U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-W-D- [redacted]

DATE: JAN. 31, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a shipping company, seeks to temporarily employ the Beneficiary as its vice president under the L-1A nonimmigrant classification for intracompany transferees. *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 record did not establish, as required, that the Beneficiary had been employed abroad in a managerial or executive capacity. The Director also found that there were inconsistencies regarding the identity of the Beneficiary's foreign employer and its relationship to the petitioning U.S. employer. The Petitioner filed a motion to reopen, which included evidence that clarified the issue of the foreign employer's identify and qualifying relationship to the Petitioner. The Director reopened the proceeding on the Petitioner's motion and denied the petition again, finding that the Petitioner had not established that the Beneficiary had been employed abroad in a managerial or executive capacity.

The matter is now before us on appeal. On appeal, the Petitioner claims that new evidence and information in its motion to reopen remedied past deficiencies in the record. The Petitioner contends that the Director did not sufficiently consider the materials submitted on motion.

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. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

The Director found the Petitioner had not established that the Beneficiary has been employed abroad in a managerial capacity. The Petitioner does not claim that the Beneficiary had been employed in an executive capacity or a capacity involving specialized knowledge.

A managerial capacity is an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization, and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A personnel manager supervises and controls the work of other supervisory, professional, or managerial employees; the duties of a first-line supervisor are not considered managerial unless the employees supervised are professional. A function manager need not directly supervise other employees, but must manage an essential function within the organization, or a department or subdivision of the organization, and function at a senior level within the organizational hierarchy or with respect to the function managed. Section 101(a)(44)(A) of the Act.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must 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.

A. Duties

When examining the managerial or executive capacity of the Beneficiary, we will review the Petitioner's description of the Beneficiary's 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).

In its motion to reopen following the first denial, the Petitioner specified that the Beneficiary's role abroad was "that of a functional manager." Therefore, we will limit our analysis to whether the Beneficiary served abroad as a function manager.

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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a petitioner must clearly describe the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties dedicated to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function.

The definition of managerial capacity has two parts. First, the Petitioner must show that the Beneficiary performed 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 was *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The petition form indicated that the "Beneficiary previously worked as Director/Owner of the foreign entity which the Petitioner later purchased, thus establishing a qualifying relationship between the two companies.[1] The Beneficiary's work for included working as a part-time contractor for and

On his résumé, the Beneficiary stated that he performed the following duties from February 2015 to September 2016:

- Work extensively to locate & establish new client relationships including negotiating new contracts per company standards.
- Work to strengthen existing client relationships by ensuring all needs are met to customer satisfaction.
- Coordinating the freight forwarding department & establishing new relationships with new carriers.
- Responding to all customer complaints or queries in an efficient manner.
- Travel to all transport fairs representing & promoting company.
- Specialized in the transport of temperature controlled deliveries.
- Monitored and tracked the flow of goods into the warehouse.

The Petitioner repeated most of the above description on the petition form, and listed the same employment dates. Several of the listed duties lack necessary details. For example, the job description did not specify what the Beneficiary did in relation to "the transport of temperature controlled deliveries." Because the description is so general, it does not establish that the

[1] A translated certificate of good standing from Romania's National Trade Register Office indicated that *the Beneficiary's company, provided "Cargo handling," "Freight transport by road," "transportation support activities," and related services. The same certificate, however, listed the company's "Main activity" as "Wholesale of grain, seeds, animal feeds and unmanufactured tobacco." The record is otherwise silent regarding grain sales.

[2] The Petitioner has indicated that changed its name to The record is inconsistent and inconclusive in this regard. For the purposes of this decision, we will treat and as different entities, but the issue does not ultimately affect the outcome of the proceeding. Before the denial, the Petitioner's former counsel stated "the foreign entity, previously [is] now There is no evidence that (based in Romania) is the same company as (based in the Netherlands), and on appeal, the Petitioner's current attorney of record states that "earlier counsel had failed to fully assess and accurately present the relevant facts of corporate ownership."

Beneficiary was primarily a manager rather than, for example, a dispatcher or customer service representative.

