U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-E-, INC.

DATE: JAN. 16, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, claiming to be a waterproofing services provider,[1] seeks to continue the Beneficiary's employment as a managing director under the L-1A nonimmigrant classification for intracompany transferees.[2] *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the California Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner disputes the Director's decision claiming that the Beneficiary will assume the position of an executive and a personnel managerial and that he was employed abroad in a managerial and specialized knowledge capacity.

Upon *de novo* review, we will dismiss the appeal because the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial or executive capacity. However, we will reserve the remaining issue regarding the Beneficiary's foreign employment as the Petitioner has not satisfied a fundamental element of eligibility, which requires it to establish that the Beneficiary will be employed in a managerial or executive capacity under an extended petition.

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[1] The Petitioner provided evidence indicating that it was, or planned to be engaged in the construction of residential homes.

[2] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf. That petition was approved for the period February 7, 2017, until February 6, 2018. 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. Although the Petitioner checked "yes" at Section 1, No. 12 of the L Classification Supplement indicating that it was filing the petition as a "new office," the record shows that it was previously approved for a new office petition and therefore no longer qualified as a "new office" when this extension petition was filed.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.*

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

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Petitioner originally claimed that the Beneficiary will be employed in a managerial capacity. However, in later submissions, the Petitioner stated0 that the Beneficiary will assume the role of an executive and a personnel manager. Therefore, we will address both claims.

A. Managerial Capacity

First, we will address the Petitioner's original claim that the Beneficiary's proposed employment would be in a managerial capacity. In doing so, we will discuss evidence regarding the Beneficiary's job duties and evidence regarding the nature of the Petitioner's business and its staffing levels.

"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.

Based on the statutory definition of managerial capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). The Petitioner must also prove that the Beneficiary will be *primarily* engaged in managerial duties, as opposed to ordinary operational

activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner must provide a job description that clearly describes the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the 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.

1. Staffing

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

In the petition form, the Petitioner indicated that it was established in 2016 and had one employee in March 2018 when this petition was filed. The Petitioner also provided a business plan showing its intent to have a four-person staff by the end of its first year of operation. The Petitioner described its intended staffing in an organizational chart, which shows the Beneficiary at the top of the hierarchy overseeing an "inspector engineer" and a "Project Department" comprised of a project administrator, an onsite supervisor, and "contractors." The Petitioner did not specify the number of contractors it intended to hire or the tasks they would perform. It also provided an undated employee list, which included names and position titles for employees and contractors during an unspecified time period; the list included the three positions that were listed in the organizational chart and indicated that the Petitioner also had two subcontractors, a "company secretary," and a clerk. Notwithstanding these documents, the Petitioner claimed only one employee at the time of filing and provided its payroll register and wage report for the 2017 fourth quarter showing that the Beneficiary was its only employee during the quarter that preceded this petition's filing date.

In the RFE, the Director acknowledged the Petitioner's submission of an employee list and questioned whether the Beneficiary's subordinates are supervisory or professional employees. The Director also questioned whether the Petitioner is adequately staffed to relieve the Beneficiary from having to primarily perform non-qualifying job duties. Accordingly, the Petitioner was asked to provide an organizational chart describing its staffing levels and the Beneficiary's position with respect to his subordinates as well as evidence of wages paid to its employees.

The Petitioner's response included employment offer letters from 2016 and 2017, an undated employee list naming the same employees as in the previously submitted list, and copies of cashed

checks issued by the Petitioner and made out to [redacted] and [redacted] in September, October, and November 2017; both employee lists included these individuals, whose position titles were identified as a clerk, a project administrator, on-site supervisor, and inspector engineer,[3] respectively. We note, however, that the Petitioner's wage report confirmation for the third quarter of 2017 shows no incurred payroll expenses and the Petitioner's quarterly wage report and payroll register for the 2017 fourth quarter both show that the Beneficiary was the only employee during that quarter. Thus, the cashed checks from purported employees are inconsistent with the other submitted wage evidence. Moreover, evidence of the Petitioner's staffing in 2017 is not relevant for the purpose of establishing that the Petitioner was eligible in March 2018 when this petition was filed. 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).

