U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-L-G-2011 CORP. DATE: JAN. 15, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a provider of freight forwarding and logistics services, seeks to temporarily employ the Beneficiary as its general and operations manager 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 would be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary will be employed in a managerial capacity based on his supervision of subordinate professional personnel and his management of an essential function of the company.

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.*

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director found that the Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity. However, the Petitioner does not claim that the Beneficiary will be been employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary will be 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.

When examining the claimed managerial capacity of a given beneficiary, we will look to the petitioner's description of the job duties. *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.

At the time of filing, the Petitioner stated that the Beneficiary, as general and operations manager, will: plan, develop, establish and implement policies and objectives; dictate the direction of the business; exercise discretion to make company decisions; coordinate all aspects of the business; plan the Petitioner's budget, review activity reports and financial statements, and coordinate formulation of financial programs to fund operations; supervise the accounting process; and negotiate and enter into contracts.

In a request for evidence (RFE), the Director advised the Petitioner that the submitted description was too general and therefore insufficient to establish that the Beneficiary would perform primarily managerial duties on a day-to-day basis. The Director requested that the Petitioner provide additional detail regarding his specific proposed job duties and the percentage of time to be spent on each task.

In response to the RFE, the Petitioner provided a different list of duties, but did not assign percentages to specific tasks as requested by the Director. Specifically, the Petitioner described the Beneficiary's proposed duties as follows:

- Design and implement plans that support the adequate satisfaction of clients . . . .
- Apply their experience, skills, and proven skills in commercial and institutional relationships, developed in Latin America, in the scope of the Latin American market, which facilitates our organization in the United States, FL [redacted] the possibility of opening new businesses with this important region, with the important presence of Venezuelans and Latin Americans in South Florida.
- Design, apply, and promote improvement actions to increase the profitability of the business, through the optimization of resources, synergy with clients and suppliers, recruitment of new customers, and effective control operations, under an environment of controlled competitiveness.
- Responsible for fulfilling and enforcing the rules and procedures.
- Propose policies and criteria for the application of new technologies, methods, and tools that incorporate improvements in the management of services.
- Design and implement plans for the effective acquisition of new clients, through the application of promotional methods and public relations (with clients in the area of influence of [redacted] and in Latin America)
- Offer innovative services that make the difference with other similar companies, creating an effective and efficient connection with our current clients, and those that could potentially be captured.
- Travel to the Latin American Region to establish effective contacts in the industry of the services offered by the company, and opening new business opportunities, supported by their personal characteristics and knowledge of the Latin American idiosyncrasy.

We agree with the Director's determination that this description was also lacking the requested level of detail and specificity regarding the Beneficiary's day-to-day duties. While responsibilities such as designing and implementing plans and improvement actions, making policy proposals, and having the authority to enforce rules and procedures are indicative of the Beneficiary's role at the top of the five-person organizational chart, the Petitioner did not provide sufficient insight into the nature of his expected daily tasks. 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).

Further, the Petitioner did not explain what actions the Beneficiary is expected to take in order to "offer innovative services" or acquire new clients. In fact, several of the Beneficiary's duties, such as "recruitment of new customers," making connections with current and potential clients, and establishing industry contacts, suggest that the Beneficiary, who will have no subordinates engaged in sales or marketing activities, would be directly performing these non-managerial company functions. In light of these potentially non-qualifying duties, we are unable to determine that the broadly stated managerial responsibilities would constitute the Beneficiary's primary duties. Although the Director specifically requested the information, the Petitioner's description of the Beneficiary's job duties does not establish what proportion of the duties is managerial in nature, and

what proportion is non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

On appeal, the Petitioner now states that the Beneficiary's "essential duties" would include:

> (1) Ensure [the Petitioner's] administrative, operational financial compliance with its bylaws and with the general laws, practices, and procedures that regulate the cargo business;
> (2) Decide how to exercise [the Petitioner's] corporate interests regarding legal issues that may arise;
> (3) Report periodically to the parent company regarding key aspects of [the Petitioner], such as its income and expenses; market changes and adjustments made in response; and opportunities for business expansion, where [the Beneficiary] would focus [the Petitioner's] resources.
> (4) Approve [the Petitioner's] web-site contents;
> (5) Hire and fire employees, set salaries, and oversee employee performance;
> (6) Open and close bank accounts and review income and expenditures. Oversee the accounting of [the Petitioner] to manage clients' payment of invoices and payment of [the Petitioner's] debts; and
> (7) Negotiate and enter into day-to-day business related contracts on behalf of [the Petitioner].

