U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-, LLC

DATE: JULY 15, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR NONIMMIGRANT WORKER

The Petitioner, a coordinator of corporate travel and events, seeks to employ the Beneficiary as marketing manager/executive 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 business to transfer a qualifying foreign employee to the United States to temporarily work in a managerial or executive capacity.

The Director of the California Service Center denied the petition. The Director concluded that, contrary to the Act and Department of Homeland Security regulations, the Petitioner did not demonstrate that it would employ the Beneficiary in a managerial or executive capacity.

On appeal, the Petitioner argues that the Director disregarded approvals of a prior L-1A petition and its extension for the Beneficiary in an offered position with job duties identical to those in this matter.

Upon *de novo* review, we will dismiss the appeal.[1]

I. LEGAL FRAMEWORK

An L-1A petitioner must establish that, within the three years before a beneficiary's admission into the United States, it or its parent, branch, subsidiary, or affiliate employed the beneficiary abroad full-time for at least one continuous year in a managerial, executive, or specialized knowledge capacity. 8 C.F.R. §§ 214.3(l)(3)(i), (iii), (iv). A petitioner must also demonstrate that it would employ a beneficiary in a managerial or executive capacity. 8 C.F.R. § 214.2(l)(3)(ii).

[1] The Petitioner's Form I-290B, Notice of Appeal, indicated that the company would submit a brief, additional evidence, or both within 30 days of the appeal's filing. As of this date, more than five months after the appeal's filing, we have not received any further submissions from the Petitioner.

II. MANAGERIAL OR EXECUTIVE CAPACITY IN THE UNITED STATES

The Petitioner claims that it would employ the Beneficiary in either a managerial or executive capacity. We will therefore examine each claim, beginning with the purported managerial nature of the offered position.

A. Managerial Capacity

The definition of managerial capacity has two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). 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, e.g.*, *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

Employment in a "managerial capacity" must primarily involve: 1) managing an organization, or a department, subdivision, function, or component of it; 2) supervising and controlling the work of other supervisory, professional, or managerial employees, or managing an essential function of the organization, or a department or subdivision of it; 3) having authority over personnel actions, or functioning at a senior level within the organizational hierarchy or regarding the managed function; and 4) exercising discretion over day-to-day operations of the managed activity or function. Section 101(a)(44)(A) of the Act.

Evidence of managerial capacity must include "a detailed description of the services to be performed." 8 C.F.R. § 214.2(l)(3)(ii). In addition to the job duties of an offered position, we examine a petitioner's organizational structure, the job duties of its other positions, the nature of its business, and other factors affecting the proposed employment.

Here, the Petitioner states that, as marketing manager/executive, the Beneficiary would spend 60 percent of his time planning, developing, and directing the company's marketing division. His duties would include supervising the division's accounting practices, and preparing budgets and financial reports. The Petitioner also states that the Beneficiary would spend 10 percent of his time on each of the following: directing the division's financial strategy, planning, and forecasts; assisting in identifying and assessing new business opportunities; studying, analyzing, and reporting on industry trends and expansion opportunities; and assisting in personnel review, development, and training.

As the Director found, the Petitioner's description of the job's duties is vague, lacking details of proposed daily activities. *See 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) (stating that "[s]pecifics 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 regulations"). As the regulations require a detailed description of a position's job duties, reciting vague job responsibilities or broad business objectives is insufficient.

Here, the Petitioner asserts that the Beneficiary will spend 60 percent of his time, planning, developing, and directing the marketing division, including supervising the division's accounting practices, and preparing budgets and financial reports; but the Petitioner does not explain what that means in the context of the Petitioner's specific business model and staffing. Absent an understanding of what daily duties would make up 60 percent of the Beneficiary's time, we cannot find that the Beneficiary would be primarily employed in a qualifying capacity. With regard to the Beneficiary's other claimed duties, the Petitioner has not demonstrated how those duties, which are also generally described, would qualify as managerial or executive, rather than operational. For example, the record does not establish that the Beneficiary's assisting in identifying and assessing new business opportunities or studying, analyzing, and reporting on industry trends would be qualifying duties. As noted, managerial duties do not include ordinary operational activities performed alongside the Petitioner's other employees. *See, e.g.*, *Family Inc. v. USCIS*, 469 F.3d at 1316; *Champion World*, 940 F.2d at 1533. The Petitioner did not address the deficiency of the job description on appeal. The record therefore does not establish that the Beneficiary would primarily perform managerial duties.

