U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 14274215

Date: FEB. 5, 2021

Appeal of California Service Center Decision

Form I-129, Petition for L-1A Manager or Executive

The Petitioner, a business operating as a salon and spa, seeks to temporarily employ the Beneficiary in the position of Director, Administration & Business Development 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 Director of the California Service Center denied the petition, concluding that the record did not establish, as required, that: (1) the Beneficiary would be employed in a managerial or executive capacity in the United States, and (2) the Beneficiary has been employed abroad in a managerial or executive capacity. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal because the Petitioner did not establish that the Beneficiary's proposed employment in the United States would be in a managerial or executive capacity. Since the identified basis for denial is dispositive of the appeal, we decline to reach and hereby reserve the Petitioner's arguments regarding the remaining issue pertaining to the Beneficiary's employment abroad. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

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 their services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id*. 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).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The issue to be addressed is whether the Petitioner established that the Beneficiary would be employed in a managerial capacity. The Petitioner does not claim that it will employ the Beneficiary in an executive capacity.

"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.

When examining the managerial capacity of a given beneficiary, we will review the petitioner's description of the proposed position, which must clearly describe the duties to be performed by the beneficiary. *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.

A. Duties

To be eligible for L-1A nonimmigrant visa classification as a manager, the Petitioner must show that the Beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(A)(i)-(iv) of the Act. If the Petitioner establishes that the offered position meets all elements set forth in the statutory definition, the Petitioner must 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).

In a letter of support, the Petitioner states that it was formed in 2001 and began providing beauty salon and spa services in 2003. It claims that it employs 10 full- and part-time employees and approximately 34 independent contractors, and seeks to employ the Beneficiary as its Director of Administration and Business Development to facilitate its attempts to expand its business operations. According to the Petitioner, the founder and president of both the foreign affiliate and the U.S. company has been responsible for the overall direction and management of both companies, but due to advancing years and increasing commitments with his various businesses, he seeks to appoint the Beneficiary to further develop the U.S. business.

The Petitioner described the duties of the proffered position as follows:

As Director of Administration and Business Development, [the Beneficiary] will be in charge of managing the business development and expansion planning and strategies for the U.S. company as well as long term strategies for any investment represented by the Board of Directors. [The Beneficiary will also be responsible for directing administration through subordinate managers and designing cash flow strategies and implementing budget and cost optimization policies. Among others, her duties will include but not be limited to the following:

Business Development

- Be responsible for managing and directing the business development, operations, and marketing activities of the existing customized beauty solutions and services business in Texas. 4%
- Expand the business presence in the United States by establishing new clients, expanding to new markets by adding locations or increasing geographic reach for new clients, expanding customized beauty services offered, and recommending new services including in-home services or modifications to existing services based on market feedback and market research and analysis to ensure a leading position in the industry; 4%
- Review market research conducted by subordinates and outside agencies regarding the current business environment for the customized beauty solutions and services business in Texas and surrounding areas to study and analyze the market share and marketing efforts of competing businesses; 3%
- Establish, negotiate, and overseas strategic partnership to further develop the company's business presence; 3%
- Engage business consultants to obtain feasibility studies for the customized beauty services and Salon and Spa markets in different U.S. locations, including expansion into new markets, services and products related to the customized beauty services business, with focus on exercise, nutrition, and wellness; 3%
- Participate in industry meetings and trade shows to learn about new beauty treatments, products, and services; 2%
- Review information obtained from industry related trade associations and other resources to make decisions on business expansion and opportunities in the customized beauty services or related businesses; 3%
- Develop relationships with private equity, investment banking, and key personnel to obtain funding or services for business development projects, if needed; 3%
- Review professional publication to keep abreast with the latest news, research, interviews, market reports an analysis for the customized care and beauty services industry; 2%
- Present collected data and strategies for expansion with recommendation to the President of the company and the Board of Directors; 3%

Sales and Marketing Management

- Oversee and monitor the company's sales and marketing activities through subordinate staff members to increase brand presence; 7%

- Manage the company's advertising and sales promotion campaigns through coupon mass mailings, social media, including the maintenance and improvement of the company's website; working with outside consultants for the development of new marketing strategies via internet media; 7%
- Manage campaigns to measure customer satisfaction and customer support; 6%
- Review results and develop steps to ensure customer satisfaction; 5%
- Contact and work with outside computer an information technology personnel, website designers, local media outlets (TV, newspapers, radio) and advertisement consultants to develop new advertising plans; 5%

