U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-D-A-G- LLC

DATE: FEB. 22, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, which sells security equipment manufactured by its foreign affiliate,[1] seeks to extend the Beneficiary's temporary employment as its 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, Vermont Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Beneficiary will be employed in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits copies of previously submitted evidence and asserts that the Director erred by not taking into account the Petitioner's status as a new office.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a managerial or executive capacity, or in a specialized knowledge capacity, for 1 continuous year within 3 years preceding the Beneficiary's application for admission into the United States. 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, executive, or specialized knowledge capacity. Section 101(a)(15)(L) of the Act.

[1] The Petitioner refers to the foreign company as its parent company, but the foreign company is not a member of the petitioning limited liability company. Rather, the two entities are affiliates, because the same individual holds a majority interest in both companies. *See* definition of "affiliate" at 8 C.F.R. § 214.2(l)(1)(ii)(L).

When a petitioner seeks to extend the validity of an L-1A petition that involved the opening of a new office, the petition must include a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition, as well as a statement describing the staffing of the new operation, including the number of employees and types of positions held. 8 C.F.R. § 214.2(l)(14)(ii)(C) and (D).

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as "an assignment within an organization in which the employee primarily":

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) 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;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

Further, "[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.*

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as "an assignment within an organization in which the employee primarily":

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

A. Duties

When examining the managerial or executive capacity of the Beneficiary, we will look first to 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).

First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities described in the statutory definitions of managerial or executive capacity. *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.

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated:

> The Beneficiary in the capacity of the General Manager will be responsible for defining and directing new strategies for the company's business tools to achieve strategic sales and marketing goals. Also, the Beneficiary will be in charge of the company's management and will oversee compliance with commercial, logistics, and environmental aspects of its products and services.

The Petitioner submitted a chart showing the Beneficiary's duties, and estimates of how much time the Beneficiary would spend on each duty during the upcoming year, noting that the time devoted to each duty would change over time. The chart below includes a summary of the range of percentages provided for each job duty.

Establish and carry out the Petitioner['s] goals, policies, and procedures;	10-20%
Direct and oversee Petitioner's financial and budgetary activities	9-25%
Manage general activities related to selling products and providing services for the Petitioner	10-15%
Consult with other executives from the Parent company, staff, and board members about general operations;	5-20%
Establishes sales strategies and marketing goals, evaluating performance of the company and its staff, and determines areas of cost reduction and program improvement;	5-15%
Implements the corporation's accounting practices and financial policies, analyzing reports, audits, deciding investment risks, budget, allocation of resources	10-30%

Engages in long-range planning, develops strategies and programs to the company's expansion plans, directs market research, and identifies business opportunities in the U.S.	5-15%
Negotiate or approve contracts and agreements	5-20%
Hiring and training professionals to work in the company and establishing their duties and responsibilities;	5-15%
Analyzing financial information, such as price, future trends, and investment risks, making investment decisions, estimating forecast of business and preparing plans of action	5-10%
Directing efficacy of wholesale, export and distribution activities of company's products and directing dissemination of technical support service in accordance with corporate marketing strategy.	5-20%

The Director issued a request for evidence (RFE). The Director stated that the Petitioner had not shown that, during its first year of operations, the Petitioner had developed to a point that it could support a primarily managerial or executive position. The Director also asked the Petitioner to specify whether it seeks to employ the Beneficiary as a manager or as an executive. The terms are not interchangeable, and there is no provision for eligibility based on a combination of factors from the two definitions.

In response, the Petitioner submitted the same list of responsibilities and time percentages. The Petitioner did not specify whether it seeks to employ the Beneficiary as a manager or an executive.

In denying the petition, the Director found the job description to be generic, having little specific bearing on the Beneficiary's position and actual duties within the Petitioner's business.

On appeal, counsel submits a revised job description, stating:

> The beneficiary will be exercising his [*sic*] discretionary authority in managing and establishing sales strategies and marketing goals, evaluating performance of the company and its staff, and determining areas of cost reduction and program improvement, as well as negotiating or approving contracts and agreements.
>
> In addition, the Beneficiary will identify new markets for penetration and act as liaison with distributors to assure that these markets are accessed; and will be analyzing financial information, such as price, future trends, and investment risks, making investment decisions, estimating forecast of business and preparing plans of action.
>
> Please see below a chart with the percentage of the time the beneficiary will approximately expend in each duty:

Evaluating import/export department performance, determining areas of cost reduction and program improvement.	Up to 20-25%
Formulating and implementing import/export legal compliance policies and procedures.	Up to 15%
Engaging in long-range planning and identifying foreign business opportunities. International travels.	Up to 20%
Hiring and training professionals to work in the company and establishing their duties and responsibilities	Up to 10%
Managing employees and reviewing records, policies and procedures	Up to 10%
Analyzing import/export reports, such as shipment fees and services costs, tax transactions, and operations risks, estimating forecast of business and preparing plans of action, making decisions.	Up to 25%
Acquisition of new clients and business relationships	Up to 5%

