U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF U-T-, INC.

DATE: FEB. 13, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a distributer of 3D printing equipment, seeks to temporarily employ the Beneficiary as its "vice general manager" 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 in a managerial or executive capacity and that he would be employed in a managerial or executive capacity under an approved petition.[1]

On appeal, the Petitioner disputes the denial contending that the Director did not consider "all relevant evidence" and did not adequately explain why the submitted evidence was not sufficient to establish eligibility.

Upon *de novo* review, we find that the Petitioner has not overcome the Director's findings regarding the Beneficiary's employment capacity in his proposed U.S. position. Therefore, we will dismiss the appeal on that ground. However, we find that the record contains sufficient evidence establishing that the Beneficiary was employed abroad in a managerial capacity. Therefore, we will withdraw the Director's adverse finding on this issue.

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

[1] The Director also commented on the Beneficiary's proposed subordinates finding them to be "at most, supervisory positions of non-professional positions." As the definition of "managerial capacity" applies only to the Beneficiary's proposed position and not to those of his proposed subordinates, the Director's observation is not relevant to the issue of the Beneficiary's eligibility and will not be addressed in our discussion.

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. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Petitioner claims that the Beneficiary will be employed in a managerial capacity. Therefore, we will only address this claim in our decision 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 job description must clearly state 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. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

In the present matter, the Petitioner claimed eight employees on the petition form but did not provide a gross or net annual income. In support of the petition, the Petitioner provided an organizational chart depicting ten positions, including the Beneficiary and individuals who appear to have been contracted as part of an outsourcing arrangement.[2] The organizational chart depicts the president/CEO at the top of the hierarchy, followed by the general manager, who would oversee the Beneficiary in his proposed position as vice general manager. The chart indicates that the Beneficiary would directly oversee a sales channel manager of the "Western Region," a key account manager, an office manager, and a national sales manager who appears to be part of the outsourcing arrangement and would oversee two (or possibly three) of the outsourced entity's employees.[3] Regardless, the organizational chart is inconsistent with the claim that the Petitioner had eight employees at the time the petition was filed.

In a request for evidence (RFE), the Director instructed the Petitioner to provide an organizational chart depicting its staffing levels and listing all employees in the Beneficiary's division or team along with their job titles, job duties, and educational levels. The Petitioner was also instructed to submit payroll evidence, including quarterly wage reports for 2017, the Petitioner's payroll summary, and relevant tax forms, such as Forms W-2, W-3, and 1099-MISC, showing wages paid to all individuals whom the Beneficiary would oversee in his proposed position.

The Petitioner provided a response statement claiming that the Beneficiary will manage the products development and sales functions and that he would oversee subordinate managers. The Petitioner also provided a new organizational chart that was not entirely consistent with the chart that was previously submitted. As the new chart was not dated and unaccompanied by additional information, it is unclear whether it depicts the Petitioner's staffing at the time of filing or a new staffing structure that was in place at the time of the Petitioner's RFE response. This distinction is relevant, as 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). If the new chart reflects a staffing structure that was not yet in place at the time of filing, the information it contains would not be relevant to establish eligibility in this matter. If, however, the new chart was intended to show the Petitioner's organizational hierarchy at the time of filing, this would point to inconsistencies between the original and subsequently submitted charts and the Petitioner would have to resolve these incongruities by providing independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Although both charts depict the Beneficiary as the general manager's direct subordinate, the second chart shows a somewhat altered staffing arrangement and assigns new position titles to certain

[2] The chart shows that the Beneficiary's subordinates would include [redacted] in the position of "National Sales Manager, [redacted]." The latter position is shown as overseeing two [redacted] sales employees and an [redacted] marketing position held by [redacted]. The record does not clarify whether [redacted] and [redacted] are the same person. Therefore, it is not clear whether [redacted] national sales manager at [redacted] is also [redacted] marketing employee.

