U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-G- LLC

DATE: JAN. 31, 2019

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an importer and wholesale distributor of truck spare parts and plastics, seeks to continue the Beneficiary's temporary employment as executive manager 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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner contends, contrary to the Director's conclusion, that the Beneficiary devotes all of his time to performing managerial duties and that it is properly staffed to relieve him from performing non-qualifying operational tasks.

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 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 April 27, 2017, until January 23, 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).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The sole issue to address is whether the Petitioner established that the Beneficiary would act in a managerial or executive capacity under the extended petition. The Petitioner does not claim that the Beneficiary would be employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary would 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 managerial capacity of a given beneficiary, we will review the petitioner's description of the 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). 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, 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 stated that it was formed in the United States in 2016 "to get into the American market for consumer goods which consists of truck spare parts and plastics" to be produced by the Beneficiary's foreign employer. The Petitioner also indicated that "apart from our core business of truck parts trade, we have been the supplier and trader of PVC and PE packaging materials, plastic sports goods and consumer goods." It also noted that it collaborates "with over 100 Chinese factories within their supplier network in China."

The Petitioner explained that as executive manager the Beneficiary would be involved in "the reorganization and expansion/development of its vital product development and product delivery operations," apply "unique knowledge" of the foreign employer's "internal procedures," and "design the product development processes and quality control operations." It also stated that the Beneficiary would be "responsible for the direction and control of the [Petitioner's] overall strategic business development function," conduct "all major business decisions," and finalize critical negotiations and contracts."

Further, it indicated that the Beneficiary would provide "business leadership and vision involving a complex mix of in-depth knowledge of [the foreign employer's] methodologies, products, services and business development plans" and focus on "various marketing and business development projects." It further explained that 90% of the time the Beneficiary would be "engaged in the management, coordination and [direction of the Petitioner's] strategic business development, marketing and commercial activities, including planning and implementation of [the foreign employer's] investment in the U.S." The Petitioner also stated that the Beneficiary would spend the remaining 10% of his time on "other managerial tasks such as analyzing financial reports to determine progress and status in attaining objectives and revising plans in accordance with current conditions."

Furthermore, the Petitioner listed the following duties for the Beneficiary under the extended petition, amongst others:

- oversee and manage the expansion of the Petitioner's product development and delivery operations, ensure that they are in-line with strategic growth and business development plans, and hire additional staff – 20% of his time,
- manage the delivery of the Petitioner's consumer goods consisting of truck spare parts and plastics, conduct weekly meetings to ensure new developments/features are in line with Petitioner policies and growth plan, make decisions on the suitability of frameworks/project proposals, and move a part of the foreign employer's facilities to the U.S. within the next four years – 23% of his time,
- approve and negotiate contract and project terms with regards to final price and terms of agreement – 5%
- supervise a team of four U.S. professionals including a sales and marketing manager, executive manager assistant, a sales representative, and a sales assistant who oversee all U.S. client projects, delegate briefs and assign off on quality

control documents on a daily basis, review and look after consultancy based requests that are proposed by U.S. clients – 10% of his time,

- continue to oversee and manage the foreign employer's team of seven professionals located in Turkey and have overall authority to hire, train, assign tasks and oversee progress and evaluate performance – 6% of his time,
- develop and implement recruitment and training strategies to ensure company's growth targets are being delivered on, including all hiring and firing, recruitment of additional professional personnel who will provide support functions so that the Beneficiary can concentrate on strategic value added initiatives – 2% of his time,
- review monthly reports provided by subordinates to determine and evaluate progress and status of ongoing projects – 2% of his time,
- develop production and quality control strategies, take control of initial implementation phases, oversee processes and cost-effective operations while adhering to Petitioner and foreign employer quality guidelines and standards – 5% of his time,
- post implementation, delegate projects to U.S. and Turkish teams to ensure performance is in line with client's strategic objectives – 5% of his time,
- evaluate financial aspects of the Product Delivery division to prioritize key projects and devise budget and expenditure plans for determining costs commitment of Development division – 5% of his time,
- advise and direct staff where budget can be best utilized in the organization through weekly management meetings, including making key decisions to reallocate resources if a project is deemed critical – 5% of his time,
- develop plan to ensure product delivery operations runs on time and within budget – 5% of his time,
- assess risks and set contingency plans through auditing company processes – 2%, and
- evaluate the company's overall production performance with respect to its production operations to present recommendations – 5%.

