U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-NY LLC

DATE: DEC. 14, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a provider of graphic design and related photographic services, seeks to temporarily employ the Beneficiary as its vice president of marketing and business development 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 petition, concluding that the record did not establish, as required, that: (1) it will employ the Beneficiary in the United States in a managerial capacity; and (2) the Beneficiary has been employed abroad in a managerial capacity.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred by applying improper standards and by drawing conclusions counter to the facts.

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. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director found that the Petitioner did not establish that the Beneficiary has been, and will be, employed in a managerial capacity. The Petitioner does not claim that the Beneficiary will serve in an executive capacity, or that he served abroad in an executive capacity or in a position involving specialized knowledge. Therefore, we restrict our analysis to whether the Beneficiary has been and will be employed in a managerial capacity.

A managerial capacity is an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization, and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A personnel manager supervises and controls the work of other supervisory, professional, or managerial employees; the duties of a first-line supervisor are not considered managerial unless the employees supervised are professional. A personnel manager must also have the authority to execute or recommend personnel actions such as hiring, firing, and promotions. A function manager need not directly supervise other employees, but must manage an essential function within the organization, or a department or subdivision of the organization, and function at a senior level within the organizational hierarchy or with respect to the function managed. Section 101(a)(44)(A) 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. U.S. Employment in a Managerial Capacity

1. Duties

When examining the managerial or executive capacity of the Beneficiary, we will review the Petitioner's description of the Beneficiary's 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).

In this proceeding, the Petitioner claims that the Beneficiary will primarily serve as a function manager. 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). In this matter, the Petitioner has established that marketing and business development is an essential function, but the Petitioner has not established that the Beneficiary will primarily manage rather than perform that function.

The Petitioner submitted the following breakdown of the Beneficiary's intended duties, with the approximate percentage of time to be spent on each category:

Direct and manage the [Petitioner's] photo department – 35%

- Direct the NY photo department: manage employees, select and implement technologies to meet business objectives
- Design, implement and manage the photo department
- Recruit, hire and manage the department team
- Develop and organize department's structure and employee's tasks
- Negotiate contract conditions with local partners . . . .
- Oversee and direct collaboration of partners
- Ensure delivery of best product and customer experience
- Establish and implement the [Petitioner's] marketing strategy policies, processes and strategic planning
- Manage and implement business development strategies
- Develop business opportunities with dedicated online solutions for advertisers
- Grow offline high end services for photographers
- Establish and distribute tasks to each member of the photo department, or to the external suppliers in charge
- Direct the design and development of all [the Petitioner's] services targeting photographers and advertisers
- Generate online printing revenue

Oversee photo department business development – 20%

- Oversee sales meeting[s] with photographers, galleries, advertisers and prospective partners
- Manage team's planning to meet strategic deadlines
- Define [the Petitioner's] overall targets
- Manage the achievements of targets
- Supervise coordination between internal team, partners and suppliers
- Manage the progress of projects
- Manage the daily tasks to be done by the team and external professionals and agencies
- Review performance of partners and agencies
- Oversee the quality of deliverables
- Manage internal and external satisfaction
- Prepare activity report for the CEO [chief executive officer]

Recruit and manage human resources, hire and fire, recommend employees and suppliers – 5%

- Recruit new employees to build [the Petitioner's] team:
    - Developers
    - Sales team

  - Traffic manager
  - Quality controller
  - Support technician
  - Receptionist
- As a second step, build a production team of
  - Printers
  - Retouchers
  - Mounters
  - Framers
  - Technicians
- Oversee and recruit partners who meet [the Petitioner's] quality standards

Direct the day-to-day operations – 40%[1]

- Conduct benchmarks and market analysis . . . .
- Explore new market opportunities . . . .
- Oversee business activity . . . .
- Look for ways to optimize costs and improve performance
- Oversee production team and supply chain . . . .
- Direct marketing and communication: campaigns and promotions . . . .
- Oversee the development of customized solutions for customers, from the conception to their implementation

Several of the items in the above description rely on the presence of employees whom the Petitioner has not yet hired. We will address this issue in greater detail further below; for now, it will suffice to note that the Beneficiary cannot manage or supervise employees before the Petitioner has hired them.

A number of the responsibilities are too vague to tell us what duties they entail. Examples include "[e]nsure delivery of best product and customer experience," "[e]xplore new market opportunities," and "[m]anage internal and external satisfaction." Also, because the Petitioner assigned time percentages only to broad categories rather than identifiable tasks, the Petitioner did not show that the Beneficiary would devote the majority of his time to specified high-level functions.