Also, the record does not establish the ability of the Petitioner's staff to support the Beneficiary's employment in a managerial capacity. The Petitioner does not claim that the Beneficiary would manage an essential function. Thus, to qualify as employment in a managerial capacity, the offered position must involve supervising and controlling the work "of other supervisory, professional, or managerial employees." Section 101(a)(44)(A)(ii) of the Act.

The company submitted an organizational chart indicating that the Beneficiary would directly supervise an operational director and a sales director. The chart indicates that, in turn, the operational director would supervise 10 workers, including four managers, and the sales director would oversee three workers. Despite the Director's written request for additional evidence (RFE), the Petitioner did not provide job duties of the Beneficiary's claimed subordinates or the other workers. The unsupported representation of the Beneficiary's position on the organizational chart is not sufficient to demonstrate that he actually oversees professional, managerial or supervisory employees. The record must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. As the record lacks sufficient evidence that the Beneficiary would oversee other supervisory, professional, or managerial employees, the Petitioner has not demonstrated that the Beneficiary would work in a managerial capacity,

Inconsistencies in the record also raise doubt about the credibility of the organizational chart. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Copies of the Petitioner's most recent federal payroll tax records indicate that, in the second quarter of 2018, the Petitioner employed only six people. The organizational chart indicates that these six people were all directors or managers of the company. Thus, the record lacks evidence of the Petitioner's employment of workers who would perform daily operational and sales activities that the Beneficiary would allegedly oversee. Without evidence of lower-level employees, it is not clear

who would be performing the day-to-day operational and sales duties, or that the Beneficiary would be relieved from these duties. Also, the most recent payroll records list only five of the 15 people that the Petitioner claims the Beneficiary would directly or indirectly oversee as employees of the Petitioner.

The Petitioner's organizational chart indicates that the operational director would oversee three "Freelance" workers. The chart therefore suggests that these workers may be independent contractors who were not reflected on the Petitioner's payroll tax records. However, the Petitioner has not submitted evidence to corroborate its payments to these claimed freelance workers, nor documented how their work supports the Petitioner's operations and relieves the Beneficiary from performing non-qualifying duties.

The organizational chart also indicates that the operational director would oversee two workers in Mexico - an air coordinator and a congresses supervisor - who are paid by a company related to the Petitioner. In addition, in response to the Director's RFE, the Petitioner's chief executive officer (CEO) described the sales director and the three workers she would supervise as "freelancers operating in Mexico, Spain [and] India" whom the Petitioner pays commissions. Staff in foreign countries may support an L-1A manager in the United States. *See Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016). In *Z-A-*, however, the petitioner submitted "substantial evidence relating to the support provided by the overseas staff," and "[t]he record amply substantiate[d] the existence of the foreign staff and the nature of and need for the services they provide to the Petitioner and the organization as a whole." *Id.* The Petitioner here has not documented the existence of its purported foreign sales staff or corroborated its claimed payments to these workers. Furthermore, the Petitioner has not explained how these alleged overseas positions support the Petitioner's work nor documented how they are managed by the Beneficiary. Likewise, the record does not establish the Petitioner's claim that a foreign affiliate employs an air coordinator and a congresses supervisor in Mexico who are allegedly overseen by the operational director.

Because of the evidentiary deficiencies discussed above, the record does not establish that the Petitioner would employ the Beneficiary in a managerial capacity. The Petitioner has not sufficiently detailed the job duties of the offered position. The Petitioner also has not demonstrated who would perform its day-to-day, operational and sales activities. The record therefore does not demonstrate that the Petitioner has sufficient staff to relieve the Beneficiary from significant involvement in non-managerial duties. The record also does not establish that the Beneficiary would oversee professional, managerial or supervisory employees, as required.

