U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-T-C- CORP.

DATE: DEC. 19, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a cosmetics distributor, seeks to temporarily employ the Beneficiary as sales and marketing director of its new office[1] 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 denied the petition, concluding that the record did not establish, as required, that: (1) the Beneficiary has been employed abroad in a managerial or executive capacity; and (2) the new office will support a managerial or executive position within one year after the approval of the petition.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director "misinterpreted and ignored evidence."

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). 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.*

[1] The term "new office" refers to an organization which has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation no more than one year within the date of approval of the petition to support an executive or managerial position.

The petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

II. DEFINITIONS

"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.

"Executive capacity" means 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.

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.

III. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that the Beneficiary has been employed abroad in a managerial or executive capacity. The Petitioner asserts, on appeal, that the Beneficiary's position abroad qualifies as both managerial and executive.

When examining the claimed managerial or executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. 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 foreign employer's business and its staffing levels.

A. Duties

The Beneficiary holds the same title abroad that she seeks to hold in the United States: sales and marketing director. The Petitioner listed the duties of the position:

- Establishing global marketing strategies and executing plans for existing products; Time to be spent: 10%
- Developing and maintaining strategic client relationships and developing and implementing strategies for important negotiations; Time to be spent: 30%
- Managing distribution channels for products, selecting major distributors for each regional market, and customizing marketing campaigns to suit regional markets; Time to be spent: 25%
- Ensuring effective, branded marketing communications, including those found on our company website, print communications, and advertisements; Time to be spent: 20%
- High-level supervision of team members to accomplish marketing, sales objectives by recruiting, selecting, orienting, training, assigning, scheduling, coaching, counseling, and disciplining of sales/beauty advisor employees; Time to be spent: 10%
- Meeting marketing and sales financial objectives by forecasting requirements; Time to be spent: 5%

As evidence of the Beneficiary's marketing activity, the Petitioner listed various trade shows and other events where the foreign entity exhibited its products. Printouts of electronic slides, prepared to present the foreign company's 2018 marketing plan, listed the Beneficiary as one of two presenters. (The other presenter is named as a sales manager on one version of the foreign entity's organizational chart, and as a marketing assistant on a revised chart.) Marketing plans for 2016 and 2017 are unattributed.

The Director denied the petition, concluding that the Beneficiary apparently spent most of her time on non-qualifying duties. On appeal, the Petitioner does not rebut the Director's finding by presenting additional details about the Beneficiary's duties. Instead, the Petitioner repeats the same job description and asserts that the Director did not explain why the majority of the Beneficiary's claimed duties are non-qualifying. The Petitioner also contends that the company has enough employees to relieve the Beneficiary from performing non-qualifying tasks. We will address the foreign entity's staffing further below.

The list of job duties is deficient for two reasons. First, many of the stated duties are vaguely worded, referring to responsibilities without explaining how the Beneficiary met those

responsibilities. Examples include "executing plans for existing products," "[e]nsuring effective, branded marketing communications," and "[m]eeting marketing and sales financial objectives."

Second, the categories are broad and combine potentially qualifying and non-qualifying activities. For instance, the Petitioner stated that the Beneficiary spent 25% of her time "[m]anaging distribution channels . . . , selecting major distributors . . . , and customizing marketing campaigns." The first two listed elements may be managerial, but "customizing marketing campaigns" appears to be lower-level work performed by marketing staff.

Because it lacks detail and combines qualifying and non-qualifying activities within the same categories, the Petitioner's job description does not establish that the Beneficiary's position abroad is primarily managerial or executive.

B. Staffing

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 101(a)(44)(A) 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." *Id.* 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*).

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."

The term "function manager" applies generally when a beneficiary's managerial capacity derives not from supervising or controlling a subordinate staff, but instead from primarily 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).

The Petitioner asserts that the foreign entity employed the Beneficiary both as a personnel manager and as a function manager. Although it appears that sales and marketing constitutes an essential function of the foreign entity, the assertion that the Beneficiary primarily managed that function, rather than performed operational tasks relating to it, relies on assertions regarding the foreign entity's staffing.

