U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-, INC.

DATE: FEB. 7, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a tennis academy, seeks to temporarily employ the Beneficiary as its marketing director 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 was employed abroad and would be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner disputes the Director's findings, claiming that the Beneficiary has been and will be employed in a managerial capacity.

Upon *de novo* review, we will dismiss the appeal because the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial or executive capacity. However, we will reserve the remaining issue regarding the Beneficiary's foreign employment as the Petitioner has not satisfied a fundamental element of eligibility regarding the Beneficiary's proposed employment with the U.S. entity.

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.* 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. MANAGERIAL CAPACITY IN THE UNITED STATES

The Petitioner claims that the Beneficiary's proposed U.S. employment will be in a managerial capacity. As the Petitioner does not claim that the Beneficiary would be employed in an executive capacity, we will limit our discussion to addressing the Petitioner's claim and will not consider whether the Beneficiary would be employed 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.

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.

The 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 the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the 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 and its staffing levels.

A. Supporting Evidence

The petition form was filed in February 2018 and indicates that the Petitioner was established in 2010, had "4-5" employees at the time of filing, and would compensate the Beneficiary $35,000 annually in his proposed position. In a supporting cover letter, the Petitioner stated that the Beneficiary would work 60-70 hours per week as "Marketing/Commercial Director" of a new department where he would "be in charge of entertainment, tourism, logistics, and marketing aspects of the company"; it explained that the Beneficiary will develop entertainment programs for the parents of its foreign-based customers. The Petitioner provided a job description, which indicates that the Beneficiary will spend 57 hours weekly, thus most of his time, performing operational and administrative job duties, including contacting old and new customers for feedback, promoting

newly offered services, researching and analyzing local and international markets to find better promotion strategies, analyzing negative customer feedback, contacting appropriate parties to resolve accounting and administrative issues, searching for and meeting with vendors, networking with potential business partners, organizing corporate events, and training "management" and "key personnel."

The Petitioner also discussed hiring projections, stating that it plans to hire a sales manager during the department's second year of operation and fill four additional subordinate positions in the Beneficiary's department within the first five years of the department's operation; it stated that it seeks to ultimately fill eight new positions within five years. The Petitioner also provided a business plan discussing its future hiring and financial projections. According to the Petitioner's statement and the organizational chart contained in its business plan, the Beneficiary's department was entirely unstaffed at the time this petition was filed.

In a request for evidence (RFE), the Director instructed the Petitioner to describe the Beneficiary's job duties and to provide an organizational chart showing its staffing structure, employee names, position titles, and job descriptions. The Petitioner was also asked to provide its quarterly wage reports for 2017, copies of the Petitioner's payroll summary, employment contracts, and IRS Forms W-2, W-3, and 1099-MISC.

In response, the Petitioner explained that the staffing structure discussed in the business plan is a projection of future hires and noted that new employees have not been hired yet to staff the new marketing department. The Petitioner stated that it plans to hire a marketing manager, a public relations specialist, and a sales representative upon the Beneficiary's arrival. The Petitioner did not provide a job description of the duties the Beneficiary would perform based on the staffing it had available at the time of filing. Rather, it stated that the Beneficiary will initially work 60 hours per week and provided a job duty breakdown using percentages and hourly increments to explain how the Beneficiary will distribute his time among his assigned duties within the scope of its projected personnel plan. The Petitioner stated that 68% of the Beneficiary's time will be spent working through a marketing manager, sales representative, and public relations specialist to "collect and analyze the necessary information from the potential and old customers to create new service packages" for customers, create a database as a basis for developing marketing strategies, analyze negative customer feedback, and examine the performance of social media and online tools. The Petitioner clarified that the goal of the marketing department is to create entertainment packages for existing and new customers and to market these new services locally and internationally through "new PR strategies." The Petitioner did not provide any payroll or wage evidence.

In the denial decision, the Director observed that the Petitioner described the Beneficiary's proposed position within the context of a projected, rather than an existing, personnel plan. The Director

acknowledged that although the Petitioner does not claim to be a "new office,"[1] its job description is based on future hires and developments, which is common in a new office petition. The Director determined that the Petitioner's current organizational hierarchy lacks subordinates to assist the Beneficiary and concluded that the Petitioner's staffing at the time of filing was not sufficient to support the Beneficiary in a managerial position.

On appeal, the Petitioner contends that it hired the Beneficiary "for the purpose of organizing and developing of the marketing department of the existing business," arguing that it "is perfectly legal" to transfer the Beneficiary to the United States for this purpose.

B. Analysis

We find that the Petitioner has not established that it had the ability to support the Beneficiary in a managerial position based on the circumstances that existed at the time of filing.

Although the Petitioner is correct in asserting that it is not unlawful to transfer the Beneficiary to the United States for the above stated purpose, by statute, eligibility for this classification requires that the duties of the proposed position be "primarily" managerial in nature. Section 101(A)(44)(A) of the Act. The fact that the Beneficiary will have discretion in developing and managing the U.S. entity's marketing department 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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 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." See *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*).

As a threshold matter, we note that 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 in this instance provided an organizational chart depicting a staff that had not yet been hired at the time of filing. By its own admission, the Petitioner's marketing department was devoid of personnel at the time this petition was filed. It is

[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.

therefore unclear who, other than the Beneficiary, would be available to carry out the underlying operational job duties of that department.

While the Beneficiary is not required to allocate 100% of his time to managerial-level tasks, the Petitioner must establish that the non-managerial tasks of the proposed position would only be incidental to, as opposed to the main focus of, that position. 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).

Here, the Petitioner focused on the Beneficiary's position title and discretionary authority without adequately considering the lack of a support staff who would relieve the Beneficiary from having to carry out the operational tasks of the marketing department that the Beneficiary was hired to manage. The Petitioner also neglected to properly consider that the effect of this deficient staffing structure would result in the Beneficiary having to perform primarily non-managerial job duties. The Petitioner cannot effectively demonstrate that the Beneficiary would be employed in a managerial capacity when it had no employees to support the Beneficiary and take over the performance of the operational and administrative tasks of the marketing department. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

On appeal, the Petitioner admits that "in the beginning of the employment, [the Beneficiary] will be involved in the activities that are less managerial or executive" and focuses on the "need to hire and train the personnel for the [marketing] department." The Petitioner also continues to focus on its five-year hiring plan, overlooking the regulatory criteria requiring it to demonstrate eligibility based on the facts and circumstances that existed at the time of filing. As discussed above, the record indicates that the Petitioner did not have the capacity to relieve the Beneficiary from having to allocate his time primarily to non-managerial duties at the time of filing.

III. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of E-, Inc.*, ID# 1983231 (AAO Feb. 7, 2019)