The new description is deficient for several reasons. It appears only in a statement signed by counsel, on counsel's letterhead, with no attestation or corroboration by the Petitioner. The unsupported assertions of counsel do not constitute evidence. *See, e.g.*, *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Also, regardless of the source, the new job description is very different from the earlier version, in ways that cannot be attributed simply to a difference of perspective. The new description indicates that the Beneficiary would spend up to 65% of her time on tasks relating to the "import/export department," but the Petitioner has no import/export department. Also, the new job description and accompanying commentary repeatedly refer to the female Beneficiary with masculine pronouns. It is not evident that the new statement on appeal describes the same job that the Petitioner had previously described.[2] The submission of two significantly different descriptions for the same position raises questions of credibility. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The Director correctly found that the Beneficiary's original job description lacked details about the Beneficiary's specific duties. The Petitioner has not overcome this finding on appeal by submitting an almost entirely different job description.

The original job description is deficient for several reasons. The Petitioner did not explain the difference between "deciding investment risks . . . [and] allocation of resources" and "[a]nalyzing

[2] Given these discrepancies, it may also be significant that counsel's brief is dated October 15, 2012, whereas the petition was filed, denied, and appealed in 2016.

. . . investment risks [and] making investment decisions," which it listed as separate items. Several of the duties lack details. For example, the assertion that the Beneficiary will "[m]anage general activities related to selling products and providing services for the Petitioner" does not tell us what this duty would entail. The description refers to "[h]iring and training professionals" but, as we will explain further below, there is no evidence that the company will employ professionals subordinate to the Beneficiary.

The Petitioner bears the burden of documenting what portion of the Beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991). Absent a clear and credible breakdown of the time spent by the Beneficiary performing well-defined tasks, we cannot determine what proportion of the duties would be managerial or executive, nor can we deduce whether the Beneficiary is primarily performing the duties of a function manager or executive. *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In the same appellate brief, counsel for the Petitioner also asserts that "[s]pecial rules are applicable. . . in 'new office' situations." This proceeding, however, does not involve a new office petition. Rather, the Petitioner had previously filed a new office petition, and U.S. Citizenship and Immigration Services (USCIS) approved that petition. The Petitioner now seeks to extend the Beneficiary's existing L-1A nonimmigrant status. Throughout this proceeding, the Petitioner has referred to its first year of operations in the future tense, while at the same time submitting documents (such as invoices dating back to February 2015) indicating that the Petitioner has been doing business for more than a year.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the intended U.S. operation 1 year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this 1-year period. If the Beneficiary's duties were not primarily those of a manager or executive at the time of filing this extension request, then USCIS cannot extend the Beneficiary's L-1A nonimmigrant status. The Petitioner's previous status as a new office does not entitle the Petitioner to special consideration now.

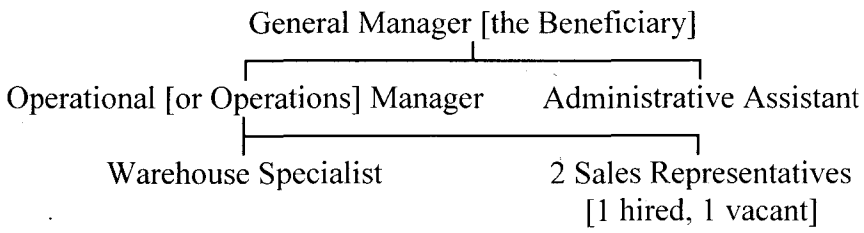
The Petitioner has not overcome the Director's finding that the submitted descriptions of the Beneficiary's duties do not establish eligibility as a manager or executive.

B. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including 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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 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. 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."[3] Section 101(a)(44)(A) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*4*). If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(*2*)-(*3*).

On Form I-129, the Petitioner stated that it had five employees in the United States, a number confirmed by payroll records from April 2016. The Petitioner submitted two organizational charts, one of which showed this structure:



A second organizational chart, projecting the company's structure at "the end of the first year of full operations," showed the same five existing employees, plus vacancies for a "finance assistant" and an indeterminate number of additional sales representatives.

As noted above, the Beneficiary's stated duties include "[i]mplement[ing] the corporation's accounting practices" and "[a]nalyzing financial information." The Petitioner did not explain who compiled and presented that information in the absence of the yet-to-be-hired finance assistant. Preparation of financial information is administrative rather than managerial or executive. Because the Petitioner is no longer a new office, we will not consider claims regarding future hiring. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). The anticipation of future qualifying circumstances cannot establish eligibility at the time of filing. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

[3] In evaluating 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 United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), 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 submitted capsule job descriptions for the subordinate employees. The only subordinate not identified as a front-line employee with an operational or administrative role was the operations manager, with the following stated duties:

> Oversee the operation and profitability of the company ensuring rapid response and high client satisfaction levels through the management of company staff and resources, in accordance with the direction of the General Manager. Locate, select, and procure merchandise for resale, representing management in purchase negotiations.

