U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-L- INC.

DATE: DEC. 18, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a freight transportation company, seeks to continue the Beneficiary's temporary employment as its president 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 the Beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner disputes the denial, stating that the Beneficiary would assume a function manager position in which he would establish the organization's goals and policies, make discretionary decisions, and be subject to only general supervision from the company's CEO, board of directors, and stockholders.

Upon *de novo* review, we find that the Petitioner has not overcome the ground for denial. Therefore, 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. MANAGERIAL OR EXECUTIVE CAPACITY IN THE UNITED STATES

Although the Petitioner primarily claims that the Beneficiary would be employed in a managerial capacity, it refers to the Beneficiary as its "top executive" and claims that the proposed employment "is also executive in nature." We will address each claim in the discussion below.

A. Managerial Capacity

First, we will address the Petitioner's foremost claim that the Beneficiary will be employed in a managerial capacity under the extended petition.

"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.

The Petitioner claims that in addition to overseeing a staff of supervisory and professional employees, the Beneficiary would also manage an essential function. 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).

When examining the managerial capacity of a given beneficiary, we will review 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 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.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business, its staffing levels, and its organizational structure.

1. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we 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.

The Petitioner claimed ten employees, including the Beneficiary, at the time this petition was filed in March 2018. The supporting evidence includes two payroll summaries and quarterly tax returns and wage reports for 2016 and 2017. It also includes an employee list, which names the Beneficiary's "direct reports," and an organizational chart,[1] which identifies ten positions that comprise the U.S. organization. The employee list indicates that six employees – the CEO and the heads of import, export, finance, international sales and marketing, and global customer service – are full-time employees working 30 hours per week, while the remaining three employees – the assistant bookkeeper, overseas sales representative, and the assistant manager of custom house brokerage and transportation – work on a part-time basis. Although the employee list and organizational chart both depict ten employees, they are somewhat inconsistent, as the employee list indicates that the CEO and assistant bookkeeper both report to the Beneficiary as his subordinates, while the organizational chart indicates that the assistant bookkeeper directly reports to the head of finance and shows that the Beneficiary reports to the CEO, not the other way around. The Petitioner must resolve this discrepancy 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).

In a request for evidence (RFE), the Director made a preliminary finding that the Petitioner did not provide sufficient evidence to show that it is adequately staffed with full-time employees who would relieve the Beneficiary from having to carry out primarily non-qualifying job duties. The Director considered each employee's wages in light of the number of hours he/she worked and determined that several employees were not compensated the required minimum wage. The Petitioner was asked to provide evidence addressing these deficiencies.

In response, the Petitioner provided a letter claiming that all of its employees are paid at least the California minimum wage and included an employee list similar in form to the one included in the initial cover letter. Like the original list, the new one also names the Beneficiary's nine "direct reports" and again includes the CEO in that list, which names the same six full-time positions and shows two personnel changes. The Petitioner stated that in addition to the nine subordinates, the Beneficiary oversees 11 vendors and contractors. It provided a new organizational chart that reflects the two personnel changes, adding an accountant to the finance department and subtracting the

[1] The Petitioner provided a total of two organizational charts – the chart described above and one other chart listing eight employees. As only the ten-person chart is consistent with claims made in the petition, we will not address the eight-person chart, which does not appear to reflect the Petitioner's claims regarding its staffing structure at the time of filing.

assistant manager of custom house brokerage and transportation from the Petitioner's staffing hierarchy. We note that the chart did not include the 11 vendors and contractors that the Beneficiary is claimed to oversee. It is unclear why, if the Beneficiary would actually oversee contractors and vendors, it did not convey this information in any of its submitted organizational charts. This incongruity regarding the Beneficiary's subordinates, along with the incongruity regarding his organizational placement with respect to the CEO, must be resolved through the submission of independent, objective evidence. *Id.*

In the denial decision, the Director again pointed to wages of several of the Petitioner's employees, finding that they were not consistent with those of full-time employment based on the federal minimum wage rates. The Director also found that the Petitioner did not establish that the Beneficiary will oversee the work of professional subordinates for whom a baccalaureate degree or higher is required to perform their job duties.[2]

On appeal, the Petitioner contends that the Director incorrectly calculated the wages paid to its employees, claiming that the previously noted employee charts listed the maximum hours each employee is permitted to work, rather than the actually number of hours worked. It states that each employee worked less than their maximum permitted hours and that the wages reflect the number of hours each employee actually worked, thereby indicating that their wages are consistent with prevailing minimum wage requirements. The Petitioner provides 2017 payroll evidence to support this claim.