The Petitioner stated that the Beneficiary "exercises absolute discretion over the operations of the Sales and Marketing Department and has the absolute authority to hire, fire, and recommend personnel actions over seven (7) functional managers and two hundred and eighteen (218) subordinates," as listed in an organizational chart:

- A product portfolio manager;
- A market researcher;
- 7 sales managers;
- 2 "Technical Services" workers, titles not specified;
- 2 group sales coordinators;
- 2 account executives; and
- 210 beauty assistants.

A subsequent revision of the organizational chart showed some structural changes but did not alter the total number of subordinate employees said to be under the Beneficiary's authority.

The Director concluded that the Petitioner did not show that the foreign entity has "sufficient staff exclusively supporting the beneficiary's position." On appeal, the Petitioner asserts that the Beneficiary "supervises over 200 subordinates both directly and indirectly."

The Petitioner did not document the employment of all 225 of the Beneficiary's claimed subordinates. Instead, an "alphalist of minimum wage earners" at the foreign entity showed 169 names as of December 31, 2016. (The Petitioner did not submit more recent records.)

The first version of the organizational chart identified nine of the claimed subordinates by name — the project portfolio manager, the market researcher, and the seven sales managers. Eight of these names, and the Beneficiary's own name, appear on the "alphalist of minimum wage earners" who each earned ₱146,705 base salary per year in the Philippines.[2] The identified co-presenter of the foreign entity's 2018 marketing plan is not named in the 2016 alphalist. Because of the format of the alphalist, it is difficult to determine which employees, if any, earned more than minimum wage

[2] The alphalist indicated that the minimum wage was ₱481 per day, with 305 work days per year.

in 2016. Because the burden of proof is on the Petitioner to establish eligibility, the Petitioner must explain ambiguous or unclear evidence to show how it supports the Petitioner's assertions.

The alphalist reported a total of ₱24,687,426 in base salaries paid during 2016. An audited financial statement and income tax return for the same year, however, both indicated that the foreign entity paid only ₱14,274,815 in salaries and wages, an amount that would only pay the minimum wage base salaries of 97 full-time, year-round employees. This significant discrepancy raises questions about the foreign entity's actual staffing and, therefore, personnel structure.

The Petitioner submitted job descriptions for the subordinate positions. These job descriptions go into more detail than the Beneficiary's own job description, but they appear to derive from templates from varying sources. The formatting varies from one description to another. For example, only the job description for "Beauty Assistant" begins with an introductory statement: "A beauty consultant typically works behind a cosmetics or skincare counter of a department store or commercial outlet and advises customers on the best products to buy that will suit their needs."

Also, a number of job descriptions are not consistent with the Petitioner's description of the foreign entity. The "Technical Services" job description refers to nonexistent "technical staff" positions, including "ITS (Information Technical Staff) managers." Furthermore, the job description for "Account Executives" clearly refers to account executives in the advertising industry; items include "[m]eeting clients to discuss their advertising needs," "[b]riefing the creative team who will produce the adverts," and "[w]orking with account planners to devise a campaign that meets the client's brief and budget." The job description has no apparent relevance to a company seeking to market its own products, rather than create advertisements for outside clients.

The job description for "Sales Managers" indicates some level of supervisory authority over account executives. Both versions of the organizational chart, however, indicate that the six or seven sales managers outnumber the two account executives, and neither chart shows the account executives being subordinate to the sales managers.

For the above reasons, the job descriptions and payroll documents raise more questions than they answer, and do not meet the Petitioner's burden of proof.

The Petitioner cited the Occupational Outlook Handbook and O*NET, both resources of the Department of Labor's Bureau of Labor Statistics, as evidence that some of the positions directly subordinate to the Beneficiary qualify as professional. The Petitioner arrived at this conclusion, however, through reference to the demonstrably unreliable job descriptions discussed above.

While the Petitioner focused on the assertion that the Beneficiary's foreign position is managerial, the Petitioner adds, on appeal, that the Beneficiary "also serves in an executive capacity."

