U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7052395

Date: JAN. 8, 2020

Appeal of Texas Service Center Decision

PETITION: Form I-129, Petition for L-1A Manager or Executive

The Petitioner intends to operate as a distributer of fragrances used in detergent, perfumes, and room fresheners. It seeks to temporarily employ the Beneficiary as marketing manager of its new office[1] under the L-1A nonimmigrant classification for intracompany transferees who are coming to be employed in the United States in a managerial or executive capacity. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the Texas Service Center denied the petition concluding that the Petitioner did not establish, as required, that: (1) it had secured sufficient business premises to house its operation; (2) the Beneficiary was employed abroad in a managerial or executive capacity; and (3) the new office would support the Beneficiary in a managerial or executive position within one year of approval of the instant petition. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we find that the Petitioner provided sufficient evidence showing that it had secured sufficient physical premises to house its new office as of the date this petition was filed and we will therefore withdraw that ground as a basis for denial. However, the Petitioner did not establish that the Beneficiary was employed abroad in a managerial or executive capacity. Therefore, we will dismiss the appeal and, because of the dispositive effect of this finding, we will reserve the remaining issue.

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. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Petitioner claims that the Beneficiary's employment abroad was in a managerial capacity. As the Petitioner does not claim that the Beneficiary was employed in an executive capacity, we will not address that issue and will limit our discussion to the Petitioner's claim that the Beneficiary was employed 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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Section 101(a)(44)(A)(ii) of the Act. 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*).

On the other hand, the term "function manager" applies generally when a beneficiary does not primarily 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).

A. Duties

In order to determine whether the Beneficiary's employment abroad was that of a function manager, we will first discuss the duties he performed during his period of employment with the foreign entity.

The actual duties themselves reveal the true nature of the employment. *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 a supporting cover letter the Petitioner stated that the Beneficiary has played a "critical role" in heading the marketing of the foreign entity's fragrance products and implementing company policies and objectives in the course of managing a "major function" at an "executive level." Although the Petitioner provided a job duty breakdown stating that the Beneficiary allocated 40% of his time to "marketing matters" and providing "marketing consultancy for market exportation," it did not specify which job duties are entailed in "marketing matters" or explain how providing marketing consulting services qualifies as a managerial, rather than an operational, task. Likewise, the Petitioner did not establish that networking and seeking out potential business partners, to which the Beneficiary is claimed to have allocated 20% of his time, qualifies as a managerial-level job duty. The Petitioner also stated that 30% of the Beneficiary's time was spent supervising exports and sales in the Asia-Pacific and African markets, but it did not explain how he supervises these functions. The Petitioner stated that the remaining 10% of the Beneficiary's time was allocated to negotiating contract terms and managing staff. Here too, however, the Petitioner did not specify the actual job duties involved in managing staff or establish that contract negotiation is a managerial job duty.

Although the Beneficiary need not allocate all of his time to managerial job duties, by statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. Sections 101(A)(44)(A) of the Act. In order to make a distinction between duties that are managerial and those that are not, the Petitioner must provide a job description that lists the Beneficiary's actual job duties. 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. *Id.*

In a request for evidence (RFE) the Director asked the Petitioner to provide a letter from an authorized representative of the foreign entity identifying the Beneficiary's typical managerial duties and the percentage of time he devoted to each duty. The Petitioner was asked to explain how the Beneficiary's position and job duties fit the statutory definition of managerial capacity and to provide evidence demonstrating that the Beneficiary managed an essential function and occupied a top-level position with respect to that function if claiming that the Beneficiary assumed a function manager role.

In a response letter, the Petitioner stated that the Beneficiary "directs and manages a critical component" of the foreign organization and identified the "critical component" as "all marketing matters including sales and exports within the Asia-Pacific and Africa." The Petitioner also provided a letter from the foreign entity's director who restated the original job duty breakdown and claimed that the Beneficiary has discretionary authority over "all marketing and sales aspects of the organization," including the sales and marketing staff, which consists of an assistant marketing manager and his two subordinate sales representatives. The letter focuses on the Beneficiary's "vast knowledge and experience" in marketing industrial fragrances and points to his "intimate experience" with the foreign entity's products, but it does not include a more detailed job duty breakdown or further describe the "critical component" the Beneficiary is said to manage.

In denying the petition, the Director found that the information offered in the Petitioner's supporting statement and subsequent RFE response was not sufficient to allow for an understanding of the

Beneficiary's actual tasks. The Director therefore determined that the Petitioner did not adequately demonstrate that the Beneficiary was employed abroad in a managerial capacity, as claimed.

On appeal, the Petitioner argues that the Director did not conduct a proper analysis of the evidence and points out that the Beneficiary manages the marketing and sales function, which is deemed "most critical" to the organization because it is responsible for 90% of the foreign entity's sales in Asia-Pacific and Africa. Although we find that the Petitioner has established that sales and marketing is a clearly defined activity that is essential to the organization, it has not clearly described the duties the Beneficiary performed in managing this essential function. Rather, the Petitioner provided a vague job description, which grouped together certain job duties, such as "marketing matters" and "marketing consultancy for market exportation" or staff management and contract negotiation, without indicating precisely how much time the Beneficiary allocated to each individual job duty. The Petitioner also did not establish that providing consulting services on the subject of market exportation should be deemed as a managerial task. Likewise, without further information, we do not find that seeking out potential business partners and engaging in contract negotiation can readily be deemed managerial-level job duties. 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).