Like the Beneficiary's own job description, the above description lacks detail and does not appear to correspond to the petitioning company. The reference to locating merchandise and negotiating its purchase does not take into account the stated purpose of the company, which is to market the products manufactured by its foreign affiliate. Photographs of the Petitioner's warehouse confirm that all the identifiable products on the shelves were manufactured by the foreign affiliate. In addition, the position description for the warehouse specialist stated that this employee "assists the materials manager," while the job description for the proposed finance assistant refers to this position's oversight of "dispatchers." The Petitioner has not shown that it employs or plans to employ a materials manager or dispatchers, leaving question as to the accuracy of the descriptions provided for these employees.

In the RFE, the Director found that none of the Beneficiary's subordinates work in professional occupations, and that only one, the operational manager, had supervisory responsibilities. The Director stated that the Petitioner had not shown that the Beneficiary's oversight of the company's small staff makes her duties primarily those of a manager or executive. The Director asked for additional information about the Beneficiary's subordinate staff.

In response, the Petitioner submitted payroll documents and a new organizational chart, showing that the Petitioner had added a marketing manager and a second sales representative, both hired after the petition's May 2016 filing date. The new chart also showed the administrative assistant as being subordinate to the operations manager, which the earlier chart did not show. The Petitioner submitted a copy of a "Bachelor of Social Communication" diploma issued to its new marketing manager, along with evidence that it hired this employee in July 2016, nearly 2 months after the petition's filing date. The position did not exist at the time the Petitioner filed the petition; it appeared on neither of the two organizational charts submitted initially. Therefore, the Petitioner's subsequent creation of the position cannot retroactively qualify the Beneficiary as of the petition's filing date. A visa petition may not be approved based on speculation of future eligibility or after a petitioner or beneficiary becomes eligible under a new set of facts. *See, e.g.*, *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

In the denial notice, the Director concluded that the Petitioner had shown that one of the Beneficiary's subordinates is a supervisor, but that the Petitioner had not established that the Beneficiary's oversight of that one supervisor would occupy the majority of her time. On appeal, the

Petitioner asserts that the Beneficiary's subordinate staff, including newly hired employees, will relieve her from performing the day-to-day operations of the business. As discussed above, changes to the Petitioner's staffing after the filing of the petition cannot establish eligibility at the time of filing as required by 8 C.F.R. § 103.2(b)(1).

The organizational chart shows that the Beneficiary had one subordinate (specifically, the operations manager) with subordinates of his own at the time of filing. The Petitioner has not established that the Beneficiary's primary duty is oversight of this one supervisor (whose own duties are questionable, as we have discussed). The Beneficiary's two conflicting job descriptions contain no discussion of subordinates except to refer to "[h]iring and training professionals." As explained above, the Petitioner has not shown that any of the Beneficiary's subordinates qualify as professionals.

The term "function manager" applies generally when a beneficiary does not primarily 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a petitioner must clearly describe the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties dedicated to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function.

As noted above, the Petitioner has provided inconsistent accounts of the Beneficiary's intended duties for the petitioning company. Because the Petitioner has not answered the Director's question as to whether it seeks to employ the Beneficiary as a manager or executive, the Petitioner has advanced no coherent claim that the Beneficiary will serve as a function manager, and the Petitioner has not identified any essential function that the Beneficiary would manage.

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, 8 U.S.C. § 1101(a)(44)(B). 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 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.*

In this instance, the Petitioner has not shown the existence of a complex organizational hierarchy or shown that her subordinates include layers of management (the use of managerial titles is not sufficient in this regard). As noted above, although the Director instructed the Petitioner to specify whether it seeks to employ the Beneficiary as a manager or as an executive, the Petitioner has never answered this query, and has not put forward any specific argument to show that the Beneficiary qualifies for classification as an executive.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must 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 petitioning entity is still at an early stage of development, but the 1 year allowed for the formation of a new office has elapsed, and therefore the Petitioner must show that it is able to support a managerial or executive position. The Petitioner has not clearly described the Beneficiary's duties nor has it established that the company has reached a point where it requires the Beneficiary to perform primarily managerial or executive duties. The roles listed on the organizational charts are in doubt as well; submitted sales invoices show the initials of several employees, with a number of different claimed titles, as "sales representatives," indicating that most of the staff directly performs duties related to sales and/or order fulfillment. The record does not contain sufficient, consistent information regarding the four subordinate employees to establish that they would relieve the Beneficiary from significant involvement in the day-to-day operations of the company as of the date of filing.

The numerous deficiencies and discrepancies in the record, already discussed above, preclude a finding that the Petitioner has met its burden to establish that it will employ the Beneficiary in a managerial or executive capacity.

III. CONCLUSION

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of A-D-A-G- LLC*, ID# 223959 (AAO Feb. 22, 2017)