We find that the documents provided are deficient because they contain only dates and wages, not the number of hours each employee actually worked during the indicated time periods. As such, we have no way of determining each individual's hourly rate, which is necessary in order to ascertain whether the rate meets federal and state wage requirements. Further, the submitted payroll evidence accounts for time periods that precede March 2018 and thus it does not address the time period when this petition was filed. 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).

The Petitioner also submits a personal declaration from its accountant, who claims to have prepared the Petitioner's payroll and other financial documents. The accountant claims to be "the individual that sets the employee payroll budget for the Petitioner allocating the MAXIMUM HOURS each employee is entitled to work during the fiscal year." (Emphasis as it appears in the original text). As with the Petitioner's own assertions, the claims put forth by the declarant must be supported with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Here, even if the statements in the declaration were proven to be true, the Petitioner has not

[2] To determine 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").

provided evidence showing the actual number of hours each employee worked. As such, the Petitioner has not determined that the employees, who were claimed to be employed on a full-time basis, actually worked fewer than the maximum 30 hours. Further, even if the Petitioner provided evidence to show that certain employees actually worked fewer than 30 hours per week, as it now claims, this would undermine the Petitioner's original that most of its support staff is comprised of full-time employees. Moreover, the Petitioner would have to provide further evidence to show how, with a primarily part-time staff, it would support the Beneficiary in a managerial position with primarily managerial job 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 light of the anomalies and deficiencies described above, the Petitioner has not established that it has sufficient staffing to relieve the Beneficiary from having to primarily perform non-managerial job duties.

2. Duties

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). The Petitioner must also 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.

Accordingly, in order to establish eligibility, the Petitioner must provide a job description that clearly describes the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

In a supporting cover letter, the Petitioner stated that the Beneficiary would be employed as a function manager who "develops and directs the expansion of the activities of the U.S. subsidiary." The Petitioner stated that the Beneficiary functions at a senior level with respect to the function, is the "influential final decision-maker" with respect to personnel matters, and is involved in training "a suitable work force" and recruiting and motivating employees. The Petitioner claimed that the Beneficiary manages an essential function, oversees the work of supervisory, professional, and managerial employees, and has authority over the company's day-to-day activities.

In addition, the Petitioner provided a job duty breakdown stating that the Beneficiary would allocate his time as follows:

- 30% of his time to directing "executives and [a] top level managerial team" to ensure they attain organizational goals;

- 20% to leading the company by making discretionary decisions that include prioritizing and delegating projects, managing "the international logistics," and providing strategies to execute project tasks;
- 10% reporting to the board of directors and shareholders;
- 20% planning for future growth and hiring "key managerial positions";
- 10% predicting future "[g]lobal industry developments" and changes; and
- 10% representing the organization at international conferences.

The RFE indicated that the Petitioner provided a deficient job description and did not adequately delineate the Beneficiary's day-to-day job duties as president of the organization or establish the percentage of time he would spend performing non-managerial job duties.

In response, the Petitioner provided a letter again claiming that the Beneficiary will manage its "major components and functions" and oversee supervisory and professional employees. The Petitioner also provided a new job duty breakdown indicating that the Beneficiary would allocate 25% of his time to motivating a "management team" and supervising and coaching employees who comprise that team to focus on target markets, provide good customer service, and "overcome the day[-]to[-]day obstacles." The Petitioner's reference to a "management team" is unclear, however, given that its staffing structure shows only one supervisory employee at the time this petition was filed. Despite the position titles assigned to the Beneficiary's subordinates, the Petitioner did not provide sufficient evidence to establish that the employees who are designated as department heads have their own subordinates such that they could be collectively deemed as being part of a "management team." Likewise, the Petitioner's claim that the Beneficiary would spend 10% of his time identifying "individuals from key performance index (KPI) for future projects" is also unclear, as the Petitioner did not define what is meant by "key performance index" or identify specific "projects" within the context of its freight transportation organization.