Asked for additional details, the Petitioner stated:

> [The Beneficiary] will be directly overseeing other employees in the execution of every day non-managerial duties; however, [the Beneficiary] will not perform those duties since his role requires him to elaborate the marketing strategy, business

[1] One version of the job description shows this percentage as 30%, but other correspondence shows the figure as 40%. We have used the latter figure so that the percentages correctly add up to 100%.

> development strategy, and strategies related to the relationship between the company and its suppliers.
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> . . . .
>
> [The Beneficiary] will be directly charged with overseeing the hiring of his subordinates . . . [who] will be selected and formally hired once [the Beneficiary] will have arrived in his new position in the United States.

The Director denied the petition, stating that the Beneficiary's job description "suggest[s] that the beneficiary will be primarily engaged in marketing, sales and routine day-to-day duties."

On appeal, the Petitioner states that the Director relied on an unacceptable interpretation of the statute and regulations. There is some merit to this assertion, but not enough to overcome the denial. The Petitioner correctly disputes this statement by the Director: "The statutory definition of the term 'managerial capacity' focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization." This passage appears to have been adapted from language which more accurately describes an *executive* capacity. It does not apply here, because the Petitioner has not claimed that it will employ the Beneficiary in an executive capacity.

But there is less justification for the Petitioner's objection to this passage:

> The definitions of managerial and executive capacity have two parts. First, you must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, you must provide supporting documentation to show that the beneficiary will primarily perform these specified responsibilities and will not spend a majority of his time on non-qualifying day-to-day functions.

The Petitioner disputes the above assertion by stating: "The definition of managerial capacity does not have 'two parts' nor is there any mention of 'high level responsibilities.'" Those exact phrases do not appear in the definition, but the underlying ideas are intrinsic to it. A manager's duties must be (1) managerial, and (2) they must be *primarily* managerial, hence the "two parts" element. Likewise, the definition indicates that a manager's authority rises above performing operational tasks and supervising non-professional front-line workers. A manager oversees, rather than performs, the basic activities of a business, and therefore a manager's responsibilities are at a higher level than those of non-managerial workers.

The Petitioner states "there is no prohibition on a manager actually performing a function in addition to managing the same." To support this assertion, the Petitioner quotes the Foreign Affairs Manual (FAM):

> This does not mean that the executive or manager cannot regularly apply his or her professional expertise to a particular problem. The definitions do not exclude activities that are common to managerial or executive positions such as customer and public relations, lobbying, and contracting.

9 FAM 402.12-14(B)(c). We note that, as a Department of State publication, the FAM is not binding upon USCIS. *See, e.g., Avena v. INS*, 989 F. Supp. 1, 8 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N Dec. 125, 128 n.3 (BIA 1979). The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad, but is not controlling in this proceeding.

Even then, the Petitioner has taken the cited passage out of context by omitting the crucial sentence that immediately precedes it: "The duties of a position must *primarily* be of an executive or managerial nature, and *a majority of the executive's or manager's time* must be spent on duties relating to policy or operational management" (emphasis added). Applying professional expertise to a particular problem is not the same thing as directly engaging in day-to-day provision of goods or services. If the Beneficiary would spend most of his time "actually performing a function," then he cannot qualify as a manager, even if he nominally manages that function.

A manager must *primarily* manage, rather than perform, an essential function. The Petitioner has not established that the Beneficiary would primarily manage any identified essential function.

2. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, 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* sections 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. 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) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*4*). While the Petitioner emphasizes the claim that the Beneficiary will be a function manager, the Petitioner also asserts that the Beneficiary will supervise a professional employee.

At the time of filing in January 2017, the Petitioner's staff consisted of its CEO and a graphic designer. The Petitioner's business plan showed the following future hiring plans, culminating in 12 employees in 2020:

2017: Account Manager, Traffic/Customer Service Manager
2018: Developer, Quality Control Manager, Receptionist, Technical Support
2019: Account Manager, Graphic Designer
2020: Sales Director

Although the Petitioner stated that the Beneficiary would "build a production team" to include printers, retouchers, mounters, framers, and technicians, the Petitioner did not employ anyone in those positions at the time of filing, nor did the Petitioner plan to hire them between 2017 and 2020.