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. A beneficiary 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 an 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.*

The Petitioner contends that the Beneficiary "establishes the overall marketing and sales goals of the organization." To support this claim, the Petitioner refers to "Marketing Plans and Strategies conceived and executed by [the Beneficiary]. Exhibit E." Exhibit E is a resubmission of the 2018 marketing plan, crediting the Beneficiary as one of two people who "presented" the plan, along with an identified subordinate. The Petitioner has not submitted evidence to show that this subordinate is an executive, and therefore the Petitioner has not shown that one must be an executive to make such a presentation. The Petitioner also has not established how the Beneficiary's role in the presentation of the plan differed from that of her subordinate. As such, the Petitioner has not shown the role of presenter to be an executive duty.

Furthermore, *establishing* goals is not the same as making *plans* to meet those goals. An executive might set the goals, while delegating to subordinates the task of finding ways to meet them. A letter from the foreign entity, quoted on appeal, indicates that the Beneficiary "ensures that company-wide goals . . . are achieved." The quoted passage does not indicate that the Beneficiary set those goals in the first place. The letter containing that passage consistently refers to the Beneficiary's role as managerial rather than executive.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary was employed in a managerial or executive capacity abroad.

IV. THE PETITIONER'S ABILITY TO SUPPORT A MANAGERIAL POSITION

The Petitioner does not claim that it seeks to employ the Beneficiary in an executive capacity in the United States. Therefore, we need only consider the requirements of a managerial capacity.

A petitioner seeking to employ a beneficiary as a manager of a new office must establish that the new office will support a managerial position within one year of approval of the petition. The Petitioner must establish the proposed nature of the office, describing its scope, organizational structure, and financial goals; the size of the United States investment and the foreign entity's financial ability to remunerate the beneficiary and to commence doing business in the United States; and the foreign entity's organizational structure. 8 C.F.R. § 214.2(l)(3)(v)(C).

When a new business is first established and commences operations, the regulations recognize that a designated manager responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the managerial level and that often the full range of managerial responsibility cannot be performed in that first year. The "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of a beneficiary in a primarily managerial or executive position.

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).

The Petitioner stated that, during its first year of operation, the Petitioner's marketing department would hire seven subordinates under the Beneficiary's authority:

- Public Relations Specialist
- Marketing Specialist
- Merchandising Manager, with four subordinates
- 2 Beauty Advisors
- 2 Sales Representatives

The Petitioner asserted that the positions of public relations specialist, marketing specialist, and merchandising manager are professional.

In the denial notice, the Director concluded that the Petitioner's marketing and sales department will have "insufficient projected staffing levels to be considered a major component or function." The Director also concluded that "the Merchandising Manager position is, at most, a supervisory position of non-professional positions."

The Petitioner asserts, on appeal, that the Beneficiary will be a personnel manager because three of her intended first-year subordinates will be members of the professions, and that she will also be a function manager through managing the essential function of sales and marketing.

The Petitioner provided the same job description for the U.S. position as for the Beneficiary's existing job abroad. Therefore, the deficiencies with the job description discussed above apply to the U.S. job description as well. Furthermore, there are significant staffing differences between the foreign entity and the new office in the United States. The Petitioner does not explain how the Beneficiary's duties with a new, eight-employee organization would be indistinguishable from her duties with a more established entity with a more complex structure and, the Petitioner claims, over 200 employees.

The job description for the merchandising manager refers to "evaluation of new vendors" and "maintain[ing] Vendor Relationships," but elsewhere the Petitioner stated that the multinational organization, including the Petitioner, exists specifically to sell the organization's own brand of

cosmetics. Another job description indicates that the make-up artist/beauty advisor positions require "specialized techniques such as creating tattoos and body painting," which appear to go well beyond the needs of a cosmetics retailer. Therefore, these job descriptions, like those for the foreign organization, appear to derive from third-party sources such as generic templates or outside job announcements for related but distinct positions with employers in other industries. As explained above, questionable job descriptions have significantly diminished weight. Even if some of the planned subordinate positions are professional, the Petitioner has not provided enough reliable evidence to show that the Beneficiary will primarily manage the sales and marketing function rather than actively engage in performing it.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Petitioner would employ the Beneficiary in a managerial capacity within a year after approval of the petition.

V. CONCLUSION

The Petitioner did not establish that the foreign entity employed the Beneficiary in a managerial or executive position, or that the new office would support a managerial position within a year after approval of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of E-T-C- Corp.*, ID# 1823429 (AAO Dec. 19, 2018)