This description, for reasons that are not explained, bears little resemblance to the list of duties provided in response to the RFE, and, like the previous descriptions is insufficient to establish how the Beneficiary's duties would be primarily managerial. The Petitioner does not explain the specific tasks the Beneficiary will perform to ensure compliance with industry practices and procedures or how much time he will allocate to this responsibility. Similarly, it is unclear that hiring and firing staff, overseeing website content, and responding to legal issues would be part of the Beneficiary's regular routine. The Petitioner has not indicated any immediate plans to hire staff, has not provided information regarding who develops its website content, and has not identified the types of legal issues that would require the Beneficiary's daily intervention.

The Beneficiary's responsibility for negotiating and entering in to "day-to-day business related contracts" is also inadequately explained. Absent further details regarding the nature of these contracts, we cannot determine whether this is managerial responsibility, or whether the Beneficiary will be directly selling the Petitioner's services. Overall, the description is lacking detail, may include non-qualifying duties, and lacks information regarding how the Beneficiary would divide his time between managerial and non-managerial functions.

The fact that the Beneficiary will manage or direct a business 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. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. While 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, the various position descriptions submitted are neither consistent nor sufficiently detailed, which limits their probative value. For the reasons discussed, the position descriptions alone are insufficient to establish that the Beneficiary would perform primarily managerial duties.

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 states that its services include freight forwarding, logistics, customs and documentation brokering, door-to-door service between and Venezuela, international courier services, guaranteed space in daily cargo flights, and shipment of air and maritime cargo to Venezuela, Chile, and other international destinations. The Petitioner further states that it consolidates and re-packs its clients' merchandise to optimize volume of shipment and advises clients on the necessary documentation needed for shipment. Finally, there is evidence that the Petitioner is engaged in sourcing and procuring merchandise for shipment to its international clients.

The Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it had four employees at the time of filing in December 2017. The Petitioner's payroll records confirm that the company employs a "procurement manager and warehousing" employee, an "administration and operation manager," and two warehouse employees. The Petitioner's organizational chart shows that one warehouse employee reports to the procurement manager and one reports to the administration and operation manager, but the Petitioner did not provide job descriptions for the lower-level warehouse staff.

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*).

Although the submitted organizational chart depicts both of the Beneficiary's direct subordinates as "managers," each with one subordinate warehouse employee, the Petitioner has not otherwise claimed that these employees are managers or supervisors. Rather, the Petitioner has consistently claimed that both of the Beneficiary's 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 working in a professional capacity.

The Petitioner provided evidence that the administration and operations manager has the foreign equivalent of a bachelor of pharmacy degree. However, the Petitioner has not established that it requires the position holder to possess such a degree. The submitted "profile" for the position indicates that the position holder will "preferably" be finished with university studies. Similarly, the Petitioner provided evidence that its "procurement manager and warehousing" employee has the foreign equivalent of a bachelor's degree in industrial engineering, but the profile for the position does not state a bachelor's degree requirement for the position; it states that the position holder will be "preferably from the Industrial Engineering area."

On appeal, the Petitioner states that the Director should not have second guessed the Petitioner's business judgment by questioning whether a degree is actually required for the subordinate positions. However, it is the Petitioner's burden to support its claims that these are professional positions requiring completion of a bachelor's degree. By submitting job profiles indicating that the position holders "preferably" have such qualifications, it has not adequately supported that the positions require a bachelor's degree.