The Petitioner did not explain who now performs the functions of the unfilled positions. An L-1A petition for a new office, in operation for less than one year, can rely on the next year's projected growth; *see* 8 C.F.R. § 214.2(l)(3)(v)(C). But in this instance, the Petitioner did not claim to be a new office. Therefore, we cannot consider any assertion that the company will grow to accommodate a managerial position. The Petitioner must establish eligibility as of the petition's filing date. 8 C.F.R. § 103.2(b)(1).

The Petitioner has not indicated that the employees of its foreign parent entity perform any services for the petitioning U.S. entity, or that the Beneficiary would have any managerial authority over them.

The Petitioner submitted copies of invoices from suppliers and IRS Forms 1099-MISC, Miscellaneous Income statements, showing that the Petitioner paid various companies and individuals as contractors in 2016. The Petitioner did not identify the services that the contractors provided. The contractor that received the most money from the Petitioner is [redacted] The Petitioner paid IBE $65,318 in 2016, $28,500 of which appears to have been rent for office space that the Petitioner sublet from IBE for $2375 per month. The record does not show what goods or services [redacted] provided to the Petitioner in exchange for the remaining $36,818. We note that the president of [redacted] is a partner in the petitioning company.

The Petitioner's financial statement indicates that the company spent $8083 on advertising and promotion in the last two months of 2016, but the Petitioner has not elaborated on who received the payments or the nature of the promotional activity. For instance, the Petitioner does not specify whether one of its employees or a third party designed marketing materials for a promotional campaign.

The Petitioner stated that the Beneficiary will have authority to "negotiate contract conditions with local partners, including: print production photo laboratory, mounting, and finishes supplier, packaging suppliers, carrier for shipping, and banks for online payment solution." The Petitioner does not indicate how many such agreements are already in place. The only existing agreement

documented in the record is with a photo printer; there is also an invoice from a website developer. These outside entities handle some of the Petitioner's operational functions, but not relating to marketing or business development, which are the Beneficiary's stated areas of responsibility.

The Petitioner noted that it already has a graphic designer on staff. Many, but not all, graphic design positions qualify as professional.[2] The Petitioner did not specify the minimum requirements for this particular position, which is a separate question from what the individual employee's qualifications are. The Petitioner, however, did not show that the Beneficiary would spend most of his time overseeing the graphic designer's work. The presence of a subordinate professional does not establish that the Beneficiary's own duties would be primarily managerial as soon as he began working for the company. Furthermore, as noted above, the Petitioner has not identified the employees or contractors who perform many basic, non-professional tasks for the company. If the graphic designer is responsible for sales, shipping, and other functions, then these tasks would diminish the time the graphic designer spends working in an actual professional capacity. Supervision of tasks ordinarily delegated to non-professional workers does not become managerial when an employee with a professional title performs those tasks on more than a minimal basis.

In the denial notice, the Director found that the Petitioner had not established that subordinates would relieve the Beneficiary from primarily performing non-qualifying tasks. The Director acknowledged the Petitioner's plans to hire more employees over the next few years, but observed that these prospective employees were not at the company on the petition's filing date.

On appeal, the Petitioner correctly states that we must look at a beneficiary's authority over contractors when considering that beneficiary's role as a function manager. But the burden is on the Petitioner to establish, rather than simply claim, this authority. The Petitioner states that it submitted "a list of outside vendors and consultants over which [the Beneficiary] will have managerial authority." The Petitioner has listed several delegated tasks, but this is not a list of vendors and consultants.

The Petitioner protests: "the Director dismisses the Petitioner as a 'photographic lab,' rather than a full spectrum production studio providing printing, production and traffic management for advertising campaigns . . . ; creative retouching and editing; and digital asset management." We note that, on the petition form, the Petitioner identified itself as a "[l]eading professional photographic lab." The same attorney of record who prepared the appellate brief also prepared the Form I-129 petition. The Director's use of the Petitioner's own language in a capsule description of the company is neither dismissive nor prejudicial.

We further note that the Petitioner has not shown that it was able to provide all of the listed services at the time of filing. Invoices document the Petitioner's reliance on third parties for photo retouching and printing. The Petitioner's foreign parent company is more fully staffed, but the foreign entity is not the petitioning U.S. employer.