Officials of stated that the Beneficiary's company provided "sales and marketing services" on a contract basis. Translated service contracts indicated that the responsibilities of the Beneficiary's company included marketing activities ranging from "[v]isiting fairs and exhibitions" to identifying and contacting potential clients, as well as "[h]andling complaints received from customers." The Petitioner did not specify who performed these sales and marketing activities.

A translated job description listed three pages of responsibilities, including several non-managerial tasks such as designing promotional materials, contacting clients, and taking orders. The job description referred to "subordinate staff" but did not identify those subordinates by name or by title, or specify which tasks the Beneficiary delegated to those subordinates and which ones he performed himself.

In the initial denial, the Director stated that the job "description is insufficient to demonstrate what the beneficiary did on a day-to-day basis while he was employed with ' On motion from that decision, the Petitioner asserted that, while the Beneficiary's name is on the contracts with and those companies had, in effect, contracted for the Beneficiary's company, rather than the Beneficiary himself, to provide the services described. This explanation does not answer the question of who performed the tasks listed in the job description.

Also on motion, the Petitioner listed the Beneficiary's "day-to-day responsibilities":

- Working to locate & establish new client relationships including negotiating new contracts per company requirements
- To lead in the formation of and strengthening client and vendor relationships by ensuring all needs and requirements are met to customer satisfaction
- Managing freight forwarding and delivery logistics
- Monitoring warehouse capaci[]ty to meet obliga[]tions and tracking the flow of goods to and from the warehouse.

This new statement on motion did not establish that the Beneficiary was primarily a function manager abroad. The Petitioner asserted that the Beneficiary had the above responsibilities but did not specify how the Beneficiary fulfilled them or who performed the operational functions that the Beneficiary oversaw. Furthermore, seeking and securing new clients appears to be a non-qualifying operational duty; the Petitioner did not provide enough details to show that this task was managerial.

Denying the petition for the second time, the Director found that the "brief description of the beneficiary's responsibilities abroad . . . lacks sufficient detail and is insufficient to demonstrate what the beneficiary did on a day-to-day basis while he was employed with

On appeal, the Petitioner does not provide more details about the Beneficiary's duties. Instead, the Petitioner asserts that the Beneficiary delegated his non-managerial responsibilities to other workers. We will explore this issue in the section below.

B. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining a beneficiary's claimed managerial capacity, including 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.

Initially, the Petitioner claimed that the Beneficiary "had a team of several strong top management professional[s] reporting to [the Beneficiary] regarding day-to-day activities of the company." The Petitioner did not identify the "several strong top management professional[s]" by name or title. In later correspondence, the Petitioner has not clarified, corroborated, or returned to this claim, instead asserting that "the appropriate understanding of his role . . . is that of a function manager."

Organizational charts for and identified the Beneficiary as a "commercial manager" who supervised two "forwarder[s]"; the record, at the time, did not describe those positions. The Petitioner did not submit evidence that the Beneficiary's company had any employees other than the Beneficiary.

On motion from the Director's first decision, the Petitioner submitted copies of invoices showing that the Beneficiary's company outsourced certain finance-related administrative tasks, such as bookkeeping and payroll, to an accountant. The Petitioner did not document similar arrangements for the tasks listed in the Beneficiary's job description. (The listed tasks did not include bookkeeping or payroll, and therefore the contract with the accountant does not show that the Beneficiary delegated or outsourced his listed responsibilities.)

The Director found that the Petitioner had not shown that "the foreign entity employed other individuals that performed the non-qualifying, day-to-day duties" listed in the job description.

On appeal, the Petitioner argues that "[a]n organization's small size, standing alone, cannot support a finding that its employee is not acting in a managerial capacity." We agree. A company's size alone, without taking into account the reasonable needs of the organization, may not be the only factor in determining whether a beneficiary is employed in a managerial or executive capacity. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS 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. *See e.g., Family Inc.*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The issue highlighted by the Director is not simply the size of the Beneficiary's company. The Petitioner has claimed that the Beneficiary's company provided particular services to and most of those services were not managerial. If the Beneficiary provided those services himself because no one else was there to do it, then he was not primarily a manager.