Further, merely stating that the Beneficiary is responsible for "marketing matters" is insufficient, as it is unclear what constitutes "marketing matters" or which daily tasks the Beneficiary executed to meet his responsibility regarding "marketing matters." The Petitioner also highlights the Beneficiary's discretionary authority over "all marketing and sales aspects," including the company's marketing goals and policies as well as its sales and marketing staff. However, the Beneficiary's discretion over the company's day-to-day marketing operations and the requisite level of authority with respect to discretionary decision-making over the marketing function 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, unless the Petitioner establishes that the tasks performed were "primarily" managerial in nature. In other words, without a detailed description of the Beneficiary's job duties we are unable to ascertain how the Beneficiary managed the sales and marketing function or that the duties performed were primarily managerial in nature.

The Petitioner also stresses that the Beneficiary's management of the sales and marketing function has positively affected the company's growth in sales and contends that the Beneficiary controls the marketing staff even though he assumes the role of a function manager and is not required to manage personnel in order to meet the statutory criteria for managerial capacity. We note, however, that aside from indicating that the Beneficiary allocated less than 10% of his time to managing "all staff levels,"[2] the Petitioner did not list any personnel management tasks that would explain precisely how he managed the sales and marketing staff in the course of managing the sales and marketing function. The Petitioner also did not provide supporting evidence, such as performance evaluations or other

[2] The Petitioner indicated that 10% of the Beneficiary's time is distributed among two distinct job duties – negotiating contracts and managing personnel – and is not entirely allocated to either job duty. As the Petitioner did not assign a time allocation to job duty, it is unclear how much of the 10% is specifically devoted to personnel management duties.

personnel actions, to support the claim that the Beneficiary controls the work of the foreign entity's sales and marketing staff. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Further, with respect to the Petitioner's reliance on our unpublished decisions to establish that the Beneficiary was a function manager in his position with the foreign entity, we note that 8 C.F.R. § 103.3(c) only provides that our precedent decisions are binding on USCIS; unpublished decisions are not similarly binding and therefore do not have the effect of mandating the outcome in this instance. Although the Petitioner is correct in stating that a function manager need not manage personnel to meet the definition of managerial capacity, it must adequately support its claim by providing a description of daily duties that demonstrate that the Beneficiary will manage the function rather than perform duties related to the function. See *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016). Here, the Petitioner has provided a deficient job description which, aside from lacking critical information about the Beneficiary's actual daily tasks, indicates that the Beneficiary spends an unknown portion of his time performing certain non-managerial job duties, including providing marketing consulting services, seeking out business partners, and engaging in contract negotiations. As several of the Beneficiary's tasks were together in the job duty breakdown, it is unclear precisely how much time the Beneficiary devoted to consulting and contract negotiation. That said, without further evidence showing otherwise, it is possible that the total time spent performing these non-managerial job duties may have consumed the primary portion of the Beneficiary's time, thereby precluding the Beneficiary from "primarily" performing managerial-level tasks.

In sum, while the Petitioner stresses the Beneficiary's high level of discretionary authority and his critical role with respect to the sales and marketing function, the job duty breakdowns provided in support of this petition do not adequately detail the daily tasks the Beneficiary performed during his employment with the foreign entity. Therefore, despite the Beneficiary's level of authority over a critical function, we cannot conclude that the job duties he performed were primarily managerial.

B. Staffing

In addition to the above analysis, we also examine the staffing of the employing organization. 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's supporting evidence includes the foreign entity's organizational chart showing a board of directors at the top of the hierarchy, followed by a managing director overseeing five departments. The Beneficiary is depicted as head of the sales department with a "sales" position as his direct subordinate.

In the RFE response, the Petitioner provided a similar organizational chart, again showing an assistant marketing manager as the Beneficiary's direct subordinate, but changing the department name from "Sales" to "Marketing and Sales" and adding two sales representatives below the assistant marketing manager's position. The response did not include a discussion of the positions within the Beneficiary's department or describe the job duties that were assigned to these positions. Although the chart included the names and position titles of the three employees in the Beneficiary's department, this

information is not sufficient to convey an understanding of the respective employees' roles within the department or the job duties they performed. In order to properly support the claim that the Beneficiary managed the sales and marketing function, it is helpful to know the underlying duties of that function as well as who performed those duties. Such evidence allows us to gauge the likelihood that the foreign entity had the necessary staffing to ensure that the Beneficiary's time spent performing the operational tasks associated with the essential function was limited and only incidental, rather than the primary portion of, his position abroad. Here, however, the record lacks this critical information. As noted earlier, the Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376.

In the present matter, the record contains numerous critical evidentiary deficiencies that preclude a meaningful and comprehensive understanding of the Beneficiary's job duties and the job duties performed by those intended to support the Beneficiary's function and relieve him from having to primarily perform the duties of that function. As such, we cannot conclude that the Beneficiary was employed abroad in a managerial capacity.

ORDER: The appeal will be dismissed.