Turning to the subordinate employees' job descriptions, the Petitioner stated that the procurement manager plans and streamlines "everything related to the process of purchasing, contracting, and locating goods and services," plans purchases and logistics, creates and updates a database of suppliers, products and prices, negotiates agreements with suppliers, plans the functions of "the department and assigns functions to "the personnel in charge," prepares "the detailed planning of the project in relation to procurement and necessary equipment," and elaborates "the detailed planning of the required equipment by stage in the projects." The organizational chart depicts a "warehouse operation" employee reporting to this position, but no description of the duties assigned to that employee. It is unclear whether the warehouse employee actually supports the procurement function, which appears to require most of the procurement manager's time. There is insufficient evidence to establish that this is a supervisory or managerial position.

The Petitioner states that the administration and operations manager is responsible for elaborating the company's budget, proposing administrative policies and procedures, financial management, cost control, accounting records, the remuneration process, supervising "operational and administrative management," planning and controlling administrative activities, negotiating cargo shipments and

controlling the cargo clearance system, administering contracts for transport, customs and cargo management, paying suppliers and collection management. The description does not mention any supervisory duties. Although the organizational chart shows a "warehouse systems operation" employee reporting to this position, the job description for the administration and operations manager does not indicate that this is a supervisory position.

Overall, the evidence is insufficient to establish that the Beneficiary will be supervising the work of managerial, supervisory, or professional employees. Further, the amount of time the Beneficiary will spend on supervisory duties is not clearly delineated in any of the various versions of the Beneficiary's position description.

On appeal, the Petitioner claims for the first time that the Beneficiary will manage the essential function of planning and overseeing expansion of the Petitioner's market share in the United States. 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).

As noted above, the Petitioner has submitted three different position descriptions for the Beneficiary, none of which suggested that he would be primarily managing business development and market expansion activities in the United States. Even though one of the descriptions states that the Petitioner expects the Beneficiary to perform duties related to business development, promoting the company's services, and handling relationships with new and potential clients, the Petitioner has not shown how he will primarily performs managerial duties in these areas rather than directly performing the non-managerial operational tasks. As noted, the Petitioner has not claimed that the Beneficiary's subordinates are in marketing, selling, or promoting the company's services.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a beneficiary as long as those tasks are not the majority of a beneficiary's duties, a petitioner still has the burden of establishing that a beneficiary will "primarily" perform managerial or executive duties. *See* section 101(a)(44) of the Act. Whether a beneficiary is an "activity" or "function" manager turns in part on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See Matter of Z-A-*, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016). Here, the Petitioner has not supported its claim that the Beneficiary will primarily manage an essential function of the company.

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 take into account the

reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, it is appropriate to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when we note discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

As discussed, the Petitioner claims to offer logistics, shipping, packaging, and freight forwarding services and also appears to source and procure products for its customers. The Petitioner has not provided a detailed, consistent description of the Beneficiary's duties, and did not provide position descriptions for two of its four subordinate employees, which makes it difficult to determine how the company's necessary operational work would be allocated among the five-person staff.

The Petitioner claims for the first time on appeal that it works with its claimed foreign affiliate to coordinate logistics as part of its freight forwarding service. The Petitioner does not identify which foreign employees support the U.S. company, or provide evidence of their interactions with the petitioning company or of any specific services the foreign entity is claimed to provide. As a result, the record does not contain sufficient evidence to establish that the foreign staff assist the Petitioner with its day-to-day operations or remove the Beneficiary from involvement in non-managerial duties required to provide the services of the company.

Further, as noted, the Petitioner does not claim to employ any staff engaged in sales or marketing functions, but states that the Beneficiary will manage these and other business development activities. Based on these deficiencies and the evidence as a whole, the Petitioner has not sufficiently supported its claim that it would require the Beneficiary to primarily perform higher level duties consistent with the statutory definition of managerial capacity.

III. QUALIFYING RELATIONSHIP

Although not addressed in the Director's decision, we find that the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer. To establish a "qualifying relationship," the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See* section 101(a)(15)(L) of the Act; *see also* 8 C.F.R. § 214.2(l)(1)(ii) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate").