The Petitioner submitted substantial documentation indicating that the Beneficiary would likely be primarily involved in non-qualifying operational level tasks as of the date the petition was filed. For instance, the Petitioner submitted client invoices dated in March and April 2018, months after the petition was filed[2], reflecting the Beneficiary's email and copies of checks signed by him for the payment of these invoices. Likewise, the Petitioner submitted evidence of the Beneficiary completing wire transfers for the payment of goods, and invoices bearing his signature and contact information throughout its first year of operations and up to the filing of the petition. In addition, the Petitioner provided emails reflecting the Beneficiary coordinating delivery quantities with suppliers and arranging for the shipment and distribution of samples to customers. As mentioned in the Beneficiary's duties, the Petitioner also stated that the Beneficiary would continue to oversee the

[2] The petition was filed in January 2018.

foreign employer's operations while in the United States. It also submitted many emails, several of these emails dating near to the date the petition, indicating the Beneficiary's continued day-to-day involvement with non-qualifying operational duties abroad, such as confirming, communicating, and coordinating client orders. In contrast, although the submitted documents suggest that the Beneficiary is delegating some tasks to his claimed U.S. and foreign subordinates, it has not sufficiently demonstrated that he is being primarily relieved of non-qualifying operational duties as of the date the petition was filed.

Whether the Beneficiary is a managerial employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See* sections 101(a)(44)(A) of the Act. The Petitioner claimed that the Beneficiary would be wholly relieved from non-qualifying operational duties as of the date the petition was filed, yet it submits documentation that reflects his performance of administrative or operational tasks and it does not quantify the time the Beneficiary spends on these duties. This lack of documentation is important because several of the Beneficiary's documented tasks, as discussed above, do not fall directly under managerial duties as defined in the statute. For this reason, we cannot determine whether the Beneficiary would primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The Petitioner also provided insufficient detail and documentation regarding the Beneficiary's asserted qualifying tasks. The Beneficiary's duty descriptions include several generic duties that could apply to any manager acting in any industry and they provide little insight into his actual day-to-day managerial tasks. For instance, the Petitioner did not detail or document product development and delivery operations the Beneficiary managed, the strategic growth, business development plans, and policies he ensured compliance with, and the "frameworks" and project proposals he made decisions on.

Although the Petitioner submitted some documentary evidence of the Beneficiary directing his subordinates, it did not sufficiently document the claimed contract and project terms he had negotiated in the United States. In addition, it did not articulate and document the briefs and quality control documents the Beneficiary signed off on, the consultancy based requests he reviewed, the production and quality control strategies he developed, budget and expenditure plans he devised, key decisions on the allocation of resources he made, plans on product delivery operations he approved, or contingency plans he set. In fact, portions of the Beneficiary's duties appear to bear little relation to its import and export operations including references to a "product delivery division," a "development division," and "projects," which were not sufficiently substantiated. The Beneficiary's duties also indicate that he would spend a significant portion of his time managing the delivery of truck spare parts in the United States. However, the Petitioner submitted emails dated near to the date the petition was filed reflecting the Beneficiary's communication with foreign employer management and stating that he had developed little market for these goods in the United States.

We acknowledge that the Petitioner submitted substantial email documentation reflecting the direction of sales and order representatives abroad and his coordination of fabric and other good orders from China. However, the Beneficiary's duties indicate that he would devote only 6% of his time to coordinating and overseeing these operations abroad; whereas, there is limited evidence that he was performing managerial tasks in the United States as of the date the petition was filed. In sum, the Petitioner did not provide sufficient evidence to substantiate that the Beneficiary would likely devote a majority of his time to managerial tasks as of the date the petition was filed.

Even though the Beneficiary holds a senior position within the organization, the fact that he 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) and (B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. *Id.* 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; however, the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial in nature.

B. Staffing

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 submitted an organizational chart in support of the petition reflecting that the Beneficiary supervised a sales and marketing manager overseeing a sales representative and an executive assistant. As noted in the Beneficiary's duties, the chart also indicated that the Beneficiary would continue to supervise several employees abroad, including a customer relations employee, a sales area manager overseeing two sales representatives, and an export manager supervising an export sales representative and a sales assistant. In response to the Director's request for evidence (RFE), the Petitioner provided an updated U.S. organizational chart asserting that it had added a sales assistant reporting to the sales representative in March 2018.

On appeal, the Petitioner emphasizes that the Beneficiary "manages and directs a professional team comprised of at least two (2) individuals in the U.S., specifically: a Sales and Marketing Manager, and Executive Manager Assistant." Likewise, the Petitioner asserts that the Beneficiary would continue to manage a "professional team" employed by the foreign employer employed in the United States.

