U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-A-, LLC

DATE: FEB. 22, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a seller of aircraft parts, seeks to employ the Beneficiary temporarily as its vice president of operations 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 it would employ the Beneficiary in a managerial or executive capacity.

On appeal, the Petitioner contends that the Beneficiary will manage components of the organization and control the work of professional employees. It states that some of its services will be performed by contractors and claims that its small staff meets its reasonable needs.

After reviewing the totality of the submitted evidence, we uncovered inconsistencies outside the record, which prompted us to issue a notice of intent to dismiss and request for evidence (NOID/RFE). The Petitioner has since responded to our notice and we have reviewed the response within the context of all prior submissions in the record. Upon *de novo* review, we find that the Petitioner has not overcome the basis for denial. In addition, based on the response to our NOID/RFE, we find that the Petitioner has not established that the Beneficiary was employed abroad for the requisite period of one year within the three years prior to filing this petition. Therefore, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized 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. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Petitioner claims that the Beneficiary's proposed U.S. employment would be in a managerial capacity. Therefore, we will only address this claim and will not discuss whether the Beneficiary will 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. 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.

The Petitioner claimed four employees – an operations manager, an "accounting" manager, a purchasing manager, and a sales manager – at the time this petition was filed in August 2017. It provided a 2017 quarterly tax return showing that it claimed four employees during the second

quarter, which immediately preceded the filing of this petition. The Petitioner also stated that it used [redacted] to assist with shipping and finding spare parts and provided evidence of payments made to these contracted parties. The Petitioner also discussed plans to hire five additional employees in the near future. We note, however, 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). As such, any additional staff that the Petitioner planned to hire after it filed this petition would not be relevant for the purpose of determining the Petitioner's eligibility *at the time of filing*.

The Director reviewed the record and determined that an RFE was warranted to determine whether the Petitioner was adequately staffed to relieve the Beneficiary from having to allocate his time primarily to the performance of non-managerial job duties. Namely, the Director instructed the Petitioner to provide an organizational chart depicting its staffing levels and asked that the chart be complete with a list of employee names and job titles, a summary of their job duties, and their respective educational levels and salaries.

The response contains a 2016 tax return and the Petitioner's organizational chart, which identifies five employees and includes the Beneficiary's position, the position of vice president of sales,[1] and the five vacant positions, none of which were filled at the time this petition was filed. The chart shows a president/CEO at the top of the organizational hierarchy followed by two subordinates – the vice president of sales and the Beneficiary as vice president of operations. The vice president of sales is depicted as having two subordinate managers – a purchasing manager and a sales manager – and the Beneficiary is depicted as having three subordinates – an accounting manager with no subordinates, an operations manager with one subordinate, and a manager of human resources ("HR") also with one subordinate.

Of the five positions labeled as "vacant," two positions – a shipping manager and a "stockman" – are under the sales vice president and the other three positions – the HR manager, the HR assistant manager, and the operations assistant manager – are under the Beneficiary, thereby indicating that the Beneficiary would oversee two employees who have managerial position titles but who did not actually have subordinates to oversee at the time of filing. As the Petitioner claimed only four employees on the petition form, it does not appear that this organizational chart reflects the Petitioner's staffing composition at the time this petition was filed. Furthermore, the five vacant positions are part of a future hiring plan and therefore are not relevant to the issue of the Petitioner's eligibility at the time of filing.

In the denial decision, the Director determined that the Petitioner did not provide evidence showing that the Beneficiary's subordinates are professional employees or that the organization is adequately staffed to relieve the Beneficiary from having to primarily perform non-managerial job duties. The

[1] Although the chart names [redacted] as the vice president of sales, the initial cover letter indicated that [redacted] is the Petitioner's co-founder whom the Petitioner seeks to transfer as an intracompany transferee; the RFE response indicates that this position is currently vacant.

Director concluded that the Petitioner did not establish that the Beneficiary would either manage an essential function or that he would oversee supervisory or professional personnel.

