U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O- LLC

DATE: JAN. 3, 2019

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an importer and distributor of quartz slabs, seeks to continue the Beneficiary's employment as its business development manager under the L-1A nonimmigrant classification for intracompany transferees.[1] *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 Vermont Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial capacity under an extended petition.

On appeal, the Petitioner contends that the Director did not properly consider the evidence before her and applied a standard of proof that is greater than the preponderance of the evidence standard.

Upon *de novo* review, we find that the Petitioner has not overcome the basis for denial. 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 managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). 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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period October 6, 2016, until October 7, 2017. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation one year within the date of approval of the petition to support an executive or managerial position.

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

II. MANAGERIAL CAPACITY IN THE UNITED STATES

The Petitioner claims that the Beneficiary would be employed in a managerial capacity. Therefore, we will limit our analysis to address this claim and will not discuss whether the proposed position falls within the definition of 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.

When examining the managerial capacity of a given beneficiary, we review 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 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, its staffing levels, and its organizational structure.

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 one employee – the Beneficiary – at the time this petition was filed in October 2017. In support of the petition, the Petitioner provided a September 2016 organizational

chart depicting the Beneficiary at the top of the hierarchy overseeing an outsourced accounting department. The Petitioner also provided a business plan, which included the company's 3-year projected personnel expenses; the plan projected the Beneficiary as the Petitioner's only payroll expense for that 3-year period. Although the Petitioner projected an additional annual expense of $400 in "professional fees" and $6000 in "supporting service fee[s]," it did not specify what either of these fee categories would entail and thus it does not appear that either category was intended to account for additional personnel who would support the Beneficiary in his proposed position.

In a December 2017 request for evidence (RFE) the Petitioner was asked to specify whether the Beneficiary would assume the role of a personnel or a function manager. The Director observed that the Petitioner's employee earnings record shows the Beneficiary as its only employee and asked the Petitioner to provide an updated organizational chart showing its staffing hierarchy along with employee job descriptions and evidence of wages paid.

In response, the Petitioner provided a job offer letter from February 2018, two months after the RFE was issued; the letter showed that the Petitioner was looking to fill the position of sales manager in March 2018. The Petitioner also provided an organizational chart for 2018 showing the Beneficiary's proposed position at the top of the hierarchy, overseeing an administrative assistant, a sales manager, and an accountant. The evidence did not show that the Petitioner employed anyone but the Beneficiary or hired contractors to provide accounting, sales, or logistics services at the time this petition was filed.

In the denial decision, the Director acknowledged the Petitioner's submission of an organizational chart, which showed an outsourced accounting department. However, the Director found that the Petitioner did not provide evidence explaining how its staffing structure can support the Beneficiary and relieve him from having to carry out the organization's non-managerial activities. Although the Director also acknowledged the February 2018 job offer letter, she correctly observed that the job offer was made and accepted after this petition was filed and thus the new employee would not be considered in determining the Petitioner's eligibility as of the date of filing.

On appeal, the Petitioner restates the Beneficiary's job duties and asserts that the Beneficiary has the necessary managerial experience to carry out those duties. It claims that "any operation [*sic*] and administrative tasks completed by the Beneficiary . . . are purely incidental to the position" and that the previously submitted organizational chart and "Service Agreement" establish that the Beneficiary would be supported by an administrative assistant and an accountant. However, a petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Here, the Petitioner provided two organizational charts with no evidence corroborating the staffing structures depicted therein. Further, as the Director correctly pointed out, 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). To the extent that

one of the charts is dated 2018, it does not depict the Petitioner's staffing structure as of October 2017 when this petition was filed and therefore it cannot be used to establish that the Petitioner was eligible at the time of filing. The Petitioner also refers to "the Service Agreement" and claims that "the Beneficiary is supported by an Administrative Assistant and outside financial and accounting matters are supported by an Accountant and matters concerning payroll and benefits are handled by a payroll service." However, "the Service Agreement" to which the Petitioner references is a lease in which the landlord agreed to provide utility usage and phone answering services as part of the agreement. The record also contains a December 2017 email from a payroll service, and a $75 invoice for accounting services in January 2018. However, neither the email nor the invoice establishes that the Petitioner contracted a payroll or an accounting service as of the date this petition was filed.

The Petitioner, did not, however explain how it would relieve the Beneficiary from having to carry out other daily operational functions, such as selling and marketing quartz slabs, issuing and paying invoices for product sales and purchases, and arranging for product shipment and delivery. Merely establishing that the Beneficiary would be relieved from having to answer telephone calls is not sufficient to establish that he would be relieved from these various non-managerial tasks that are critical to its daily 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 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 adequate supporting evidence, we cannot conclude that the Beneficiary would allocate his time primarily to tasks of a managerial nature.

