U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-N-&S- INC.

DATE: JAN. 7, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which operates an auto body repair shop and sells automotive security products, seeks to continue the Beneficiary's temporary employment as its president[1] under the L-1A nonimmigrant classification for intracompany transferees.[2] 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 record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner contends that the Director's decision was based on "far-fetched reasoning" and asserts that it submitted sufficient evidence to establish that the Beneficiary will be employed in a managerial capacity.

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.*

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[1] The Petitioner also refers to the Beneficiary's position title as "General Manager."

[2] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period January 1, 2017, until December 30, 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). This evidence must demonstrate that the beneficiary will be employed in a managerial or executive capacity, as defined at sections 101(a)(44)(A) and (B) of the Act, under the extended petition.

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The sole issue to be addressed is whether the Petitioner established that the Beneficiary will be working in a managerial capacity. The Petitioner did not claim that the Beneficiary would be employed in an executive capacity; therefore, our analysis will address only the Petitioner's claim that the Beneficiary's proposed position would be in a managerial 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 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. *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. Duties

Based on the 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 at 1533.

In a statement submitted at the time of filing in December 2017, the Petitioner submitted a statement of the duties the Beneficiary performed during the previous year, along with a list of duties he would perform under an extended petition. The Beneficiary's proposed duties included the following:

1. Continuing to create corporate culture and building the senior management team; (10%)
2. Adjusting the next short-term plan and long-term plan, based on the business operations and its financial status of the previous year; (5%)
3. Implementing strategic plans and corporate policies approved by the board; (15%)
4. Reporting to the board of directors and shareholders regarding the substantial business decision; (10%)
5. Building and developing a sales division for the company and exercising discretionary authority on the hiring and firing of the sales manager; (20%)
6. Supervising and overseeing the making and implementing of monthly and annual budget; (15%)
7. Allocating capitals to the company's priorities; (10%)
8. Effectively managing the human resources of the company according to authorized personnel policies and procedures that fully conform to current laws and regulations. (15%)

This description of duties was too broad to establish what the Beneficiary will be doing on a day-to-day basis within the context of the Petitioner's auto body repair shop and security products business. The Petitioner did not provide examples of specific short- and long-term plans the Beneficiary was expected to implement, the policies and strategic plans approved by the board, or the company priorities expected to receive capitalization under the extended petition. Further, the Petitioner indicated that the company already had an established a sales division during the previous year, so it is unclear why the Beneficiary would need to establish this division in the future. The description of the Beneficiary's duties was also confusing as it referred to a "customer service manager" position and an "accounting division" that do not exist in the Petitioner's organizational structure.

Overall, the initial description did little more than establish that the Beneficiary occupies the senior role in the company; it did not provide the required detailed description of his specific daily tasks and was therefore insufficient to demonstrate how his duties would be primarily managerial in nature. 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 request for a more detailed description of the Beneficiary's duties and the amount of time he would allocate to specific tasks, the Petitioner submitted a lengthy "Letter of Explanation" which indicated that the Beneficiary would have the following areas of responsibility:

I. Preside the production and operation management of the company, organize personnel to implement Board of Directors' resolutions

II. Organize to implement the annual business plan and investment plan of the company, manage the financial affairs of the company
III. Formulate the establishment plan for internal management organization of the company
IV. Draw up the basic management system of the company
V. Organize to formulate bylaws of the company
VI. The request for personnel appointment and dismissal

Despite the fact that the Petitioner's statement was 13 pages long, the description was broad, repetitive, and lacked the requested details regarding the specific duties the Beneficiary performs on a regular and ongoing basis. Much of the description appears to have been copied from the description of job duties the Beneficiary performed abroad for the Petitioner's parent company, which has a significantly larger and more complex organization. Therefore, it contained few details relevant to the Petitioner's actual business operations.

For example, the Petitioner stated that the Beneficiary, while presiding over "production and operation management," will be responsible to "boost the marketization, scientific and modernization of the company management," "organize to implement the company development strategy," "actively mobilize the creativity and initiative of business assistants," and "organize all strengths of the company," but these are not discrete job duties that provide insight into what he actually does on a typical day.