On appeal, the Petitioner, citing *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), argues that the Director must consider its reasonable needs and take into account its related foreign organization, which engages in similar business activities. However, the Petitioner has not shown that the findings in the cited case are applicable in this matter. Merely establishing that the Petitioner and the related foreign entity "are jointly engaged in the sales of aircraft spare parts, components, and equipment" is not sufficient to demonstrate that the foreign entity or its employees will play an active role in supporting the U.S. operation and relieve the Beneficiary from having to primarily perform the non-managerial job duties of operation. Although the Petitioner indicated that the foreign entity's staff would assist in carrying out some of its non-managerial functions, it neither specified which services it claims the foreign entity's employees would perform, nor has it provided evidence establishing that the foreign entity's employees are part of its personnel plan and would in any way support the U.S. operation. A Petitioner has must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The Petitioner also asserts that it hired outside contractors to perform some of its operational functions and asks us to consider its 2016 tax return, which shows gross earnings of approximately $5 million, but no contributions towards officer compensation or employee salaries or wages. That said, the Petitioner has provided evidence showing that it contracted [redacted] to find spare aircraft parts and [redacted] to handle the logistics of shipping its products. However, as we since discussed in our NOID/RFE, there is documentation outside the record as well as evidence that the Petitioner submitted, which shows that [redacted] whom the Petitioner claims as its president, and [redacted] whom it claims as its purchasing manager, actually own [redacted] and [redacted] respectively. Although the Petitioner's 2017 second quarterly wage report includes [redacted] and indicates that he was paid a salary during that quarter, the Petitioner has not reconciled the incongruity of retaining [redacted] as an employee on the one hand, while contracting his company to perform shipping services on the other hand. Likewise, the claim that the Petitioner actually employs [redacted] as its president is misleading and belies the true nature of his relationship with the petitioning entity, which contracted [redacted] company to find spare aircraft parts.

The Petitioner responded to our NOID/RFE with evidence of the Petitioner's contractual relationships with [redacted] and [redacted] however, the Petitioner has not resolved the above described irregularities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). This lack of resolution of key issues causes us to question the reliability and sufficiency of other evidence in the record, such as the Petitioner's organizational chart and corresponding employee job descriptions, which were submitted in support of the requested immigration benefit. *See id.* As such, we are precluded from effectively assessing the Petitioner's staffing at the time of filing, which is a necessary element that allows us to determine the extent to which the Beneficiary will be relieved from performing primarily non-managerial duties when this petition was filed.

The Petitioner also asks us to consider its purpose and stage of development, contending that it has established a reasonable need to have "a senior-level employee," like the Beneficiary, manage "the essential function of developing its presence in the United States." Although the Petitioner correctly observes that we must take into account its reasonable needs, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company or a company that does not conduct business in a regular and continuous manner. *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). Furthermore, the Petitioner's reasonable needs will not supersede the requirement that the Beneficiary must be "primarily" employed in a managerial capacity, rather than spending the majority of his time on non-managerial duties. *See* sections 101(a)(44)(A) of the Act. The Petitioner has not established that a four-person operation would be sufficient to support the Beneficiary in a managerial capacity.

We also note that the Petitioner makes two separate and somewhat inconsistent arguments concerning the issue of staffing. On the one hand, it contends that its reasonable needs justify the staffing of its organization, thereby indicating that it is adequately staffed. On the other hand, however, the Petitioner states that it plans to increase its staff to "8-9 employees" and claims that its foreign affiliate will assume the burden of carrying out some of its non-managerial functions. These claims are insufficient for the purpose of establishing eligibility. First, as previously noted, the Petitioner's projected hiring of additional employees is not relevant, as eligibility must be based on the facts and circumstances that existed at the time of filing. In this matter, the Petitioner had no more than four employees at the time of filing; it must therefore establish that it had the ability to employ the Beneficiary in a managerial capacity within the context of a four-person staff.

Moreover, the unresolved anomalies regarding the Petitioner's claimed employment of [redacted] and [redacted], and their respective ownership of entities that the Petitioner contracted to provide various operational services, call into question the validity of the Petitioner's organizational chart and the job duties to be performed by the employees listed therein. The evidence must substantiate that the Beneficiary's duties and those of his subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that the organization is sufficiently staffed to support a managerial position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. The Petitioner has not established that the Beneficiary would oversee supervisory or professional subordinates, despite what their position titles may indicate.

The record also lacks evidence to support the Petitioner's current claim that the Beneficiary would assume the role of a function manager in which he would manage the function of developing the Petitioner's U.S. presence. The term "function manager" applies generally when a beneficiary 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). In this matter, the Petitioner has not adequately described the essential function or provided evidence showing that it was adequately staffed at the time of filing to relieve the Beneficiary from actually performing the underlying duties of that function. 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 capacity. *See, e.g.*, section 101(a)(44)(A) of the Act (requiring that one "primarily" perform the enumerated managerial duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

B. Duties

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.