[3] *See* FN1.

employees. For instance, the new chart shows [redacted] as directly subordinate to the general manager and identifies him as "Commercial Office Manager Finance," whereas the original organizational chart depicted [redacted] as an office manager, who would be directly subordinate to the Beneficiary. The new chart also shows an altered staffing structure below the Beneficiary's position identifying [redacted] as the "direct sales manager" instead of "key account manager," as he was identified in the original chart. Likewise, the new chart identifies [redacted] as a "marketing and product development manager" overseeing a technical service employee and three [redacted] sales managers; the original chart identified this individual as a "national sales manager, [redacted]' overseeing two (or possibly three) sales managers.[4] Lastly, the new chart includes a new position – that of Eastern U.S. channel manager – and indicates that this position would oversee an outsourced distribution company. As the new position is marked "vacant," it appears that the Beneficiary would be tasked with overseeing the outsourced company until the vacant positions is filled.

Further, although the organizational chart in the RFE response listed [redacted] and [redacted] as its two distributors, the Petitioner only provided a distributorship agreement with [redacted] as evidence of its relationship with an outsourced service provider. Likewise, although the same organizational chart indicates that the Petitioner contracted [redacted] for various sales services, it did not provide contracts as evidence of these claimed business relationships. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). We further note that the Petitioner did not provide any of the requested wage or payroll evidence, which may have shed light on the discrepancies between the various organizational charts and provided information as to whom the Petitioner employed at the time of filing; nor did the Petitioner provide subordinate employees' job duty summaries establishing that the Beneficiary would oversee supervisory or professional employees and that he would be relieved from having to primarily perform non-managerial job duties. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In the denial decision, the Director determined that the Petitioner did not establish that as of the date of filing it had attained an organizational structure that would elevate the Beneficiary to a position above that of a first-line supervisor overseeing non-professional employees.

On appeal, the Petitioner contends that the Director did not consider "all relevant evidence" and provides an "amended" organizational chart without clarifying whether the new chart depicts a staffing structure that was in place at the time of filing. The Petitioner indicates that the Beneficiary would oversee the work of other subordinate managers and manage the products development and sales functions; it further states that the Beneficiary has professional subordinates who will relieve him from having to carry out the duties related to those functions. The Petitioner offers a job description for the channel manager position, which was not depicted in the originally submitted chart. Although this position was depicted in the subsequent chart that was submitted in response to

[4] *Id.*

the RFE, as discussed above, the Petitioner did not establish that the staffing structure in that chart existed at the time this petition was filed.

The Petitioner does not provide other subordinates' job descriptions nor does it provide a relevant payroll summary or wage evidence to show who was part of its organizational hierarchy at the time of filing, despite the fact that the RFE specifically asked for the submission of such evidence. As noted above, the Petitioner's assertions must be supported with relevant, probative, and credible evidence. *See id.* Although we acknowledge the Petitioner's submission of a payroll summary for September 2018, such evidence is not relevant as it does not establish the Petitioner's staffing structure in April 2018 when this petition was filed. The Petitioner also provided employment contracts for a market analysis specialist, a photographer, and a senior graphic designer. However, the foreign entity, rather than the Petitioner, was named as the employing party in all three contracts and the prospective employees named in those contracts were not included in any of the Petitioner's organizational charts. As such, the newly submitted employment contracts do not apply to the Beneficiary's proposed position.

We find that the Petitioner did not clarify which of the three submitted organizational charts represented the company's claimed staffing structure at the time of filing. Further, as the Petitioner did not comply with the Director's request for wage or payroll evidence, we cannot verify the content or relevance of those organizational charts, nor can we determine whom the Petitioner employed or contracted at the time of filing and whether the staffing arrangement at that time was sufficient to relieve the Beneficiary from having to perform primarily non-managerial job duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988). Without sufficient evidence of the Petitioner's staffing, we are unable to determine who was available to relieve the Beneficiary from having to primarily perform non-managerial job duties.