B. Executive Capacity

Employment in an "executive capacity" must primarily involve: directing an organization's management (or a major component or function of it); establishing its goals and policies (or those of its component or function); exercising wide latitude in discretionary decision-making; and receiving only general supervision or direction from higher-level executives, a board of directors, or stockholders. Section 101(a)(44)(B) of the Act. The term describes an elevated position within a complex, organizational hierarchy. A beneficiary must be able to "direct the management" and "establish the goals and policies" of an organization. *Id.* An executive position therefore must focus on an organization's broad goals and policies, rather than on its day-to-day operations.

For the same reasons the record does not establish the managerial nature of the offered position, the evidence also does not demonstrate that the Petitioner would employ the Beneficiary in an executive capacity. The Petitioner's description of the job duties of the offered position lack sufficient detail to determine the job's daily duties. Also, the Petitioner has not sufficiently demonstrated who would perform day-to-day, operational and sales activities that the Beneficiary claims to oversee. The record therefore does not establish that the company has sufficient staff to relieve the Beneficiary from significant involvement in non-executive duties.

When USCIS uses staffing levels to determine the managerial or executive nature of an offered position, the Agency must consider "the reasonable needs of the organization, component, or function in light of [its] overall purpose and stage of development." Section 101(a)(44)(C) of the Act. USCIS cannot impose a minimum size requirement on an L-1A petitioner. But the Agency may consider size as a factor in assessing whether a business can support a manager or executive. *See, e.g., Brazil Quality Stones, Inc. v. Chertoff*, 531 F.3d 1063, 1070 (9th Cir. 2008) (holding that "size is nevertheless a relevant 'factor in assessing whether [the petitioner's] operations are substantial enough to support a manager'") (citation omitted).

Here, in our analyses of the managerial and executive natures of the offered position, we considered the Petitioner's size. But we also examined: its organizational structure; its other positions; the nature of its business; and the existence of foreign staff. Our analyses therefore do not improperly focus on the Petitioner's size.

On appeal, the Petitioner asserts that the Director disregarded evidence. Specifically, the Petitioner submitted copies of an L-1A petition and its extension that USCIS previously approved on behalf of the Beneficiary for another Petitioner. The Petitioner argues that "the beneficiary's L-1 visa was originally approved and later extended on the same information provided by the Petitioner."

However, a different petitioner filed the prior petitions for the Beneficiary and submitted different evidence to support them. The prior L-1A grants for the Beneficiary therefore do not require USCIS to approve this petition.

III. QUALIFYING RELATIONSHIP

Although unaddressed by the Director, the record also does not establish a qualifying relationship between the Petitioner and the Beneficiary's foreign employer. As previously indicated, an L-1A petitioner must establish that, within the three years before a beneficiary's admission into the United States, he or she worked abroad for the petitioner or its parent, branch, subsidiary, or affiliate. 8 C.F.R. § 214.3(l)(3)(i).

The Petitioner, a limited liability company (LLC), submitted copies of its operating agreement and federal income tax returns indicating that its CEO owns 60 percent of the LLC, with her spouse, the company's chief financial officer, owning the remaining 40 percent. Minutes of a shareholders' meeting also document the CEO's ownership of about 25 percent of the Mexican company, with four other individuals owning the balance of the stock. Contrary to the Petitioner's claims, the record does not establish the Mexican company as the Petitioner's affiliate. The term "affiliate" means "[o]ne 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)(*2*).[2] Here, the record indicates that different groups own and control the Petitioner and the Mexican company. The only common owner of the companies is the Petitioner's CEO. The record therefore does not establish the Beneficiary's foreign employer as the Petitioner's affiliate. Thus, in any future filings in this matter, the Petitioner must submit additional evidence to establish a qualifying relationship between itself and the Beneficiary's foreign employer.

IV. CONCLUSION

The record on appeal does not establish that the Petitioner would employ the Beneficiary in a managerial or executive capacity. We will therefore affirm the petition's denial. A petitioner bears the burden of proving eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner here has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of O-, LLC*, ID# 3997231 (AAO July 15, 2019)

[2] An "affiliate" may also be one of two subsidiaries owned and controlled by the same parent or individual, or a foreign partnership or similar organization that provides accounting services marketed under the same internationally recognized name as a U.S. partner. 8 C.F.R. § 214.2(l)(1)(ii)(L)(*1*), (*3*). These other definitions, however, do not apply to the facts of this case.