U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-S-

DATE: JAN. 7, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a manufacturer and trader of dunnage air bags, seeks to temporarily employ the Beneficiary as "the head of sales and president" of its new office[1] 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 California Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary is employed abroad in a managerial or executive capacity. Further, the Director determined that the Petitioner did not demonstrate that the Beneficiary would be employed in a managerial or executive capacity in the United States within one year.

On appeal, the Petitioner asserts that the Director issued an improper blanket request for evidence (RFE) and contends that it was prejudiced when provided with only two weeks to respond to the RFE.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, 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 term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

The petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

II. MANAGERIAL CAPACITY WITH THE FOREIGN EMPLOYER

We will first analyze whether the Petitioner established that the Beneficiary is employed abroad in a managerial capacity. The Petitioner does not claim that the Beneficiary is employed abroad in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary has been employed abroad 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 foreign managerial capacity of a given beneficiary, we will 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 foreign employer's organizational structure, the duties of a beneficiary's foreign subordinates, the presence of foreign employees to relieve a beneficiary from performing operational duties, the nature of the foreign business, and any other factors that will contribute to understanding a beneficiary's actual duties and role abroad. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the foreign employer'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 performs 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 is *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the foreign employer's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner, the Beneficiary's foreign employer based primarily in Hong Kong, stated that it "is an international company engaged in the business of manufacturing and trading of dunnage air bags and other cargo securing items for the transportation business." The Petitioner indicated that the Beneficiary had been "engaged in managerial and marketing management duties" and that he was "assigned to several projects of importance." The Petitioner explained that the Beneficiary handled its European operations for the last three years as a sales manager, and that he had previously worked in a similar capacity for six years prior to the date the petition was filed. It also listed the following foreign duties for the Beneficiary, amongst others:

- sets targets, performance plans, and rigorous objective standards for the sales team,
- meets with sales staff to review weekly performance,
- delivers deep reviews for each sales team member,
- creates and checks quarterly commission reports,
- coaches individual sales members to improve sales performance,
- disciplines and reports underperforming sales persons,
- plans and implements training programs,
- presides over weekly sales team meetings,
- maintains a deep understanding of customer needs and monitors their preferences,
- resolves escalated customer issues and complaints,
- sets and adjusts pricing plans and discount rates,
- provides advanced negotiation expertise,
- makes sure that data in MOSS is kept up to date and ensures the information given online is correct and of recent status,
- creates monthly newsletters and manages advertising campaigns,
- develops marketing campaigns, including web presence and catalogue development, and
- handles social media, public relations efforts, and content marketing.

The Director later issued a request for evidence (RFE) indicating that the Beneficiary's foreign duty description lacked specificity and requested that the Petitioner submit a letter from the foreign employer describing his typical managerial duties and the percentage of time he spends on each task. In response, the Petitioner did not provide a comprehensive foreign duty description as requested, but submitted the Beneficiary's resume, which listed some of the following additional duties and accomplishments.

- establish the brand name [redacted] as a global Top 3 product,
- plan, budget and execute exhibitions and trade fairs worldwide, and
- head of sales and marketing teams in the [redacted] international group, the world larges [*sic*] manufacturer of cargo securing products.

On appeal, the Petitioner contends that the Director issued an overly burdensome blanket RFE and asserts that it was not provided with sufficient time to respond. We do not find these assertions convincing. First, the record reflects that the Director issued the RFE on May 29, 2018 and required that the Petitioner respond by August 24, 2018, a period of nearly three months. This appears to be more than sufficient time to respond to an RFE. In fact, the record reflects that the Petitioner responded to the RFE approximately two weeks later on June 13, 2018.

Further, we do not concur with the Petitioner's assertion that the Director's RFE was overly general or burdensome. The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). In addition, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). In order to establish eligibility, the Petitioner must demonstrate all the regulatory requirements, including establishing that the Beneficiary is employed in a managerial or executive capacity abroad. In support of the petition, the Petitioner submitted a general duty description that lacked detail; as such, the Director requested a more detailed foreign duty description describing the Beneficiary's typical managerial duties and the percentages of time he spends on these tasks. The Petitioner did not respond to this relevant request. Therefore, we see nothing improper about the Director's RFE.

The Petitioner has not submitted a sufficiently detailed duty description that describes the Beneficiary's day-to-day managerial-level duties abroad or credibly establishes that he devotes his time primarily to qualifying tasks. Specifics are clearly an important indication of whether a beneficiary's duties are primarily 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).

