U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-F-S- LLC

DATE: FEB. 27, 2019

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a housekeeping service, seeks to temporarily employ the Beneficiary as its president under the L-1A nonimmigrant classification for intracompany transferees. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The 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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that it will employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred by deviating from binding prior practice.

Upon *de novo* review, 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. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity. The Petitioner asserts that the Beneficiary's role would be predominantly managerial, and therefore we need not discuss the requirements for 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). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

When examining the managerial or executive capacity of a given beneficiary, we will look 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). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Duties

The Petitioner asserted that the Beneficiary would spend 90% of her time performing managerial duties. The Petitioner submitted a two-page job description, divided into the following major categories and showing the approximate percentage of time to be devoted to each responsibility:

- 10% — Review strategic plan related to operational activities.
- 15% — Advise US setup on long term financial plans.
- 10% — Recommendation on location for expansion of business.
- 5% — Drive various initiative[s] for all departments to encourage them to contribute proactively to achieve operational excellence.
- 25% — Advise managers in solving issues.

- 10% — Make various business policies that help company to grow in proper direction, including proper flow of information at all level[s] of organization, transparent business organization structure.
- 10% — Conduct regular meetings with respective departments to set the new sales targets, services and budgetary controls.
- 10% — Advise company to make specific operational budget to hire best talent with excellent skill.
- 5% — Recommending promotions and assignment of functions to suit the dynamic market condition.

The Director found that the Beneficiary "will be engaged primarily in . . . non-managerial, operations tasks." On appeal, the Petitioner asserts that it provided a job description showing that the Beneficiary's intended position meets every element of the statutory definition of "managerial capacity."

Although the job description is over two pages long, many of the individual items describe goals or principles rather than specific tasks that the president would perform. Examples include:

> Use expertise from management employment abroad to create a culture of productivity and resourcefulness for all staff.
>
> . . . [M]anage labor cost for the operation.
>
> Foster an environment of employee empowerment . . . .
>
> Create healthy competitiveness among the team players . . . .
>
> Have good time-management skills and [be] able to prioritize tasks in a logical manner.

The Beneficiary would spend 25% of her time "[a]dvis[ing] managers in solving issues," but some of the items within that category are responsibilities of lower-level employees. For example:

> Janitorial operations managers need to know how to use the tools and equipment needed for the job . . . .
>
> Managers must ensure that cleaning crews use the proper protective gear . . . .

A list of the responsibilities of subordinates does not explain what the Beneficiary herself would do with 25% of her working time. That same category indicated that the Beneficiary should "[h]ave good time-management skills," but time-management skills are a general aptitude rather than a defined activity that takes up part of the Beneficiary's time.

Other items redundantly appear in more than one category, such as organizing meetings and creating employee incentives.

Furthermore, the Petitioner has not shown that the scope of the organization would demand the level of managerial attention set forth in the job description. We will address this issue in more detail below.

For the reasons set forth above, the Petitioner has not shown that the Beneficiary's duties as president would be primarily managerial.

B. Staffing

The Petitioner's initial organizational chart showed the following hierarchy:

- Chairman and Chief Executive Officer
- President [the Beneficiary]
- General Manager [on extended leave of absence]
- Operation Manager
- The chart showed no titles for the workers on the lowest level of the chart

The Petitioner indicated that it had only three employees at the time of filing (one operation manager and two lower-level workers without titles), with the other workers paid as contractors.

In response to a request for evidence, the Petitioner indicated that the company had added an office manager and two more operation managers. The Petitioner must establish eligibility at the time of filing, and continuing through adjudication. *See* 8 C.F.R. § 103.2(b)(1). Therefore, subsequent staff changes cannot establish eligibility if the Petitioner did not already meet all eligibility requirements at the time of filing. The Petitioner acknowledged this requirement, stating: "Notwithstanding the restructuring and addition of managers, as of the time we submitted our petition, the management structure and personnel existed to demonstrate that the President will be able to devote her full-time efforts to managing the organization."

In the denial notice, the Director acknowledged that several of the Beneficiary's subordinates have titles that include the word "manager," but the Director found that their actual duties did not appear to pertain to managers. The Director also found that the Petitioner had not shown that the Beneficiary would control the work of professionals or supervisors. The Director concluded that the Petitioner had not shown that the company's staff would relieve the Beneficiary from performing primarily non-qualifying tasks.