Administration

- Establish, design, and implement policies, goals, objectives and procedures, confirming with management and staff members as necessary; 4%
- Review financial and accounting statements, sales an activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and/or budget adjustments; 3%
- Review financial and sales reports to evaluate sustainable strategies and activities for a healthy rate of business development; 3%
- Plan and administer budgets with third party vendors, contractors, and consultants for the upkeep and maintenance of the Salon and Spa facility; 3%
- Direct and manage changes and or additions in the design, including furnishings, equipment and remodeling of the Salon and Spa premises as necessary; 3%
- Determine staffing requirements, including cosmetologists (contractors), oversee and have final authority over the hiring/termination of employees and cosmetologists; 3%
- Exercise binding authority to retain services of outside counsel, Certified Public Accountants, building maintenance, lighting, and repair contractors, and landscape architects, computer and Information Technology personnel, public relation companies, and Salon Product Vendors on behalf of the company; 3%
- Periodically assess the efficacy of services being provided by all contractors, vendors, and salon software being utilized by the company, and make decisions on modernization or changes required. 2%
- Direct Site Operations Manager to prepare and deliver necessary financial information to CPA for purposes of tax filings; 3%
- Report directly to the President of [the Petitioner], General Partner of [the Petitioner], and meet with him on a regular basis to discuss ongoing operational activities, status reports for new projects, financial standing and reports; 3%

Legal

- Review and approve proposals, negotiate contracts with suppliers and vendors, computer and information technology personnel, web designers for advertisements and website management, and other professional staff; 3%
- Maintain services of and coordinate with outside counsel to ensure the firm's legal representation in matters involving court representation or arbitration processes; 2%

- Ensure that the firm complies with all state, city and municipal regulations and laws related to the nature of the business; 3%
- Negotiate and execute agreements whenever necessary for business operations with consultants, contractors, clients, and vendors. 2%

In a request for evidence (RFE), the Director advised the Petitioner that the Beneficiary's position description lacked sufficient detail to establish that she would be performing primarily managerial duties. In response, the Petitioner simply resubmitted the same list of duties, but added the percentage of time she would devote to each stated duty, as presented above.

Based on the percentages of time provided, it appears that the Beneficiary would devote 30% of her time to business development, 30% to sales and marketing management, 30% to administration, and 10% to legal. In the RFE response, the Petitioner further asserted that based on these breakdowns, the Beneficiary will devote more than 50% of her time to business development and sales and marketing management, thereby establishing that the majority of her time will be devoted to qualifying managerial duties. However, the Petitioner did not provide further clarification or detail to adequately convey the nature of the specific tasks the Beneficiary would perform on a day-to-day basis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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).

The Director also noted a discrepancy in the proposed organizational chart submitted in support of the petition, which demonstrated that the Beneficiary reported directly to the Petitioner's president and would oversee three managerial employees: a site/operations manager and two business development managers. According to the chart, one business development manager would oversee the salon staff, and the other business manager would oversee the spa staff. However, the Director noted that only the site/operations manager position was staffed at the time of filing, and clarification from the Petitioner was requested.

In response, the Petitioner explained that the purpose of the Beneficiary's transfer to the United States was to expand the Petitioner's salon and spa business, and that once such expansion was underway and progressing, the two business development managers would be hired to oversee their respective departments. The Petitioner noted that the organizational chart to which the Director referred was designated as "proposed," and thereby reflected the ultimate organizational structure that the Petitioner hoped to achieve once the Beneficiary was transferred to the U.S. entity.

In denying the petition, the Director determined that the lack of sufficient subordinate managerial staff, coupled with the non-specific description of the Beneficiary's proposed duties, precluded a finding that the Beneficiary would be employed in the U.S. in a primarily managerial capacity. The Director noted that, absent evidence that the Petitioner had a sufficient number of subordinate managerial, supervisory, or professional employees to relieve the Beneficiary from performing non-qualifying duties, the record did not support a finding that the Beneficiary would be performing high-level responsibilities such that her employment with the Petitioner would be in a primarily managerial capacity.

On appeal, the Petitioner contends that the Director erroneously treated the petition as an "extension," and thus erroneously based the denial on the Petitioner's lack of subordinate managerial employees at the time of filing. The Petitioner states that the instant petition was a petition for "new employment," and therefore there was no requirement to have a subordinate staff of managerial employees in place when the petition was filed. We disagree.