The Beneficiary's duty description includes several generic duties that could apply to any manager acting in any business or industry and they do not provide insight into the actual nature of his role abroad. The Petitioner provided insufficient examples and little supporting documentation to demonstrate the Beneficiary's performance of qualifying duties abroad, such as targets he set, performance plans he put in place, standards he implemented, or training programs he established. Likewise, the Petitioner did not adequately detail or document customer issues the Beneficiary resolved, pricing or discount plans he put in place, negotiations he conducted, advertising campaigns he managed, or marketing campaigns he developed. In addition, the Petitioner did not articulate or document sales strategies the Beneficiary created, plans he established to address performance gaps, or workshops and educational trainings he attended. The Petitioner claims that the Beneficiary oversees a team "of several strong top management professionals," but the record includes little supporting documentation to substantiate that he delegates duties to these claimed subordinates. This lack of detail is particularly noteworthy since the Petitioner indicates that the Beneficiary has been working for the foreign employer for approximately six years.

The Beneficiary's foreign duties also include several apparent non-qualifying tasks, such as resolving customer issues and complaints, reviewing data in "MOSS," creating a monthly

newsletter, handling social media, and monitoring sales orders from receiving until shipping. Whether the Beneficiary is a managerial employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See* sections 101(a)(44)(A) of the Act. Here, the Petitioner does not document what proportion of the Beneficiary's foreign duties are managerial functions and what proportion are non-qualifying. The Petitioner lists the Beneficiary's duties as including both managerial tasks and administrative or operational tasks, but does not quantify the time the Beneficiary spends on these different duties. This lack of documentation is important because several of the Beneficiary's daily tasks, as discussed above, do not fall directly under managerial duties as defined in the statute. For this reason, we cannot determine whether the Beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Even though the Beneficiary holds a senior position within the foreign employer, the fact that he manages or directs the business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a foreign position be "primarily" managerial in nature. *Id.* The Beneficiary may exercise discretion over the foreign employer's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making; however, the position descriptions alone are insufficient to establish that his actual duties abroad are primarily managerial in nature.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, the reasonable needs of the organization are taken into account in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

As discussed, the Petitioner stated in a support letter provided with the petition that the Beneficiary supervised "a team of strong top management professionals" and his duty description indicated that he oversaw sales staff. In the RFE, the Director noted that the Petitioner did not provide sufficient evidence to demonstrate the Beneficiary's subordinates and requested that it submit an organizational chart showing the Beneficiary place within the company, including his subordinates by name and job title along with their duties, education levels, and salaries. Again, we examine the foreign employer's organizational structure, the duties of a beneficiary's foreign subordinates, the presence of foreign employees to relieve a beneficiary from performing operational duties, the nature of the foreign business, and any other factors that will contribute to understanding a beneficiary's actual duties and role abroad. Therefore, the evidence and documentation requested by the Director with respect the foreign employer's organizational chart and the Beneficiary's subordinates was reasonable and probative to the Petitioner demonstrating his managerial or executive capacity abroad.

In response, the Petitioner provided a foreign organizational chart reflecting that the Beneficiary reported to the general manager of the foreign employer. The chart also indicated that the

Beneficiary oversees [redacted] in "Australia, U.A.E., UK, South Africa, USA, [and] the Netherlands," "International Sales" including three employees identified only as [redacted] and [redacted] and "Domestic Sales" consisting of two employees identified only by name.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act. 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*).

The Petitioner has not submitted sufficient evidence to establish that the Beneficiary oversees managerial or professional subordinates abroad as necessary to qualify him as a personnel manager. As discussed, the Director requested that the Petitioner submit a comprehensive organizational chart including the names and titles of the Beneficiary's subordinates along with their duties, educations, and salaries. However, the Petitioner did not submit this evidence to substantiate that the Beneficiary oversees subordinate managers and/or professionals. In fact, the submitted organizational chart includes no tiers of subordinates to establish that the Beneficiary manages subordinate supervisors, and the Petitioner has not submitted any evidence specific to the educations required for the positions subordinate to the Beneficiary or the bachelor's degrees, if any, held by his subordinates.[2] However, the Petitioner has submitted little evidence to substantiate the Beneficiary's place in the foreign organizational structure or his subordinates abroad. Therefore, the Petitioner has not established that the Beneficiary acts as a personnel manager abroad.