On appeal, the Petitioner asserts that the Beneficiary need not supervise professionals, because she will control the work of supervisors and managers. The Petitioner states that it "has few employees but numerous contractors," and has "provided probative evidence in the forms of organizational

diagrams, subordinate job descriptions, pay records, and purchase contract for expanded business operations." We will discuss these elements below.

The Petitioner cites *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), to support the proposition that a company with few employees can still support a managerial position so long as other workers are available to relieve a given beneficiary from primarily performing non-qualifying duties. Nevertheless, the burden is on the Petitioner to establish that these workers are available, and what they do. The Petitioner does not diminish or meet this burden simply by asserting it relies on contractors instead of employees.

The lowest level of the initial organizational chart showed 23 names without titles. Below most of the names were notations such as "+ 3 Peoples" (*sic*); the Petitioner did not explain why the chart identified only some of these individuals by name. Adding together the names and the adjacent figures, the lowest level of the organizational chart showed 66 workers.

The record does not support the Petitioner's claim to use the services of more than 60 contractors. The Petitioner submitted 22 IRS Forms 1099-MISC, Miscellaneous Income statements for 2016. These 22 forms account for only a third of the staff claimed on the organizational chart. Some, but not all, of the names on those forms match names on the organizational chart. The Petitioner submitted only two IRS Forms 1099-MISC for 2017 (in order to demonstrate that two claimed operation managers chose to be paid as contractors rather than employees).

Furthermore, in 2016, only one documented contractor received an amount compatible with year-round, full-time work ($29,345). The other 21 received less than $14,000 each, with four receiving less than $1000 each. The two IRS Forms 1099-MISC for 2017 showed higher salaries (more than $40,000 each), but this does not tell us what any other employee or contractor earned that year.

The Petitioner did not submit contracts, agreements, or other documentation to show what services the contractors performed for the Petitioner. They may have performed janitorial and cleaning services, but the burden is on the Petitioner to show it. There is no presumption that the contractors performed the company's operational functions, or that the operation managers had supervisory authority over those contractors.

The Petitioner submitted purported job descriptions for the general manager, office manager, and operation manager positions. These job descriptions, however, appear to have been copied from one or more outside sources. The general manager's job description contains several references to property management. For example, it states that the general manager "[m]anages the operations of the buildings" and "the property office," and it mentions "lease ups of new and existing buildings," "unit tours," "turnover of vacant units," and a "Property Supervisor" who does not appear on the Petitioner's organizational chart. Therefore, we cannot give this job description any weight as an accurate reflection of the general manager's true duties, and we cannot conclude that the Petitioner relied on this job description in good faith with full knowledge of its contents. (The job description did, however, include some references to the name of the company, indicating that the Petitioner or

someone acting on the Petitioner's behalf customized the company's name but not basic details about the nature of the Petitioner's business.)

When the Petitioner submits one job description that clearly does not apply to the job it purports to describe, we will not presume the accuracy or suitability of the other job descriptions. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted). Because the Petitioner bears the burden of proof, it is the Petitioner's responsibility to show that the other job descriptions are more accurate and reliable than the one described above. At best, they are generalized descriptions of the type of position shown, which may or may not deviate from the actual tasks performed by the specific individuals at the petitioning company.

Beyond the demonstrably inapplicable duties attributed to the general manager, the office manager's duties, as described, are largely administrative and clerical rather than those of a manager. The operation manager's job description refers to "employee attendance" although the operation managers have no subordinate employees, and indicates that each operation manager "[m]ust be able to strip/wax floors, clean carpet or [perform] any janitorial tasks if needed."

Although not mentioned in the initial submission in November 2017, the Petitioner later stated that it acquired another cleaning company in June 2017. Only one of the other company's 20 identified personnel began working for the Petitioner. Therefore, the record does not show that this acquisition had any significant effect on the scope of the Petitioner's operations. The revised organizational chart shows fewer total personnel than the initial version.

The record demonstrates that the Petitioner provides residential and office cleaning services, as claimed, but the record does not support key assertions regarding the size of the company or the responsibilities of the Beneficiary and her immediate subordinates. Therefore, the Petitioner has not established that the scope and complexity of the organization warrants managerial oversight as claimed.

III. CONCLUSION

The appeal will be dismissed for the above stated reason. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-F-S- LLC*, ID# 1933860 (AAO Feb. 27, 2019)