In the denial decision, the Director acknowledged that the Petitioner named six employees, including the Beneficiary, in its employee list and pointed out that the Beneficiary was the only employee named in the Petitioner's quarterly wage report for the 2017 fourth quarter. The Director determined that despite the Beneficiary's position title and placement at the top of the Petitioner's organizational hierarchy, it has not established that it has the ability to relieve the Beneficiary from having to primarily perform the operational, non-managerial tasks of the organization.

Although the Director also referred to the "small workforce" and found that the Petitioner has a support staff to carry out "clerical and construction-related labor," we find that the record lacks evidence showing that the Petitioner employed anyone but the Beneficiary or that it had contractors to perform its daily operational tasks at the time this petition was filed. As noted above, the wage evidence on record, including cashed checks, quarterly wage reports, and a quarterly payroll register, applied to various time periods in 2017; thus, the submitted evidence reflects a staff that the Petitioner may have had prior to March 2018 when this petition was filed. Despite providing an employee list naming six people, the petition indicates that the Beneficiary was the Petitioner's only employee; it is therefore unclear who, aside from the Beneficiary, could have carried out the Petitioner's administrative and client-driven tasks when this petition was filed.

On appeal, the Petitioner claims that the Beneficiary will manage the "start-up business" and that he will allocate 70% of his time to managerial job duties, which will include overseeing a professional staff. We note, however, that the Petitioner claimed only one employee at the time of filing and provided no evidence to show that it hired contracts to perform operational tasks at the time of filing.

Furthermore, the Petitioner did not adequately describe the types of services it offers. Although the petition form indicates that the Petitioner intends to provide waterproofing services, the record contains a letter from January 2018 and corresponding documents indicating that the Petitioner

[3] Although [redacted] was identified as the payee of a November 2017 check issued by the Petitioner, it is likely that the employee list misspelled this individual's name, thereby creating an incongruity that is not material to issues concerning the Petitioner's eligibility in this matter.

submitted a construction bid for a single family home. The Petitioner's business plan does not contemplate residential construction and therefore does not account for this type of business activity either in its personnel plan or in its financial allocations. Given the lack of clarity as to the types of business activities the Petitioner planned to engage in at the time this petition was filed, it is unclear how its organization should be staffed to ensure that the Beneficiary's time is primarily occupied with managerial-level job duties.

To establish that the Petitioner adequately staffed the new operation in the previous year, it must submit a description of staffing, including the number of employees, their positions, and evidence of the wages paid to these employees. 8 C.F.R. § 214.2(l)(14)(ii)(D). Here, although the record indicates that the Petitioner paid wages to individuals named in an employee list, there is no evidence that it employed or contracted these individuals at the time of filing. In fact, the petition indicates that the Beneficiary was the Petitioner's only employee at the time of filing and no further evidence is provided to show that the Petitioner's staffing structure at that time involved other employees or contractors. This lack of a support staff leads us to question how the Petitioner's organization is run and who was available to relieve the Beneficiary from having to primarily perform its operational and administrative tasks at the time of filing. While the Beneficiary is not required to allocate 100% of his time to managerial-level tasks, the Petitioner must establish that the non-qualifying tasks the Beneficiary would perform are only incidental to, as opposed to the main focus of, the proposed position. 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).

Furthermore, even if the Petitioner were to establish that its staff at the time of filing included the individuals named in the employee list, the record does not contain evidence establishing that these individuals are supervisory, professional, or managerial. 101(a)(44)(A)(ii) of the Act. Such evidence is critical for the purpose of establishing that the Beneficiary meets the statutory criteria of a personnel manager. If, as the Petitioner claims, the Beneficiary was "personally supervising the management staff" and was relieved from having to perform primarily non-managerial functions at the time of filing, the burden is on the Petitioner to establish that it employed a "management staff" and was otherwise equipped with workers who would perform the non-managerial duties in the Beneficiary's place. The record in this instance does not contain critical evidence showing that the Petitioner had the organizational composition to support the Beneficiary in a position where his time would be primarily allocated to tasks of a managerial nature.

2. Duties

Next, we will discuss the duties to be performed by the Beneficiary. We note that 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 the L Classification Supplement, the Petitioner stated that the Beneficiary's "key duties" will include managing professionals and the "start-up business," interviewing, hiring and training employees, and developing a company structure. As noted above, the Petitioner claimed that 70% of the Beneficiary's time would be allocated to managerial duties. Although the Petitioner's business plan included two job duty breakdowns, neither applied to the projected job duties as of the date this petition was filed; rather, one job description pertained to the Beneficiary's job duties during the company's first year of operation and the second job description projected the Beneficiary's job duties in the Petitioner's fifth year of operation.