The Petitioner also stated that the Beneficiary would spend 5% of his time observing "the business activity" and doing market comparisons, 10% organizing departments to meet their respective goals, 10% planning future goals and strategies, and 20% making discretionary decisions and receiving updates "from local and international markets." Although these job duties indicate that the Beneficiary has a degree of discretionary authority that is characteristic of someone employed in a managerial capacity, they do not convey a meaningful understanding of the specific underlying tasks the Beneficiary would execute as part of his daily activity.

On appeal, the Petitioner refers to the occupational information found in O*Net and the *Occupational Outlook Handbook* (OOH) to support its claim that the Beneficiary's position is within a managerial capacity. We find, however, that the petitioner's reliance on the general descriptions found in these sources is misplaced, as neither source contains provisions that take into account the statutory and regulatory requirements that are relevant in this matter. Specifically, the Petitioner is subject to section 101(a)(44)(A) of the Act as well as the definitions and provisions found in 8 C.F.R. § 214.2(l). Both statutory and regulatory provisions require the Petitioner to establish that the Beneficiary's proposed employment would be primarily in a qualifying managerial capacity. By

regulation the Petitioner must provide a detailed description of the Beneficiary's proposed job duties in order to facilitate an accurate understanding of the proposed employment and allow for a proper determination as to whether it meets statutory and regulatory guidelines. 8 C.F.R. § 214.2(l)(3)(ii). Simply meeting general guidelines set out in O*Net or the OOH is not sufficient.

In whole, the Beneficiary's management of the business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section 101(a)(44)(A) of the Act. As noted earlier, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. Section 101(A)(44)(A) of the Act. While the Beneficiary may exercise discretion over the Petitioner's daily operations and possess the requisite level of authority with respect to discretionary decision-making, these elements alone are not sufficient to establish that his actual duties would be primarily managerial in nature. 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). As such, a detailed job description is critical to a determination of whether the Beneficiary would be employed in a managerial capacity. Here, the record lacks a detailed job description that adequately delineates the Beneficiary's specific tasks based on the Petitioner's staffing and scope of operations at the time of filing.

Furthermore, the Petitioner conflates the requirements for personnel and function manager without providing sufficient evidence to demonstrate that the Beneficiary falls within either category. As previously noted, in order to establish that the Beneficiary would assume the position of a function manager, the Petitioner must first describe the function to show that it is "a clearly defined activity." *Matter of G- Inc.*, Adopted Decision 2017-05. Here, the Petitioner broadly states that the Beneficiary "develops and directs the expansion" of its activities in the United States without adequately describing a specific function or component of the U.S. organization that the Beneficiary would manage. Further, whether a beneficiary is an "activity" or "function" manager turns in part on whether the Petitioner has sustained its burden of proving that the duties of that beneficiary are "primarily" managerial. *See Matter of Z-A-*, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016). As discussed above, the Petitioner has provided a deficient job description that neither defines an essential function, nor conveys an understanding of how the Beneficiary would go about managing the function. Likewise, the deficient job description, coupled with insufficient evidence of adequate staffing, also precludes us from finding that the Beneficiary would oversee a staff that is comprised of supervisory, professional, or managerial subordinates.

B. Executive Capacity

Even though the Petitioner primarily claims that the Beneficiary would be employed in a managerial capacity, it confusingly incorporates a paraphrased definition of executive capacity, claiming that the Beneficiary "is responsible for directing" the Petitioner's major components, establishing its goals and policies, exercising wide latitude in discretionary decision making, and receiving only general oversight from superiors. Section 101(a)(44)(B) of the Act.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and they must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Here, the Petitioner has not adequately articulated the Beneficiary's job duties or provided evidence establishing that he would primarily direct the management of the U.S. organization.

III. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of F-L- Inc.*, ID# 1948082 (AAO Dec. 18, 2018)