At the time of filing, the Petitioner stated that it is an affiliate of the Beneficiary's foreign employer, a Venezuelan company, and described the ownership as follows: "The [Petitioner] is owned by [redacted] and [the Beneficiary]. The Foreign Business Entity . . . is owned by [redacted] and [redacted]"

The Petitioner submitted the foreign entity's incorporation document indicating that each of the four claimed owners has a 25% share in the company. The record also contains copies of the Petitioner's

stock certificates issued since 2015, which show that, at the time of filing, the Petitioner was owned by the Beneficiary (33%), [redacted] (33%), and [redacted] (34%).

In response to the Director's RFE, the Petitioner stated that "the Beneficiary presently owns 51% and [redacted] owns 49% of the United States Business Entity's shares of stock." The evidence shows that this change in ownership occurred in January 2018, subsequent to the filing of the petition. The Petitioner emphasized that [redacted] owns 25% of the foreign entity and 49% of the U.S. company, and appeared to claim that his minority ownership in each company is sufficient to establish an affiliate relationship.

Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. 8 C.F.R. § 214.2(l)(1)(ii)(L).

Here, the Petitioner and the foreign entity have only one owner in common – [redacted] As a minority shareholder in each company, he does not hold a controlling interest in either the Petitioner or the foreign entity. Therefore, the record does not establish that the two entities are affiliates as defined in the regulations as they are not owned and controlled by the same parent, individual, or group of individuals. On appeal, the Petitioner refers to the foreign entity as its parent, but the record does not support a finding that the foreign entity owns any shares in the petitioning company.

For the foregoing reasons, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer. For this additional reason, the petition cannot be approved.

IV. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

Another issue not addressed in the Director's decision is whether the Beneficiary has been employed abroad in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(iii).

The Petitioner has not provided a consistent description of the Beneficiary's job title or duties with the foreign entity, which limits the probative value of its statements regarding his employment abroad. Initially, the Petitioner stated that his position abroad is "General and Operations Manager" and that he has "full responsibility staffing, work of the entire organization including the day-to-day management of the company," and reports directly to the board of directors. The Petitioner's statements indicate that the Beneficiary serves as the top manager of the company.

However, the Petitioner's evidence included a list of the foreign entity's employees which identified the Beneficiary as "sales manager," and named other individuals in the roles of manager, operations manager, operations supervisor, and head of operations. At the same time, the Petitioner submitted the foreign entity's organizational chart, which identified the Beneficiary as "head of operations" reporting to an operations manager, who reports to the company CEO, who, in turn, reports to the board of directors. This chart shows the Beneficiary as supervising a "yard chief" who supervises

"operators," "receptors" and their supervisors, and is clearly a lower level position than the "general and operations manager" position described in the Petitioner's initial statement.

In response to the RFE, the Petitioner submitted a letter from the foreign entity, which stated that the Beneficiary holds the position of "Operations Manager" and supervises the chief of operations, operations supervisor, and control and receiver analysts. The accompanying description of duties bears no resemblance to the original job description for the "general and operations manager" position attributed to the Beneficiary in the initial submission. Rather, the foreign entity states that the Beneficiary checks daily entries and exits at the warehouse, evaluates information issued by equipment control analysts, checks information provided by the receivers and supervisor for the correct storage of containers, plans for the hauling of containers to the assigned dock, and evaluates the department's staff and income. The Petitioner re-submitted the organizational chart which shows the beneficiary as "head of operations" reporting to the "operations manager." The Petitioner also submitted paystubs indicating that the Beneficiary was the foreign entity's "head of operations" throughout 2017.

The Petitioner must resolve 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). It appears more likely than not that the Beneficiary serves as the foreign entity's "head of operations" and reports to an operations manager, and is not employed in the more senior "general and operations manager" position claimed at the time of filing. However, the Petitioner did not provide an explanation for the Beneficiary's changing job titles and job duties and we are left with insufficient probative, credible information regarding his foreign employment. Accordingly, the Petitioner did not meet its burden to show that he was employed abroad in a managerial or executive capacity. For this additional reason, the petition cannot be approved.

V. CONCLUSION

The appeal must be dismissed because the Petitioner did not establish that the Beneficiary will be employed in the United States in a managerial capacity. We further find that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's employer abroad or that the Beneficiary has been employed abroad in a managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of C-L-G-2011 Corp.*, ID# 1805541 (AAO Jan. 15, 2019)