In the RFE, the Petitioner was notified that the original job description lacked sufficient detail and did not establish that the Beneficiary would primarily perform managerial job duties. According, the Petitioner was asked to provide a more detailed job duty breakdown describing the Beneficiary's proposed managerial job duties and the percentage of time he would allocate to each job duty.

In response, the Petitioner provided a statement containing a job duty breakdown, which indicates that 35% of the Beneficiary's time will be allocated to "recruitment, selection, interviewing, hiring and firing, training of managers and employees basis [*sic*]." However, the Petitioner did not establish that these human resources tasks qualify as managerial job duties. The Petitioner indicated that another 35% of the Beneficiary's time would be allocated to managing the sales and administration department "with [the] Inspector Engineer, evaluate his of [*sic*] work performance on [a] daily basis." However, as previously indicated, the Petitioner has not established that it employed an "inspector engineer" at the time this petition was filed. Further, the Petitioner did not establish that this subordinate position is supervisory or professional. Although the Petitioner provided a job description for an "inspector engineer" and indicated that the rate of pay for this position would be $12/hour, it did not establish that either the assigned job duties or educational requirements for an "inspector engineer" would be those of a professional, nor did the Petitioner's organizational chart depict this position as supervisory or managerial over subordinate employees or contractors. Thus, despite claiming that the Beneficiary would allocate his time primarily to personnel management, the Petitioner did not adequately support this claim with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376.

The fact that the Beneficiary will manage a business does not necessarily establish eligibility for classification as an intracompany transferee in an executive 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" managerial in nature. Section 101(A)(44)(A) 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, meeting these two statutory requirements is not sufficient to establish that the Beneficiary would primarily perform managerial job duties. Specific information about the Beneficiary's actual duties is critical; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41. Here, the Petitioner indicated that 70% of the Beneficiary's time would be spent overseeing a non-supervisory and non-professional

employee and performing human resources tasks, such as recruiting and training new employees. However, the Petitioner did not establish that these duties are managerial in nature.

Although it is generally understood that a developing business in its initial phase of operation may not require or have the ability to support an employee who primarily performs managerial-level job duties, the regulations only allow the "new office" operation one year from the date of approval of the petition to support a managerial position. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). Beyond that initial one-year time frame, 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 capacity. *See, e.g.*, sections 101(a)(44)(B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Church Scientology Int'l*, 19 I&N Dec. at 604.

Here, the Petitioner provided a job description which indicates that the Beneficiary would continue to carry out non-managerial functions beyond the company's first year of operation. Despite its immediate organizational needs, the Petitioner has not progressed to a developmental phase where it has the capacity to support the Beneficiary in a position that entails primarily managerial-level job duties. Therefore, we cannot conclude that the Beneficiary would be employed in a managerial capacity under an extended petition.

B. Executive Capacity

As noted earlier, the Petitioner also claims that the Beneficiary would be employed in an executive capacity under the extended petition.

"Executive capacity" means an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct so that he or she can primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

On appeal, the Petitioner restates the Beneficiary's job duty breakdown claiming that "[t]his evidence is persuasive in demonstrating that the Petitioner has attained a level of organizational complexity to elevate the Beneficiary to an executive position." We disagree with this assertion and find that the job description itself is not evidence of the Petitioner's organizational complexity. Rather, it represents claims that the Petitioner makes about what the Beneficiary will do and the context within which he will operate. However, the Petitioner's unsupported statements regarding the Beneficiary's job duties are of very limited weight and normally will be insufficient to carry its burden of proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376. As noted earlier, the Petitioner claimed only one employee at the time of filing and provided no evidence to show that it was paying contract labor to perform its operational tasks.

In light of the above, we find that the Petitioner has not established that at the time of filing its organization included a tier of employees through whom the Beneficiary can be said to direct the management of the organization and focus on its goals and policies.

III. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial or executive capacity under an extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of G-E-, Inc.*, ID# 1956853 (AAO Jan. 16, 2019)