Accordingly, in order to establish eligibility, the Petitioner must provide a job description that clearly describes 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).

In its supporting cover letter, the Petitioner stated that the Beneficiary would have "broad powers" to direct and manage "the departments of the company," establish departmental goals and policies, negotiate with potential clients, and establish business relationships with aircraft parts suppliers. The Petitioner also provided a scheduled breakdown of the Beneficiary's proposed daily activities along with two other job descriptions where one includes a breakdown of job duties while the other focuses on the specific elements of the definition of "managerial capacity."

The proposed daily schedule indicates that the Beneficiary will spend 2 ¼ hours daily on meetings with "the management" and reviewing and assigning tasks to "the company's executives, managers, and subordinates." However, given the previously noted irregularities and inconsistencies, the Petitioner does not appear to have a management or executive staff with whom the Beneficiary could meet and confer. Despite the managerial position titles of the two employees in the Beneficiary's proposed department, neither had any subordinates to oversee and thus neither can be deemed to have held a supervisory position at the time of filing. The daily schedule also indicates that the Beneficiary would allocate an hour daily to verifying and controlling shipments and deliveries.

However, the Petitioner's proposed organizational chart indicates that the shipping function would be within the control of the vice president of sales, rather than the Beneficiary. More specifically, the organizational chart shows that the vice president of sales would oversee [redacted] who would oversee a shipping manager. Regardless of the previously noted irregularities regarding [redacted] claimed employment with the Petitioner, the record indicates that the Petitioner contracted [redacted] company to provide it with shipping services, which, according to the organizational chart, would fall within the purview of the vice president of sales, not that of the Beneficiary. It is therefore unclear why the Beneficiary would allocate any time at all to shipment-related issues.

Furthermore, the daily schedule indicates that the Beneficiary would spend several hours of his day performing administrative and operational tasks, such as drafting memos, bank letters, and contracts, reviewing invoices and shipping documents, negotiating with clients, vendors, and shipping companies, and conducting market research through communications with aircraft dealers and distributors. As noted earlier, 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 capacity. *See, e.g.*, section 101(a)(44)(A) of the Act (requiring that one "primarily" perform the enumerated managerial duties); *Church Scientology Int'l*, 19 I&N Dec. at 604.

The Petitioner's second job description includes a separate job duty breakdown; however, a number of the listed job duties are unclear and do not readily fit the staffing structure depicted in the Petitioner's organizational chart. For instance, the Petitioner stated that the Beneficiary would outline an agenda "for subordinates in ongoing investment and/or business development projects." However, the Petitioner did not describe any specific investment or development projects, nor is it clear that an account manager or an operations manager – the Beneficiary's only two subordinates at the time of filing – would have the skillset to execute an investment or development project agenda.

The Petitioner also indicated that the Beneficiary would take an active role in developing and controlling investment and business development programs. However, it did not describe any such programs within the specific scope of an operation that buys and sells aircraft parts. Further, as in the Beneficiary's daily schedule of activities, the job description indicates that the Beneficiary would be responsible for functions that are not readily deemed as managerial, including negotiating with potential and existing clients and with suppliers and vendors, coordinating with shipping companies and distributors, identifying potential clients, seeking out "promising types of aircrafts" and "salvage aircrafts," and monitoring receipt and execution of client orders. As the job duty breakdown did not allocate time constraints to the listed activities, it is unclear how much time the Beneficiary would spend carrying out the operational and administrative functions of his department.

Although the Petitioner provided a third job description outlining the statutory elements of "managerial capacity," this job description does not provide further insight as to the Beneficiary's specific job duties within the scope of the operation. Rather, the Petitioner broadly focuses on the Beneficiary's discretionary authority with respect to policies and "upper-level managerial employees," his direction of "the main operations of the company," and his placement within the Petitioner's organizational hierarchy. We note, however, that 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).