The Petitioner stated that this area of responsibility also requires the Beneficiary to "coordinate the relationships with relevant automobile manufacturers, suppliers of parts, taxation bureau, transport authority," and noted that he signs and issues all daily administrative and business documents. Without more detail, we cannot determine that these are managerial, rather than routine operational and administrative duties. The Petitioner does not have an administrative employee or department and none of the Beneficiary's subordinates are claimed to handle administrative matters or deal with suppliers. Similarly, the Petitioner stated that the Beneficiary's production and operation management duties require him to directly supervise salespersons who, as discussed further below are non-professional employees, and "marketing personnel," which the Petitioner does not otherwise claim to have. Therefore, these duties are not clearly classifiable as managerial functions.

The Petitioner stated that the Beneficiary's responsibility for organizing the annual business and investment plan and managing the financial affairs of the company involves directly managing the "Finance Department, and General Manager of Finance Department." The Petitioner's organizational chart does not include a finance department, a general manager for a finance department, or any subordinate managers at all. The Beneficiary's responsibility to "draw up the basic management system of the company," contains a reference to the company's "Human Resource Department," which also does not appear on the chart as part of the Petitioner's organizational structure. This duty also refers to an employee labor union and "Congress of Workers," an "Assistant," department managers, and "sub-departments," which do not appear to exist within the petitioning company. Similarly, the Petitioner indicates that the Beneficiary's personnel responsibilities include the ability to appoint and dismiss the "Deputy Manager," and

"Financial Director," positions that are not found on the Petitioner's organizational chart. The Petitioner must resolve this these inconsistencies 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). Here, the Petitioner's frequent references to non-existent departments and subordinate staff throughout the Beneficiary's job description have not been adequately explained or resolved.

Overall, the lengthy description provided in response to the RFE has limited connection to the Petitioner's actual business activities as an auto body repair shop with two departments and five to six employees. It did not provide credible information regarding the Beneficiary's actual tasks and was lacking in probative value because it contains several references to positions and departments that do not exist within the organization. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The Petitioner has not provided any detail or explanation of the Beneficiary's activities in the course of their daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros.*, 724 F. Supp. at 1108., *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Here, the Petitioner did not provide any concrete examples of policies, strategies, or goals the Beneficiary would develop and implement in support of its claim that he would spend his time primarily focused on higher-level planning and decision-making responsibilities associated with the company's overall development. The fact that the Beneficiary will manage the business as its senior employee does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section 101(a)(44)(A) of the Act. Even though the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, a broad overview of his responsibilities is insufficient to establish that his actual duties would be primarily managerial in nature as of the date of filing, especially when that broad overview contains information that conflicts with the company's actual organizational structure.

B. Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive 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 stated that it had six employees as of the date of filing on December 11, 2017. 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).

The Petitioner did not provide an organizational chart at the time of filing. In response to the RFE, it stated that it employs two sales employees in its sales department and a part-time worker); and four employees in its "technical engineering department" and . Based on the Petitioner's state quarterly wage reports, we note that the company had six employees in November and December 2017, but only four employees by the end of the first

quarter of 2018. It appears that [redacted] was one of the employees who left the company, as he received only $640 in wages in the first quarter of 2018. Further, the record does not contain evidence of wages paid to [redacted] in the last two quarters of 2017 or the first quarter of 2018. This individual received an IRS Form W-2 in 2016 and was one of three employees paid in the second quarter of 2017, but we cannot determine that he or she worked for the Petitioner at the time of filing.

The Petitioner indicated that both members of the sales department are "sales" employees, hold bachelor's degrees, and are responsible for product sales and promotion. It did not provide job titles for the employees in the technical engineering department but stated that all employees have a "college degree." The Petitioner stated that all four employees provide installation and commissioning of company products, while two also provide product training, and the other two (including [redacted] whose ongoing employment was not documented in the record) also perform auto repairs.