The Petitioner does not claim, on appeal, that the Beneficiary's company had any employees other than the Beneficiary. Instead, the Petitioner asserts that the Beneficiary relied on workers outside the company. First, the Petitioner cites the aforementioned contract with an accountant, which is irrelevant because, as the Director noted, it does not account for the non-managerial services that lay within the Beneficiary's responsibilities.

Second, the Petitioner states that the organizational chart "indicates that the beneficiary was contracted to . . . direct and oversee two subordinate on-site employees of " The record contains minimal information about those two employees and their duties.

Furthermore, has no apparent qualifying relationship with the petitioning U.S. employer. If employees of performed tasks on behalf of in the course of their employment with that company, then the Beneficiary's presence there as a contractor does not show that he was a function manager of the Beneficiary's company. By definition, a function manager "manages an essential function *within the organization*." 8 C.F.R. § 214.2(l)(1)(ii)(B)(*2*). Supervising employees of is not a function, essential or otherwise, within the Beneficiary's company. It is important, here, to note that had hired the Beneficiary's company as a support contractor, not *vice versa*. A company might rely on contractors to perform its functions, but simply being a contractor is not, itself, a function.

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). In this matter, the Petitioner has not described or provided evidence that the Beneficiary managed an essential function within the Beneficiary's company.

The Petitioner has stated that the contract with was the only source of income for the Beneficiary's company. If this is so, and if the Beneficiary's company had no other employees (as appears to be the case), then the Beneficiary's company had no evident purpose or function except to serve as the Beneficiary's nominal employer while contracting his services to Direct

employment with clearly would not constitute qualifying experience in this proceeding. The Beneficiary's status as a contractor rather than an employee does not make him a function manager within his own company.

Furthermore, the contract between the Beneficiary's company and lists the obligations of both parties. The obligations of did not include providing company employees to work under the Beneficiary's direction, and the obligations of the Beneficiary's company did not include directing the activities of employees of

The Petitioner asserts that the obligations in the contract apply to as a company, not to the Beneficiary as an individual. Nevertheless, the burden is on the Petitioner to establish that other workers relieved the Beneficiary of non-qualifying tasks, such as sales calls, listed in that contract. The Petitioner has not met that burden.

A newly-submitted job description for the forwarder position at indicates that the forwarder reported to the commercial manager (the Beneficiary), and also that the Beneficiary assumed the forwarder's duties in case of his or her absence. The forwarder's responsibilities focus on coordinating deliveries; specific duties include identifying delivery routes, communicating with drivers, and monitoring the location of vehicles. None of these responsibilities appear in the contract with the Beneficiary's company, which focused, instead, on sales and marketing. Therefore, even if the Beneficiary had supervisory authority over the forwarders, the evidence points firmly away from the conclusion that the forwarders relieved the Beneficiary of having to perform marketing tasks.

For the reasons discussed, the Petitioner has not established that the Beneficiary's employment abroad was in a managerial capacity.

III. E-2 VISA APPLICATION

We will dismiss the appeal for the reasons discussed above; however, a review of U.S. government records reveals an additional issue which the Petitioner must address if it pursues the matter further.

On December 8, 2017, at the U.S. Consulate in Romania, the Beneficiary applied for an E-2 nonimmigrant visa as the spouse of a treaty investor. The Beneficiary's spouse is the principal investor in ' in Oregon; the Beneficiary specified that he also intended to reside in The company name is very similar to the Petitioner's name, but there is no shared ownership or control between the two companies. The December 2017 nonimmigrant visa application was approved, and the E-2 visa issued January 5, 2018.

Given the Beneficiary's stated intention to reside in Oregon, it is not evident that he still intends to work for the Petitioner in Nevada, more than 500 miles south of

IV. CONCLUSION

The Petitioner has not established that the Beneficiary's foreign company, employed the Beneficiary in a managerial capacity as the statute and regulations require.

ORDER: The appeal is dismissed.

Cite as *Matter of O-W-D-*, ID# 943886 (AAO Jan. 31, 2018)