In sum, the Petitioner has not adequately demonstrated that it had the staffing infrastructure to support the Beneficiary in a managerial position at the time this petition was filed.

B. Duties

We also reviewed the Beneficiary's proposed job description and find that the Petitioner provided insufficient evidence to establish that the Beneficiary would perform primarily managerial job duties in his proposed position. The Petitioner claims that the Beneficiary will assume the role of a function manager.

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). We find that the Petitioner has not established that the Beneficiary will manage an essential function.

In a supporting cover letter, the Petitioner provided a vague job duty breakdown stating that 70% of the Beneficiary's time would be spent managing daily operations, "supervising and improving a liaison" with the parent company and working with that entity's CEO to develop expansion strategies, "[m]anaging the process of identifying, liaising and representing" the Petitioner, contacting potential buyers of its various product lines, and organizing and hosting launch events that showcase the Petitioner's products in the North American market. The Petitioner did not specify how the Beneficiary would manage its daily operations or supervise and improve "a liaison" with the parent company, nor did it identify any expansion strategies or establish that contacting potential clients or organizing and hosting launch events are managerial-level job duties.

In the RFE response, the Petitioner provided a job description that was similarly vague and appears somewhat inconsistent with the job description that was originally submitted. For instance, the new job description indicates that the Beneficiary would direct and oversee subordinate managers and executives by setting business objectives and tracking their results. The original job description, however, broadly stated that the Beneficiary would manage "the process of identifying, liaising and representing" the Petitioner's products, supervise and work with "other team members" to create advertising campaigns, and oversee "sales teams and customer services personnel" to monitor customer feedback; the Petitioner did not initially claim that the Beneficiary would oversee "managers and executives" in the course of managing the products development and expansion functions and although the original organizational chart assigned managerial position titles to all four of the Beneficiary's subordinates, only one of those subordinates was depicted as having subordinates of their own, thereby indicating that the employees' respective managerial position titles were not indicative of managing or overseeing subordinate personnel.

Further, although the original job description indicates that the Beneficiary would organize and host launch events, the new job description indicates that the Beneficiary's involvement would be limited to overseeing "the Company's personnel" while they, rather than the Beneficiary, will organize and launch these events. As the Petitioner did not describe employee job duties or clarify which organizational chart most accurately depicted its staffing at the time of filing, it is unclear which of "the Company's personnel" would actually carry out the organizing and launching activities. Although both job descriptions indicate that the Beneficiary would collaborate with the foreign parent entity and work with its CEO to develop business expansion strategies, the Petitioner did not discuss any business strategies in greater detail or clarify each party's contribution in the collaborative process. Reciting the 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. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The Petitioner in this matter has not provided any detail or explanation of the Beneficiary's activities in the course of their daily routine. Lastly, the Petitioner's second job duty breakdown indicates that the Beneficiary will have direct and indirect management authority over "the function of qualifying and approving" the company's product distributors; however, despite making the distinction between direct management of this function and indirect management through "personnel in charge of the Company's sales channels' management," the Petitioner did not describe the underlying steps involved in qualifying and approving a distributor or specify the actual daily tasks the Beneficiary would perform with respect to the qualification and approval process.

On appeal, the Petitioner resubmits the job duty breakdown it provided in response to the RFE and states that the Beneficiary will "head a critical function" through subordinate employees. Whether a beneficiary is an "activity" or "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). While it is possible that the Beneficiary will exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to an essential function, the Petitioner it did not provide a job duty breakdown adequately describing the Beneficiary's proposed daily job duties and establishing precisely how he will work through other employees to manage the product marketing and development functions.

In light of the deficiencies discussed above, we find that the Petitioner did not establish that the Beneficiary would primarily manage an essential function.

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. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.

Cite as *Matter of U-T-, Inc.*, ID# 2150443 (AAO Feb. 13, 2019)