U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-T- INC

DATE: FEB. 5, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner,[1] a technology consulting company, seeks to temporarily employ the Beneficiary as its vice 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 Vermont 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 asserts that it submitted sufficient evidence to establish that the Beneficiary would be employed in a managerial or executive capacity with support from employees of its foreign parent company, along with one to two employees to be hired during the company's "1st year of full time operations"[2] in the United States.

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

[1] The Petitioner stated its name as ' on the Form I-129, Petition for a Nonimmigrant Worker. The Petitioner's name appears as ' ' on its certificate of incorporation.

[2] The Petitioner, which was incorporated in 2008 and reported gross receipts of $203,454 on its 2015 tax return, requested a three-year validity period for this petition and marked "No" on the Form I-129 where asked if the Beneficiary is coming to the United States to open or be employed in a new office. 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. Despite the Petitioner's reference to its "first year" of operations, it did not request treatment as a new office or indicate that it was filing a "new office" petition.

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. Section 101(a)(15)(L) of the Act. The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

"Managerial capacity" means as 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 term "executive capacity" is defined 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) takes 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.

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

The Director determined that the Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity. The Director emphasized that the Beneficiary, who would be the Petitioner's only employee, at least initially, would not be relieved from performing non-qualifying duties associated with the company's day-to-day operations, and explained that future hiring plans have no bearing on eligibility at the time of filing. The Director acknowledged the Petitioner's claim, made in response to a request for evidence (RFE), that its parent company's staff would provide support for the U.S. office, but found that this claim was a "material correction" to the petition because the Petitioner had not mentioned the foreign staff at the time of filing.

On appeal, the Petitioner asserts that the Director should have considered the foreign employees and the organization as a whole when determining whether there are sufficient employees to relieve the Beneficiary from performing non-qualifying duties in the United States. In addition, the Petitioner emphasizes that it has consistently stated that the Beneficiary would be hiring up to two employees

during the next year. The Petitioner maintains that it provided a detailed position description and sufficient evidence to show that the Beneficiary would be employed in a managerial or executive capacity.

When examining the managerial or executive 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 or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, USCIS examines 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.

A. Duties and Staffing

The Petitioner is a technology consulting company with no current employees, which is seeking to expand its business activities in the United States.[3] At the time of filing, the Petitioner indicated that the Beneficiary would perform the following duties as vice president:

1. Evolve strategies and programs to grow the USA subsidiary
2. Completely manage the responsibilities of all operations in the United States which include, but are not limited to, the following:
   a. Re-validate & strengthen positioning of our services for the US market
   b. Hire 3 to 5 Senior Managers[4] for sales and delivery for sourcing and co-executing the client engagements in US
   c. Optimize the delivery model between US and India entities . . .
   d. Provide key strategic input and governance directives . . .
   e. Manage finance operations, Personnel and Human Resources development policies
3. Report back to the foreign parent company in India
4. Identify potential business deals & merger/acquisition targets

Later, in response to an RFE, the Petitioner described the Beneficiary's proposed role as "an Executive position where [the Beneficiary] will be responsible for the key function of the organization namely growing the business by working with Small and Medium Businesses (SMB) market in the United States." The Petitioner provided a lengthy description of his proposed duties,

[3] The Petitioner paid approximately $169,000 in "contract staffing" according to its 2015 tax return, but $0 in salaries and wages.

[4] In an accompanying business plan, the Petitioner indicated that it would hire one or two consultants to deliver services to customers in 2017, with plans to hire a sales manager and additional consultants in 2018. The business plan does not indicate the Beneficiary would be hiring "3 to 5 Senior Managers" as stated in his job description.

noting that he would focus on: (1) developing partner relationships; (2) market and business development; (3) resource management, including the hiring, supervision and development of five senior managers (sales, pre-sales, delivery management) and 18 to 20 consultants in the first three years of operations; (4) engagement and delivery management; and (5) strategic management and corporate governance.

The Petitioner indicated that it had set up "support functions" for the Beneficiary to ensure that he could focus on the strategic and executive management of the business. Specifically, the Petitioner stated that the foreign entity's human resources and technical teams would assist with recruiting, while the foreign entity's administrative assistant will assist the Beneficiary with his travel arrangements. Further, the Petitioner stated that the foreign entity's finance, billing, and accounting teams would be responsible for assisting the U.S. office with the Beneficiary's expense settlements, customer invoicing, accounts receivable and accounts payable, internal bookkeeping and taxes, and payroll. Finally, the Petitioner stated that the foreign entity's "Pre-Sales and Cold Calling teams" would assist the Beneficiary with market and business development functions during the "initial period."

B. Analysis

Based on the 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 *primarily* engage in managerial or executive duties, as opposed to ordinary operational activities alongside the company's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533. Here, the Petitioner did not consistently indicate whether the Beneficiary would be employed in a managerial capacity or executive capacity, so we will consider his eligibility under both statutory definitions.

1. Personnel Manager

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*).

We agree with the Director's determination that, because the Petitioner had no employees at the time of filing, the Beneficiary cannot qualify as a personnel manager. 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). For this reason, the Petitioner's future hiring plans will not be taken into account.