Preliminarily, it appears that the Petitioner is confusing the requirements for a petition that involves the opening of a new office with a petition for new employment. 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, however, was formed in 2001, and has been engaged in the provision of beauty salon and spa services since 2003. Moreover, on the L Classification Supplement to the Form I-129 Petition, the Petitioner answered "No" to Question 12 on page 24, which asked: "Is the Beneficiary coming to the United States to open a new office?" Consequently, the Petitioner is not eligible for the more lenient provisions afforded under an initial new office petition.

After reviewing the record and the assertions of the Petitioner on appeal, we concur with the Director's conclusions. At the time of filing, the Petitioner employed a site/operations manager, who oversaw one full-time receptionist, three part-time receptionists, one full-time housekeeper, and four part-time housekeepers. It also indicated that approximately 34 contractors were retained as hairstylists, massage therapists, nail technicians, and aestheticians, with no intermediate supervisor between them and the Beneficiary. The Petitioner, however, indicates that the Beneficiary will be primarily performing business development and sales and marketing tasks, yet the current organizational structure of the Petitioner, coupled with the generalized list of the Beneficiary's proposed duties, does not support a finding that the Beneficiary will manage the organization, or primarily manage the business development and sales and marketing functions of the organization. For example, the Petitioner states that the Beneficiary will "review market research conducted by subordinates" to help study the market share of competing businesses, and will "oversee and monitor the company's sales and marketing activities through subordinate staff members." However, there are no sales or marketing personnel employed by the Petitioner to which the Beneficiary can delegate such non-qualifying duties. Moreover, the Petitioner indicates that the Beneficiary herself will be tasked with expanding the business, and will be responsible for hiring a number of additional positions in the first phase of the Petitioner's expansion plan. While its assertions are noted, the Petitioner has not demonstrated that the Beneficiary will primarily manage the business development and sales and marketing functions of the company, as opposed to performing them herself.

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). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Here, while the Petitioner asserts that the Beneficiary will ultimately hire numerous employees to relieve her from performing non-qualifying tasks, the record at the time of filing does not establish that the Beneficiary

will be primarily managing the organization, or primarily managing its business development and sales and marketing functions. Rather, the record indicates that the Beneficiary will primarily be engaged in the performance of non-qualifying sales and marketing and related tasks until such time that a subordinate staff of managers or professionals is hired to relieve her.

It is the Petitioner's burden to clearly describe the proposed duties and to establish that the Beneficiary's actual duties would be primarily managerial in nature. Reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros.*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Here, the Petitioner has not provided the necessary detail or an adequate explanation of the Beneficiary's proposed activities in the course of her daily routine, in light of the Petitioner's current organizational structure.

The fact that a beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial 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" executive or managerial. Here, the Petitioner indicates that the Beneficiary will exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making and personnel matters. However, due to the deficiencies discussed, the submitted position descriptions do not establish that her actual duties would be primarily managerial in nature.

B. Staffing and Organizational Structure

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 definition of "managerial capacity" allows for both "personnel managers" and "function managers." Here, the Petitioner states that the Beneficiary will be employed in a managerial capacity based on her proposed supervision and control of subordinate personnel. 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.*

At the time of filing, the Petitioner indicated on its organizational chart that it had 10 full-time and part-time employees - a site/operations manager, four receptionists, and five housekeepers - and approximately 34 hairstylists, massage therapists, nail technicians, and aestheticians identified as independent contractors. The Petitioner also submitted a proposed organizational chart, indicating that it plans to hire additional employees including two business development managers, an administrative assistant, an event coordinator, and a marketing specialist, in addition to numerous independent contractors to provide spa and salon services. Given that most of the existing positions within the organization are low-level services positions, it is unclear how the Beneficiary will be acting in a capacity that is primarily managerial in nature. According to the Petitioner, the site/operations

manager is responsible for overseeing the receptionists and housekeepers. However, there are no employees assigned to direct or coordinate the work of the Petitioner's 34 independent contractors, nor are there any employees that would perform administrative or operational tasks. Absent additional employees to relieve the Beneficiary from performing such tasks, we cannot determine whether her employment will be in a capacity that is primarily managerial in nature. In addition, the Petitioner provided no credible evidence reflecting the Beneficiary delegating duties to the site/operations manager or to substantiate her personnel authority over that individual. *See* section 101(a)(44)(A) of the Act. 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).