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*).

First, the Petitioner has not submitted sufficient evidence to demonstrate that the Beneficiary supervises subordinate managers or supervisors. As discussed, the Petitioner submitted a U.S. and foreign organizational chart reflecting subordinate managers, including the sales and marketing manager in the United States, the U.S. based sales representative overseeing a sales assistant, a sales area manager abroad, and a foreign export manager. However, the submitted evidence indicates that the Petitioner did not hire the claimed U.S. sales assistant below the U.S. sales representative until late March 2018; as such, this employee is not relevant to establishing the Beneficiary's eligibility as of the date the 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).

Therefore, the only remaining asserted U.S. based manager as of the date the petition was filed is the asserted sales and marketing manager. However, the Petitioner provided statements and documentation leaving question as to whether the sales and marketing manager acted as a subordinate supervisor as of the date of the petition. For instance, although the Petitioner provided an organizational chart with the petition reflecting that it employed three subordinates, the sales and marketing manager, executive assistant, and sales representative, it emphasized several times in support letters and on appeal that it employed only "a professional team of two individuals." In fact, a letter from the sales and marketing manager from April 2018, several months after the petition, mentions only "two (2) degreed professionals." Further, this letter directly from the sales and marketing manager questionably makes no reference to his claimed role as a subordinate manager.

In addition, the Petitioner provided a business plan referring to the claimed sales and marketing manager as a "sales representative" and an email from the Beneficiary to foreign management referring to this employee as the same. Likewise, supporting emails from the first year of operation reflect the asserted sales and marketing manager acting as a sales representative subordinate to the Beneficiary rather than as a subordinate supervisor overseeing subordinates of his own. The Petitioner also submitted a performance review for the U.S. based sales representative from March 2018, and employee supposedly subordinate to the sales and marketing manager; however this review was completed by the Beneficiary and not the sales and marketing manager.

Moreover, the duties of the sales and marketing manage appear to overlap significantly with those of the Beneficiary, indicating that he would focus on "trade promotion programs," "developing field action plans," and establishing "sales objectives...plans and quotas for districts in support of national sales objectives." It appears unlikely that the sales and marketing manager would also be focused on the setting of overall programs, plans, and objectives given the company's limited number of operational employees in the U.S, and the supporting documentation indicating that he acts as a sales representative. Further, the duties of the claimed sales and marketing manager mention national sales

districts which are not shown to exist. Indeed, it is also noteworthy that the Petitioner only submits internal payroll documentation to support its U.S. employees and not independent objective evidence, such as the IRS Forms W-2 and state quarterly wage reports requested by the Director in the RFE. Therefore, in total, the submitted evidence indicates that the subordinate sales and marketing manager would not act as subordinate supervisor under the extended petition.

Beyond this, the Petitioner also claims two foreign based managers subordinate to the Beneficiary including the asserted export manager and a sales area manager based in Turkey. However, the Petitioner also indicated in the Beneficiary's duties that he would spend limited time continuing to oversee these operations abroad, or only approximately 6% of his time. Therefore, even if it had submitted sufficient evidence to substantiate these asserted foreign managers, it states directly that the Beneficiary would not spend a majority of his time acting as a personnel manager with respect to these claimed foreign subordinates. Further, the Petitioner provides several emails between the Beneficiary and the asserted export manager; however, these emails reflect the Beneficiary instructing this employee on sales approaches with customers and inquiring as to the status of orders, indicating that he is more likely a foreign employer sales representative and/or ordering processing employee. These emails also indicate that the Beneficiary is responsible for acting as a first line supervisor over the foreign employer's sales representatives and order processing employees abroad, including coordinating and reporting orders and asking for the status of foreign orders. However, there is little indication from these several emails that these employees act as subordinate managers. As noted, 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." *See* section 101(a)(44)(A) of the Act. In total, the Petitioner did not submit sufficient evidence to establish that the Beneficiary would primarily supervise subordinate managers abroad, as reflected in the submitted organizational charts.

Therefore, the remaining question as to whether the Beneficiary qualifies as a personnel manager is whether the evidence demonstrates that he supervises professional subordinates. 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."