In the alternative, the Petitioner has not demonstrated that the Beneficiary acts as a function manager abroad. 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;

[2] 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."

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).

We note that the Petitioner does not expressly assert that the Beneficiary is employed as a function manager abroad; regardless, the submitted evidence does not sufficiently demonstrate that he is employed as a function manager. First, the Petitioner does not clearly describe the function the Beneficiary manages nor does not explain why his function is essential to the organization. In addition, as previously discussed, the Petitioner submitted a vague foreign duty description for the Beneficiary which includes non-qualifying operational duties, and it does not quantify the amount of time he devotes to managerial duties as opposed to non-qualifying tasks. As such, even if the Petitioner had clearly described and documented the Beneficiary's function, it also did not establish that the Beneficiary is primarily engaged in managing an essential function rather than performing it. Therefore, the Petitioner has not established that the Beneficiary qualifies as a function manager abroad.

For the foregoing reasons, the Petitioner has not established that the Beneficiary is employed in a managerial capacity abroad.

III. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The next issue we will address is whether the Petitioner established that the Beneficiary would be employed in a managerial capacity in the United States within one year of an approval of the petition. The Petitioner does not claim that the Beneficiary would be employed in an executive capacity in the United States; as such, we will only analyze whether he would be employed in a managerial capacity. In addition, because of the dispositive effect of the above finding of ineligibility; namely, our affirmation of the Director's conclusion with respect to the Beneficiary's asserted foreign managerial capacity, we will only briefly address the remaining issue pertaining to his proposed employment in the United States.

Upon review, we find that the Beneficiary's U.S. duty description is also overly vague as it does not effectively convey his day-to-day managerial duties within one year. The Beneficiary's job description includes several general duties that could apply to any manager acting in any business or industry; such duties do not provide insight into the actual nature of his role. The Petitioner provided insufficient specifics related to how the Beneficiary's day-to-day duties fit specifically within the company's first year business plans. For instance, the Petitioner provides few examples of the actions the Beneficiary would take during its first year of operation to assure that the business develops as necessary to support him in a managerial capacity within one year.

For instance, the Petitioner indicates that the Beneficiary would be tasked with setting up a local management team, finding and recruiting suitable candidates, starting advertising campaigns, creating local pricing, shipping, and freight cost plans, and developing a stable customer base relationship. However, the Petitioner submits little detail on the local management team the Beneficiary would establish, advertising campaigns he would launch, pricing, shipping, and freight cost plans he would establish, or customers he would target. Again, specifics are clearly an

important indication of whether a beneficiary's duties are primarily 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 the case of a new office petition, we also review the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial capacity. A petitioner has the burden to establish that it would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial in nature within one year of the petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed manager position is plausible based on a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

In a support letter submitted with the petition, the Petitioner stated that it intended "to hire…at least ten employees for our U.S. office within the next year, including one electrician/mechanic and [*sic*] service our production machinery, six to eight machine operators, forklift operator and warehouse clerk, [and] sales assistant." Again, similar to the Beneficiary's foreign role, the Petitioner submitted no organizational chart and no proposed duties, education levels, or salaries for these proposed employees, as requested by the Director. Without this evidence, the Petitioner has not demonstrated that the Beneficiary would oversee managerial and/or professional subordinates within one year. In fact, the asserted titles of its first year employees all appear to be operational level employees, not the required subordinate managers and/or professionals required to qualify the Beneficiary.

In addition, beyond vaguely stating it would hire the aforementioned employees during the first year, it did not clarify when during the first year it would hire them or how it would support their salaries within one year. The Petitioner also provided a vague business plan that does not sufficiently demonstrate it would support the Beneficiary in a managerial capacity within one year. For instance, the Petitioner stated that it would invest over $2 million in the new venture during the first year, but it provided little indication as to how it would spend this investment to successfully launch the business during first year and it submitted little supporting evidence to substantiate this investment.

For the above stated reasons, the Petitioner did not establish that the Beneficiary would act in a managerial capacity within the first year.

III. CONCLUSION

The appeal must be dismissed because the Petitioner has not established that Beneficiary is employed in a managerial capacity abroad or that he would be employed in a managerial capacity in the United States within one year.

ORDER: The appeal is dismissed.

Cite as *Matter of O-S-*, ID# 1982084 (AAO Jan. 7, 2019)