The Petitioner's lease indicates that it is authorized to use its business premises solely for the operation of an auto body and repair shop, and the record shows that it does business as [redacted] The Petitioner also appears to sell and install automotive safety and security products such as in-vehicle cameras and video recorders.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act. The Petitioner does not claim that the Beneficiary will act as a function manager. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," 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." *Id.* If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

In this matter, the Petitioner has not established that the Beneficiary will be primarily acting as a personnel manager. The Petitioner initially indicated that the Beneficiary will allocate 15% of his time to human resources functions and would hire additional staff in the sales department, but the remainder of his duties were described in abstract terms and did not convey how much time he would spend on personnel-related activities. Nevertheless, even if the Petitioner established that the Beneficiary's duties are primarily supervisory in nature, it would need to demonstrate that he would oversee subordinate supervisory, professional, or managerial employees.

The record does not establish that any of the Beneficiary's subordinates hold supervisory or managerial positions despite the Petitioner's claim on appeal that he will supervise managers. Both employees in the sales department were claimed to be simply "sales" employees and the Petitioner did not distinguish either employee as a supervisor or manager of the department or assign managerial or supervisory duties to either worker. As noted, the latest available payroll information

indicates that the staffing of the sales department was reduced to one employee while the petition was pending. Similarly, the Petitioner did not assign job titles or provide evidence of a tiered hierarchy within its "technical engineering" department. None of the employees are claimed to perform supervisory or managerial duties. Rather, the record shows that the Beneficiary directly supervises the lower level sales and technical staff. While the Beneficiary's job description indicates that he supervises managerial staff such as a deputy manager, financial director, human resources director, and other department managers, the Petitioner did not establish that these positions exist within its organization.

The Petitioner has neither claimed nor established that the Beneficiary's direct subordinates are professionals. To determine 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 an employee is employed in a professional capacity. The Petitioner claims that both sales employees have a bachelor's degree while its technical staff members all have a "college" degree. The very brief descriptions provided for these positions would not support a finding that they hold professional positions. Further, the Petitioner did not provide sufficient evidence that the subordinate staff actually have the listed degrees. As such, the record does not establish that the Beneficiary's subordinates are managerial, supervisory, or professional employees or that he will primarily perform the duties of a personnel manager. Rather, the record shows that his personnel-related duties are those of a first-line supervisor of non-professional personnel.

Further, the Petitioner has not provided sufficient evidence to establish that the Beneficiary's subordinates are able to relieve him from significant involvement in the non-managerial day-to-day operations of the business. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, we must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The Petitioner operates its auto body shop with one to two sales employees and three to four technical staff. While the available staff may be sufficient to handle a significant portion of the sales and automotive work, the Petitioner has not indicated who, other than the Beneficiary, is available to perform routine administrative and operational functions necessary to operate the business. As noted the Petitioner indicates that the Beneficiary signs and issues all daily administrative and business documents, deals with suppliers, and he is likely responsible for sourcing and purchasing parts and the products the Petitioner sells, as the Petitioner has not assigned these duties to his subordinates.

The record also reflects fairly significant staff turnover and periodic staff shortages which would reasonably require the Beneficiary to at least intermittently perform the duties of the subordinate staff. The Beneficiary's job description indicates that he delegates certain functions to various subordinate managers and departments, but those claims are not persuasive since the listed subordinate managerial positions and departments do not exist within the company.

Based on the nature of the company, the Petitioner has not shown that it requires the Beneficiary to primarily perform the higher level managerial functions attributed to him. Rather, it appears that the Beneficiary would more likely than not be required to perform a variety of non-managerial duties necessary for the day-to-day operations of the company. Due to the deficiencies in the submitted evidence, the Petitioner has not met its burden to establish what proportion of the Beneficiary's duties would be managerial in nature, and what proportion would be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Accordingly, it has not established that he would be employed in a managerial capacity.

III. CONCLUSION

The appeal will be dismissed because the Petitioner did not establish that it will employ the Beneficiary in a managerial capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of L-N-&S- Inc.*, ID# 1925237 (AAO Jan. 7, 2019)