The Petitioner maintains that the primary purpose of the Beneficiary's transfer to the U.S. entity is to expand its business operations. The Petitioner stated that initially, she will be tasked at hiring various personnel in what it deems "phase one" of its business plan, and will ultimately manage the business development function of the Petitioner once this subordinate staff is hired and in place. The Petitioner contends that the proposed organizational chart, when realized, will elevate the Beneficiary to a position that is primarily managerial and thus it has satisfied the regulatory requirements. Finally, the Petitioner asserts that it should not be penalized for not having a subordinate staff of managerial employees in place at the time of filing, since that is what the Beneficiary's transfer is intended to accomplish.

It must again be noted that the Petitioner is not a new office, and 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 record as constituted does not establish how the Beneficiary, with one subordinate manager in charge of overseeing housekeepers and receptionists, will be performing high-level managerial duties and relieved from performing non-qualifying operational duties. Further, as briefly noted above, the current organizational chart demonstrates that there is no intermediate supervisor between the Beneficiary and the salon and spa contractors, composed of hairstylists, nail technicians, etc., further suggesting that the Beneficiary will assume the role of a first-line supervisor until the appropriate business development managers for both the salon and spa personnel are hired.[1]

Alternatively, the Petitioner refers to the Beneficiary's position as a "functional manager" position. In the case of a function manager with no direct subordinates, other factors considered may include a

[1] It should be noted that the subordinate spa and salon personnel under the Beneficiary's supervision do not appear to qualify as professional employees. 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"). Section 101(a)(32) of the Act, states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The Petitioner has not demonstrated that these hair stylists, nail technicians, massage therapists, or aestheticians require a baccalaureate degree for entry into their field of endeavor.

beneficiary's position within the organizational hierarchy, the depth of a petitioner's organizational structure, the scope of a beneficiary's authority and its impact on a petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that a beneficiary manages. *See Matter of Z-A-*, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016).

While it appears that managing the business development and the sales and marketing of the Petitioner is an essential function, its description of the Beneficiary's duties, coupled with the deficiencies in the Petitioner's organizational structure, do not establish that she will primarily manage those functions, as opposed to performing research into sales and marketing and engaging directly in other non-managerial services related to that function. Again, the Petitioner asserts that the Beneficiary will rely on subordinate sales and marketing personnel to provide her with the relevant information needed to make decisions regarding the business development strategies of the Petitioner. As noted above, the Petitioner employs no such individuals, and the absence of such employees to perform these underlying tasks suggests that she will be directly involved in the research and marketing required for the Petitioner's planned expansion. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a beneficiary as long as those tasks are not the majority of a beneficiary's duties, a petitioner still has the burden of establishing that a beneficiary will "primarily" perform managerial duties. *See* section 101(a)(44)(A) of the Act. Whether a beneficiary is a "function" manager turns in part on whether the petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See Matter of Z-A-*, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016).[2]

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., 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 size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

Here, the vacancies in the Petitioner's organizational structure, which demonstrate the absence of subordinate managerial, professional, or supervisory employees to relieve the Beneficiary from performing non-qualifying duties, renders it impossible to conclude that the Beneficiary's position will be primarily managerial in nature. The record as constituted does not demonstrate that the

[2] On appeal, the Petitioner relies on both *Matter of Z-A-* and *Matter of G- Inc.* for the proposition that the Beneficiary's role as a function manager in charge of the business development function of the Petitioner establishes that the position is primarily managerial. We disagree. The Petitioner must establish that the Beneficiary will primarily manage, as opposed to perform, the function. *See Matter of G-, Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017). For the reasons discussed above, the Petitioner's organizational structure precludes a finding that the Beneficiary will primarily manage, and not perform, the Petitioner's business development and sales and marketing functions.

Beneficiary will primarily perform the claimed duties stated by the Petitioner, and the current organizational structure of the Petitioner does not establish that the Beneficiary will be relieved from performing non-qualifying tasks. Specifically, it is questionable whether the Beneficiary can possibly perform tasks that are primarily managerial in nature with only the site/operations manager to carry out the operational tasks that may be required for the business, such as sales, marketing, inventory management, accounting, payroll, personnel management, and day-to-day operational and administrative functions that would be associated with any business, while permitting the Beneficiary to perform only high-level managerial responsibilities.

Overall, the record does not contain sufficient evidence regarding the Beneficiary's proposed role or the roles of her subordinates to establish that she would primarily perform qualifying managerial duties. Accordingly, the Petitioner has not established that she would be employed in a managerial capacity as defined at section 101(a)(44)(A) of the Act.

ORDER: The appeal is dismissed.