precludes a finding that the Beneficiary would spend the primary portion of her time performing tasks that are managerial or executive in nature.

III. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of T-, Inc.*, ID# 813155 (AAO Dec. 12, 2017)