Further, even if we were to consider future hiring, the Petitioner has submitted inconsistent information regarding its staffing plans. The Petitioner's business plan indicates that the company would hire only one or two consultants in the immediate future and add a sales manager in 2018, while the Petitioner elsewhere claims that the Beneficiary would be charged with hiring as many as three to five "senior managers" and up to 20 consultants. In either case, the Beneficiary would not have any such staff available to assist him with sales or service delivery immediately upon approval of the petition and the hiring plans will not be considered in determining his eligibility as of the date of filing.

For this reason, we cannot conclude that the Beneficiary would be employed in a managerial capacity as a "personnel manager" as such employees are required to primarily supervise and control the work of other supervisory, professional, or managerial employees.

2. Function Manager

The Petitioner claims, in the alternative, that the Beneficiary will manage or direct its business development 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).

Here, although the Beneficiary would have authority over U.S. business development as the vice president and the Petitioner's sole employee, the Petitioner did not establish that his actual duties would involve primarily managing, rather than performing, the day-to-day operations of the function.

In determining the Beneficiary's actual duties, we must consider the totality of the record and weigh all relevant factors, including: the nature and scope of the petitioner's business; the petitioner's organizational structure, staffing levels, and the beneficiary's position within the petitioner's organization; the scope of the beneficiary's authority; the work performed by other staff within the petitioner's organization (and related foreign entities), including whether those employees relieve the beneficiary from performing operational and administrative duties; and any other factors that will contribute to understanding the beneficiary's actual duties and role in the business.

We disagree with the Director's decision to disregard the Petitioner's claims regarding the support to be provided by the foreign entity's staff. The Petitioner was asked to provide additional information to explain how the unstaffed U.S. office would support the Beneficiary in a managerial or executive capacity and the Petitioner provided this information in response to the RFE; we do not consider the Petitioner's response to represent a material change to the initial petition. Given that the Petitioner has previously achieved profits in the United States despite not having a permanently staffed office, it is reasonable to believe that foreign staff can and will support some of the U.S. office's functions.

However, based on the Petitioner's description of the Beneficiary's proposed duties, and its brief descriptions of the support functions to be performed by foreign staff, the Petitioner has not shown how the Beneficiary would be relieved from performing the day-to-day duties related to business development or how he would be able to primarily manage this function. Further, the Beneficiary will be required to perform other non-managerial duties outside of this function which preclude a finding that his actual duties would be primarily managerial in nature.

Most of the support activities attributed to the foreign staff are unrelated to the Beneficiary's responsibility for business development, but instead are focused on human resources, administrative functions, billing, accounting, and finance. While the foreign staff will relieve the Beneficiary from involvement in certain routine matters within the U.S. office, it has not been shown that the staff will substantially assist him with his responsibility for market and business development. The Petitioner stated that the foreign entity's "Pre-Sales and Cold Calling" teams would assist with market and business development, but did not provide sufficient detail regarding the nature or scope of the tasks they would perform. The Petitioner indicated that the Beneficiary himself is responsible for identifying new opportunities in the market, building client relationships, and suggesting solutions to meet client needs. These research and client-facing duties have not been shown to be managerial in nature. The record therefore does not support the Petitioner's claim that the Beneficiary would primarily manage the market and business development function or indicate how much of his time would be allocated to this function. For these reasons, the Petitioner has not established that the Beneficiary will be employed as a function manager.

3. 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. 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.*

While the Beneficiary may have authority over the company's goals and policies, the Petitioner did not show that he would have a subordinate management-level employees as of the date of filing, or that he would primarily focus on executive duties rather than on the day-to-day operations of the company.

We must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in denying a visa petition for classification as an L-1A intracompany transferee. *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 non-managerial or non-executive 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).

The Petitioner did not submit evidence that it employs subordinate staff to perform any of the actual day-to-day, non-executive operations of the company, nor has it sufficiently established that these activities will be primarily performed by its foreign parent company's staff. For example, the Petitioner did not identify staff that would perform non-executive duties associated with the Beneficiary's responsibilities for developing partner relationships and engagement and delivery management. The Beneficiary has the authority to contract with partners, but the Petitioner has not shown that the underlying research involved in identifying and evaluating potential partners is an executive duty, or established that such tasks would be delegated to someone else. Similarly, the Petitioner indicates that the Beneficiary will manage engagement and delivery and have the ability to develop the company's delivery model for U.S. customers, but the Petitioner has also indicated that it will initially have no consulting staff and it is unclear who would assist the Beneficiary with client engagements. It does not appear that the immediate reasonable needs of the petitioning company would plausibly be met by the services of the Beneficiary as vice president and the foreign entity's employees, or that it would have a reasonable need for the Beneficiary to perform primarily executive duties.

In sum, the fact that the Beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial or executive in nature. Sections 101(A)(44)(A) or (B) of the Act. Even though the Petitioner has demonstrated that the Beneficiary would exercise discretion over the Petitioner's day-to-day operations and with respect to discretionary decision-making, it has not submitted evidence sufficient to demonstrate that he would primarily perform managerial or executive duties or that it was prepared to employ him in a managerial or executive capacity as of the date of filing.

III. CONCLUSION

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 V-T- Inc*, ID# 916101 (AAO Feb. 5, 2018)