In response to the Director's RFE, the Petitioner provided another job description that integrates the Beneficiary's proposed daily schedule of activities and job duty breakdown, both of which we addressed in our discussion above. The new job description does not adequately address the deficiencies noted in our discussion above. For instance, in referencing the Beneficiary's time spent in daily agenda meetings, the Petitioner continues to cite to all the positions within the Beneficiary's department, despite the fact that the HR department was devoid of employees at the time of filing and the assistant operations manager position was also vacant. Likewise, the Petitioner continues to refer to "the company's executives" and the Beneficiary's oversight of supervisory, professional, and managerial employees," even though none of his claimed subordinates has subordinates of his or her own and no evidence was provided to show that either the operations manager or the accounting manager is a professional employee.[2]

Further, the Petitioner provided additional information about the Beneficiary's involvement with shipping activities; however, it did not explain why the Beneficiary would dedicate five hours weekly to an activity that is supposed to be within the purview of the vice president of sales and his claimed subordinate staff. The Petitioner also continued to make vague references to "investment programs" and "business development" programs without identifying any such programs or explaining their significance within the scope of the Petitioner's specific type of business activity. Although the Petitioner restated that the Beneficiary would use his discretionary authority to identify potential clients, dealers, distributors, and suppliers and search for salvageable aircraft parts, this element alone is insufficient to establish that the actual duties would be primarily managerial in nature, particularly in light of the deficiencies described above. Whether the Beneficiary is a managerial employee turns on whether the Petitioner has sustained its burden of proving that his duties are "primarily" managerial. *See* section 101(a)(44)(A) of the Act.

Lastly, the Petitioner provided an evaluation letter from an associate dean at the [redacted] However, the expert opinion does not establish that the Director's decision was based on an incorrect application of law or USCIS policy. The letter states an opinion based on scholastic documents outside of the record and it is not based on a review of applicable immigration statutes and regulations. For example, the letter paraphrases the statutory definition of managerial capacity pointing to the Beneficiary's hiring, firing, and supervision of personnel, but it does not apply these

[2] 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 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." Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that he or she is employed in a professional capacity.

statutory elements or assess the Beneficiary's job duty breakdown within the scope of the organization as it existed at the time of filing. The textbook or common understanding of business terms will not supersede the statutory definitions; the applicable definition of manager is contained in the statute at section 101(a)(44)(A) of the Act.

We may, in our discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron Int'l*, 19 I&N Dec. 791 (Comm'r 1988).

On appeal, the Petitioner focuses on the Beneficiary's placement within the organizational hierarchy and asserts that he is "part of the senior management tier"; it also points to his discretionary authority over financial and business matters and resubmits previously submitted job descriptions and work schedules reiterating that the Beneficiary will be employed in a managerial capacity. However, the Petitioner does not offer further evidence or information that adequately addresses the above noted deficiencies and establishes that the Beneficiary would primarily perform job duties in a managerial capacity.

III. FOREIGN EMPLOYMENT

Finally, we find that the Petitioner has not overcome the adverse evidence that we addressed in our recently issued NOID/RFE where we pointed to inconsistencies regarding the Beneficiary's claimed employment with , the Petitioner's Russian affiliate, since October 2010. Namely, we notified the Petitioner that U.S. Department of State records show that when the Beneficiary applied for a nonimmigrant visa (NIV) in 2012, 2013, and 2014, he did not claim to have been employed by either at the time of or prior to filing these NIVs. Rather, he claimed as his "present" employer. We further noted that the Beneficiary filed three additional NIVs at various times in 2017 and that in each NIV he identified as his prior employer and stated that his employment with did not commence until after his employment with ended in January 2015. Although we acknowledged that the Beneficiary's résumé shows a period of overlapping employment by both entities, we asked the Petitioner to explain the logistics of the overlap given that the entities are physically 500 miles apart.

In response, the Petitioner maintains its claim regarding the overlapping employment and states that opened a branch office that was located only 24 miles from thereby allowing the Beneficiary to hold positions simultaneously with both entities. The Petitioner further states that the virtual NIV application format precluded an applicant from being able to claim simultaneous employment with multiple employers.

Although the Petitioner provided plausible explanations to address the inconsistencies we noted in our NOID/RFE, it did not provide any contemporaneous evidence, such as payroll summaries or state issued tax documents, verifying the Beneficiary's claimed employment with

The Petitioner's explanations do not constitute independent, objective evidence and therefore they are not sufficient to resolve the above noted inconsistencies. *See Ho*, 19 I&N Dec. at 591-92. As a result of these unresolved inconsistencies, we find that the Petitioner has not established that the Beneficiary was employed abroad for one year during the three years that preceded the filing of this petition.

IV. 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 or that he meets the foreign employment requirement. The appeal will be dismissed for these reasons.

ORDER: The appeal is dismissed.

Cite as *Matter of S-A-, LLC*, ID# 1363329 (AAO Feb. 22, 2019)