U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-S- LLC

DATE: JAN. 25, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which provides video editing and photo retouching services to a film studio, seeks to continue the Beneficiary's temporary employment as its chief executive officer under the L-1A nonimmigrant classification for intracompany transferees.[1] 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 Petitioner will employ the Beneficiary in a managerial or executive capacity under the extended petition.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by not giving sufficient weight to evidence of the Beneficiary's "high-level responsibilities" over the company's activities and personnel. We issued a request for evidence after additional questions surfaced during review of the appeal. We have considered the Petitioner's response to that notice.

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

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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf, which was approved for the period May 1, 2017 until April 30, 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.

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).

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner does not claim that it seeks to employ the Beneficiary 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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 101(a)(44)(A)(i) and (ii) of the Act. The Petitioner specifies that it seeks to employ the Beneficiary as a personnel manager, not a function manager. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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." Section 101(a)(44)(A) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*4*). If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(*2*)-(*3*).

The Petitioner initially stated that the Beneficiary's subordinates include the following:

- Personal Assistant
- Lead Video Editor
- 3 Video Editors
- 3 Photo Retouchers
- Graphic Director
- Graphic Designer

Although the Beneficiary's job description referred to "[m]eeting with other managers," the Petitioner, prior to the appeal, did not identify any managers subordinate to the Beneficiary. Instead, the Petitioner stated: "the organizational structure is designed to be extremely flat . . . . [The Beneficiary] will therefore supervise the entire team." The organizational chart indicated that the lead video editor supervised the other editors, but otherwise all other employees report directly to the Beneficiary. On appeal, the Petitioner modified this assertion, stating that the lead video editor and lead photo retoucher are managerial positions. At the time of filing, the Petitioner did not claim to employ a lead photo retoucher. New developments after the filing date cannot establish eligibility. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

The Petitioner asserts that the lead video editor qualifies as a manager by virtue of supervising the work of professionals. The Petitioner has also described several other subordinate positions as professional. The record, however, does not support this assertion.

To determine whether the 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 United States 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."

The Petitioner submitted background information indicating that a bachelor's degree is "usually required" for some of the subordinate positions. The Petitioner also submitted copies of four "sample job postings." (On appeal, the Petitioner discloses that it never actually published the postings.)

Two postings, for video editor positions, showed no degree requirement. The remaining two announcements were for graphic designer positions. These two announcements share many similarities, but only one of them listed a degree requirement (for a "Bachelor's Degree in Graphic Design or related field"). The announcements also differed as to the experience required. The version with no degree requirement called for "2-4 years of experience," while the other version required "4-8 years of experience."

Asked to explain these discrepancies, the Petitioner asserts that the graphic designer and video editor positions "require at least a Bachelor's degree," but he adds: "we will also accept equivalent work experience . . . we do not require that [applicants] have completed a formal 4 year bachelor's degree." The Petitioner does not explain what it considers equivalent to a bachelor's degree.

> A combination of education and experience may be considered equivalent to a professional degree, but usually only when a substantial amount of specialized academic course work is combined with employment and training which are documented as conveying to the employee professional knowledge and competency.

> Normally, this competency is further demonstrated by professional recognition such as the employee's membership in professional organizations or associations requiring minimum professional standards for admission as a member.

Matter of Caron Int'l, 19 I&N Dec. 791, 798-99 (Comm'r 1988). In this respect, it is significant that the statutory definition of "professional" at section 101(a)(32) of the Act lists fields (such as medicine and law) that typically involve licensure rather than self-declaration of a given field as a profession. In this instance, the Petitioner has not shown any academic requirement for any of the positions subordinate to the Beneficiary.

The Petitioner's own description of its "organizational structure" as "extremely flat" does not support a finding that the Beneficiary spends a significant amount of time supervising the lone supervisory employee that the Petitioner initially described. (Also, the lead video editor has substantial editing duties of his own, and does not appear to have managerial-level responsibilities such as hiring authority.) Subsequent changes to the management structure cannot retroactively establish eligibility.

The Petitioner maintains that the Beneficiary's "significant discretionary authority" is consistent with a managerial capacity. Without a showing that the Beneficiary's subordinates are professionals, however, the Beneficiary's direct supervision of those subordinates cannot establish eligibility.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it will employ the Beneficiary as a personnel manager under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of K-S- LLC*, ID# 1690391 (AAO Jan. 25, 2019)