On appeal, the Petitioner cites *Matter of Z-A-*, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016), in support of the contention that the Beneficiary will assume the role of a function manager; it refers to a previously submitted organizational chart and "evidence of the Beneficiary's attempts to hire additional staff." However, as discussed above, the Beneficiary was unable to expand his support staff beyond a single administrative assistant as of the date of filing. Claiming that the Beneficiary will manage the Petitioner's business development function is not sufficient without evidence showing that the Petitioner has the organizational capability to relieve the Beneficiary from having to primarily perform the underlying non-managerial duties of that function.

Furthermore, the regulations that apply to an extension of a "new office" petition require that we examine the organizational structure and staffing levels of the Petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. If a business does not have the necessary staffing after one year to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible for an extension. Here, the Petitioner's original business plan indicates that the Petitioner intended to operate with the Beneficiary as its only employee for the first three years of its operation. Although the Petitioner provided evidence showing that the Beneficiary attempted to hire an additional employee, that attempt did not result in anyone being hired as of the date this petition was filed.

While it is likely that the Beneficiary, as the Petitioner's only employee, will exercise discretion over the day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, these factors alone are not sufficient to establish that the Beneficiary would allocate his time primarily to managerial job duties. The Petitioner must provide evidence showing that it has the ability to relieve the Beneficiary from having to spend his time primarily carrying out the organization's operational functions. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner argues on appeal that it has provided sufficient evidence and that it met the preponderance of the evidence standard of proof. We disagree and find that the Petitioner has not established that its limited staffing composition at the time of filing would be sufficient to support the Beneficiary in a function manager role where his duties would be to primarily manage, rather than perform the underlying duties of, the business development function.

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).

As noted earlier, the Petitioner claims that the Beneficiary will manage the business development function, which is critical to the U.S. operation. 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). Although a function manager is not required to directly supervise or manage subordinate managerial, supervisory, or professional employees, the Petitioner must still establish that it is able to relieve the Beneficiary from significant involvement in the day-to-day activities of the function he is claimed to manage.

In this matter, despite raising the function manager claim, the Petitioner has not adequately described the Beneficiary's job duties or provided evidence that he would primarily perform duties that are consistent with managing the business development function. For instance, the Petitioner repeatedly uses terms like "direct" and "oversee" in listing the Beneficiary's job duties; these terms necessarily imply that someone other than the Beneficiary would perform the underlying work that he would direct and oversee. The Petitioner also claims that the Beneficiary would "[c]onsult with product development personnel" in carrying out his job duties. However, as discussed earlier, the Petitioner has not provided evidence to establish that it has either in-house employees or outsourced contractors to whom the Beneficiary can delegate the operational tasks associated with the business development function he is tasked with managing. Thus, despite claiming that Beneficiary's duties would be limited to primarily directing and overseeing, rather than actively performing, the duties of his function, the Petitioner has not laid out a roadmap for how it would relieve the Beneficiary from having to carry out the underlying duties of the business development function when it had no employees, aside from the Beneficiary, at the time this petition was filed. If USCIS finds reason to believe that an assertion stated in the petition is not true, it may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop. Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS.* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In whole, the Petitioner provided a job description that is inconsistent with its staffing composition and organizational complexity at the time this petition was filed. In light of the evidentiary deficiencies discussed above, the Petitioner has not established by the preponderance of the evidence that the Beneficiary would manage an essential function.

III. FOREIGN EMPLOYMENT

Further, while not addressed in the Director's decision, we note that when asked about the Beneficiary's employment abroad in the petition form, the Petitioner stated that the Beneficiary has worked for its claimed foreign affiliate, [redacted] from November 2007 to October 2017 without interruption. However, U.S. Department of State records show that the Beneficiary previously filed three nonimmigrant visa applications that are inconsistent with the Petitioner's current claim regarding the Beneficiary's foreign employment. At the time of the first filing in October 2016, the Beneficiary claimed no prior employment and named [redacted] as his present employer; at the time of his second filing in May 2017, the Beneficiary stated that he was employed at [redacted] Italy from January 2007 through December 2010; and in his latest application, which was filed in November 2018, the Beneficiary claimed no prior employment and stated that he has been employed as the CEO of [redacted] since February 2011. These dates and places of employment are inconsistent with the Petitioner's current claim.

While we are not making an adverse finding based on the information obtained from the U.S. Department of State, the Petitioner may need to address the Beneficiary's statements regarding his employment abroad in any future petition filed by the Petitioner on his behalf.

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 under an extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of O- LLC*, ID# 1933910 (AAO Jan. 3, 2019)