The Petitioner has not established that the Beneficiary supervises professional subordinates. We acknowledge that the Petitioner submits resumes for each of the Beneficiary's subordinates, both in the U.S. and abroad, and documentation indicating that these employees likely hold varying bachelor's degrees. However, we must focus on the level of education required by the position, rather than the degrees held by these subordinate employees. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity. The Petitioner declares that the Beneficiary's subordinates are professionals and that they hold bachelor's degrees, but it does not indicate why bachelor's degrees

are necessary to perform the duties of these positions. In fact, as we have discussed, the evidence indicates that the Beneficiary likely acts as first line supervisor of various sales representatives and sales processing employees, and without further explanation, it is not clear why these operational level positions require a bachelor's degree for minimum entry. As such, the Petitioner did not submit sufficient evidence to establish that the Beneficiary primarily oversees professional employees in his position abroad. Therefore, the Petitioner has not demonstrated that the Beneficiary oversees subordinate managers, supervisors, or professionals as required to qualify him as a personnel manager.

The regulations also require that a Petitioner seeking the extension of a new office petition submit evidence of its financial status after one year. 8 C.F.R. § 214.2(l)(14)(ii)(E). However, the Petitioner provides little detail or documentation regarding its financial status after one year. For instance, the Petitioner states that it earned approximately $200,000 during the first year of operations and projects it would earn upwards of $800,000 during its second year. However, there is little supporting documentation to substantiate these claimed numbers or information to substantiate its current financial status. We acknowledge that the Petitioner submitted internally generated payroll documentation for the asserted members of its organizational structure, but it is not clear how it is sustaining this organizational structure after one year without evidence to demonstrate its financial status as of the date of the petition was filed. This lack of evidence leaves question as to whether the Petitioner has developed sufficiently during the first year to support the Beneficiary in a managerial capacity.

In fact, other supporting evidence leaves only further uncertainty as to whether the Petitioner has developed sufficiently during its first year to support the Beneficiary in a managerial capacity. For example, the Petitioner's statements throughout the record still reflect a questionably prospective stance, expressing confidence it "can take a reasonable share" of the truck spare parts and plastics market and noting that it plans on "conducting research" on the U.S. marketplace. The Petitioner states in a provided business plan submitted with the petition that although it is renting warehouse space to stock goods, it has only "exchanged samples with potential customers and...quoted prices for some basic items." This same business plan indicated that it 2018 the Petitioner planned to get more samples to the United States and deliver them to customers and that it would "start trial business with customers."

Similarly, the Petitioner provided emails from the Beneficiary to foreign management from December 2017, just prior to the date of the petition, indicating that it had made little progress in selling the "core" of its business emphasized in support letters, the sale of truck spare parts. Further, these emails reflect the Beneficiary requesting "additional capitals" from the foreign employer to continue to support the business. The Petitioner also submits photographs of its rented office space and warehouse reflecting the Beneficiary and only two other employees, while future hiring projections indicate it plans to hire other operational level employees, such as a warehouse manager. However, without these employees as of the date of the petition, it appears likely that the Beneficiary is widely involved in the shipment and distribution of the company's product samples to generate

initial business. As such, the preponderance of the evidence indicates that the Petitioner most likely did not develop sufficiently during the first year to support the Beneficiary in a managerial capacity.

In the alternative, the Petitioner did not demonstrate that the Beneficiary acts as a function manager. Although the Petitioner does not overtly assert that the Beneficiary acts as a function manager, on appeal, the Petitioner stated that "the record substantiates the Petitioner's claim that the Beneficiary manages an essential function." 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 manages 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 primarily *manages*, as opposed to *performs*, the function; (4) the beneficiary acts at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary exercises discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

Upon review, the Petitioner has not established that the Beneficiary will act as a function manager. Although we recognize that the foreign employer's projected plans to sell truck spare parts and other plastics in the United States may be essential to the organization, the Petitioner has not demonstrated that the Beneficiary is primarily tasked with managing these services rather than performing them. As discussed previously, the Petitioner submitted substantial supporting documentation indicating the Beneficiary's wide involvement in the day-to-day operational aspects of Petitioner and foreign employer sales activities, such as allocating and coordinating product orders, distributing client requirements, sending wire transfers for payment, and arranging shipments. As noted, the Petitioner did not clearly designate how much time the Beneficiary devotes to the aforementioned non-qualifying operational tasks as opposed to qualifying tasks, such as promulgating policy, developing strategies, and negotiating master agreements with clients. Therefore, the Petitioner has not demonstrated that the Beneficiary will act as a function manager.

For the foregoing reasons, the Petitioner has not established that the Beneficiary will be employed in a managerial capacity.

III. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of T-G- LLC*, ID# 1939033 (AAO Jan. 31, 2019)