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[2] Source: O*NET Online, https://www.onetonline.org/link/details/27-1024.00 (last visited Dec. 13, 2017)

The Director stated: "The duties of the proffered position do not seem to be consistent with the size, scope, and operations of [the Petitioner's] business." From this statement, the Petitioner concludes that the Director placed too great an emphasis on the size of the company. The Director, however, did not say that a company the Petitioner's size can never require a manager. Rather, the Director found that *this* company has not shown that there is a realistic managerial role for the Beneficiary in the manner described. General assertions and arguments cannot rebut this case-specific finding.

Furthermore, the statute expressly permits USCIS to take the size of the petitioning company into consideration, provided it also "take[s] into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." Section 101(a)(44)(C) of the Act. In this instance, the Petitioner has not shown that, at the time of filing, the company had developed to a point where the Beneficiary would be able to manage functions without having to perform them himself. The Petitioner maintains that the Beneficiary will primarily act as a manager, but the Petitioner has not shown that adequate staff was available, at the time of filing, to perform non-managerial tasks instead of the Beneficiary. The Petitioner correctly states that a manager can oversee contractors as well as employees, but the Petitioner has provided minimal information and evidence to establish the Petitioner's reliance on contractors.

For the above reasons, the Petitioner has not established that it seeks to employ the Beneficiary in a primarily managerial capacity in the United States.

B. Foreign Employment in a Managerial Capacity

The Director found that the Beneficiary appeared to perform, rather than manage, operational tasks at the foreign parent company. On appeal, the Petitioner does not distinguish between the Beneficiary's past employment abroad and his intended employment in the United States. Instead, the appeal rests on the broad assertion that the Director relied on an incorrect interpretation of the definition of "managerial capacity."

The Petitioner listed the Beneficiary's duties abroad, with the approximate percentage of time spent on each category. The complete list of duties is several pages long, but the basic categories are as follows:

> Direct and manage the [company's] Web & Digital department – 40%
> Management and direction of employees and staff in the Web & Digital department – 20%
> Manage human resources, hire and fire employees, recommend suppliers and review performance of all – 10%
> Direction [of] day-to-day operations – 20%
> Manage the [foreign company's] Online solutions – 10%

Within the list of duties, some items appear more than once, such as distributing tasks to members of the Web & Digital Department and managing "the achievement of the department's targets." As with the intended U.S. duties, some of the listed foreign duties are ill-defined, including the assertions that the Beneficiary "[m]anaged internal and external satisfaction" and "[i]mplemented solutions" relating to online printing.

Asked for clarification, the managing director of the foreign entity stated that the Beneficiary "managed the creation" or "created and managed" various aspects of the foreign entity's "web and digital service." Nevertheless, the Director concluded that the Beneficiary appears to have been "primarily performing non-qualifying day-to-day tasks associated with the marketing and promotion of [the foreign entity's] web and digital service."

We conclude that the list of the Beneficiary's duties abroad, while not flawless, is more plausibly managerial than those proposed for his employment in the United States. Unlike the petitioning U.S. employer, the foreign entity asserted that the Beneficiary supervised a subordinate staff including several professionals who would have relieved the Beneficiary from performing operational tasks. Also, the foreign job description deals with tasks and duties that the Beneficiary has already performed. The U.S. job description, in contrast, relies on speculation about what the Beneficiary will eventually do once he has hired sufficient subordinate staff.

The foreign company's organizational chart showed that the Beneficiary reported to the CEO and had six subordinates. His two direct reports were a communication manager with no subordinates and a project manager and senior developer with four subordinates: a senior developer, a junior developer, and two support and test technicians.

We find that the key weakness with respect to the Beneficiary's foreign employment lies not in the job description, but in the lack of corroboration regarding the Beneficiary's subordinate staff. The Petitioner refers to the Beneficiary's foreign subordinates as professionals. To determine whether the 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 United States 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."

In this instance, the Petitioner has not submitted evidence of the minimum requirements for the subordinate positions; first-hand evidence that the subordinates meet those requirements; or even documentation that the company actually employed them as claimed. An organizational chart and copies of résumés do not suffice in this regard.

The Petitioner's assertions about the foreign subordinates are not deficient in themselves, but they lack sufficient corroboration. Because the burden of proof lies with the Petitioner, there is no

presumption of eligibility that the Director must overcome. As it stands, the matter is moot because other, more significant issues (already discussed above) do not permit approval of the petition.

III. CONCLUSION

The Petitioner has not established that the Beneficiary has been employed abroad, or will be employed in the United States, in a managerial capacity as claimed.

ORDER: The appeal is dismissed.

Cite as *Matter of P-NY LLC*, ID# 767449 (AAO Dec. 14, 2017)