U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S- CORP.

DATE: JULY 16, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a medical software company, seeks to continue the Beneficiary's temporary employment as its "Company Director/CEO" 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 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, determining that the Petitioner 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 submits additional evidence and asserts that the Director erroneously denied the petition. The Petitioner contends that the Beneficiary will be employed in a managerial capacity and will primarily manage its essential functions.[1]

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.*

[1] Subsequent to filing the appeal, the Petitioner filed a new nonimmigrant petition. The new petition was approved and the Beneficiary was granted L-1B classification authorizing him to work for the Petitioner in a specialized knowledge capacity. We issued a request for evidence (RFE) to confirm that the Petitioner wished to pursue the instant appeal. The Petitioner has confirmed its intent to pursue the appeal and submitted supplemental evidence, which we have incorporated into the record.

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The sole issue addressed by the Director is whether the Petitioner established that it would employ the Beneficiary in a managerial capacity in the United States.[2] Specifically, the Petitioner claims that it will employ the Beneficiary as a function manager.

"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 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 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).

When assessing the managerial or executive nature of an offered position, we examine a petitioner's description of the job's duties. *See* 8 C.F.R. § 214.2(l)(3)(ii) (requiring an L-1 petitioner to submit "a detailed description of the services to be performed"). 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 personnel 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.

A. Job 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 *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the company's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

[2] The Petitioner initially claimed that the Beneficiary would be employed in an executive capacity, but has not pursued that claim on appeal.

At the time of filing, the Petitioner described the Beneficiary's duties as CEO as follows:

> This position is fully responsible for the direction and corporate governance of the company. This includes directing, marketing strategy, product direction, client services, and customer retention strategy. He works to administer organizational activities, set business strategies, delegate tasks, review financials and sales reports, and recruit new managerial employees. As the leader of the company, he reports to board members or company stakeholders and strives to maintain professional and corporate customers, enforce ethical practices, meet fiscal targets and manage company budgets.

The Director issued a request for evidence instructing the Petitioner to submit a detailed position description describing the specific tasks the Beneficiary would perform and the amount of time to be spent on each. In response, the Petitioner stated that his "typical executive duties" would be as follows:

- Review and manage budget and cash flow – 17%
- Sales and marketing – 7%
- Product design and direction – 40%
- IT service strategy – 12%
- Corporate Management – 12%
- Customer relations – 9%
- New product development and customer advisory – 12%

The Petitioner did not elaborate with respect to the specific duties the Beneficiary was expected to perform on a day-to-day business within these areas of responsibility. In the denial decision, the Director determined that the Petitioner did not meet its burden to provide a detailed description of the Beneficiary position, and noted that most of these broadly stated duties could not be classified as managerial or executive in nature based on the limited information provided.

We agree with the Director's assessment of the position descriptions provided with the initial filing and in response to the RFE. Both descriptions broadly stated the Beneficiary's areas of responsibility without providing any meaningful insight into what he would primarily do on a day-to-day basis as the CEO and sole full-time employee of a medical software company offering multiple products in several targeted markets. Specifics 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 the regulations. *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). As discussed further below, the Petitioner claimed to have outsourced certain software development, firmware development, and accounting tasks, but did not show who, other than the Beneficiary, would be available to perform non-qualifying duties associated with sales, marketing, client support, customer relations, and day-to-day administrative and financial matters.

The Petitioner now submits the following revised and expanded position description on appeal:

1. Contract Negotiation/Oversight (40%)
   a. Directs and oversee contracts to buyers, purchasing officers, and related clientele involved in purchasing [the Petitioner's] software solutions . . . .

b. Performs final "sign-off" on all multi-million dollar contracts for products and support.
c. Performs final "sign-off" on strategic Non-disclosure Agreements with companies engaged to work with [the Petitioner].
d. Develops and signs off on contractual agreements between [the Petitioner] and contractors.

2. Management of Budget and Cash flow: (17%)
   a. Produces financial reports, directs investment activities, and develops strategies and plans for the long-term financial goals.
   b. Develops strategic alliances/contractual agreements to ensure [the company's] products and services can scale in the U.S. markets . . .

3. Technology Strategy Decisions: (12%)
   a. Determines the information technology goals and takes responsibility for oversight of technology systems to meet those goals.
   b. Oversees meetings with end customers and alliances such as Johns Hopkins and UPS to ensure [the Petitioner] aligns its technology goals with market trends

4. Oversight of new products (12%): Ensures proper development of products designed to meet healthcare needs of U.S. market; ensures product/production are of the proper quality to address customer needs.

5. Oversight of sales and marketing (7%): Direct organizations' direct and indirect sales teams. Sets sales goals, analyzes data, and develops training programs for organizations' sales representatives.

6. Corporate Management (3%): Formulates internal policies, manages daily operations, and plan the use [of] human resources and contractors.

7. Liaison with Partner Executives (9%): Coordinates company goals with the Board of Directors/Group Investors; ensures proper communication with other critical players/Executives inside and outside the company.

The Petitioner states that it has "centralized the management of its key functions" – including electronics, manufacturing and fabrication, software development and support, direct sales, and indirect sales - under the Beneficiary's management, and that this description demonstrates that he primarily performs "functional managerial duties."

However, this newly submitted position description, while lengthier than those previously submitted, does not demonstrate with sufficient specificity what the Beneficiary actually does as part of his daily routine. In order to establish that the Beneficiary will be employed as a function manager, the Petitioner must establish that his actual duties are primarily managerial.

First, we note that, while several of the areas of responsibility attributed to the Beneficiary on appeal resemble the overview of the position provided in response to the RFE, the Petitioner made certain

changes to the areas of responsibility without explanation. Whereas the Petitioner previously indicated that the Beneficiary spends 40% of his time on "product design and direction," the Petitioner now states that he allocates 40% of his time to "contract negotiation/oversight," and did not attempt to reconcile the two statements. Rather, it now simply states that he is not involved in any software design duties. The Petitioner also replaced the Beneficiary's "customer relations" duties with "liaison with partner executives" and removed "customer advisory" functions from the original description. Notably, these were all among the responsibilities that the Director observed were not clearly managerial in nature. Overall, these changes to the Beneficiary's time allocations and areas of responsibility account for approximately half of the Beneficiary's time. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Regardless, the expanded description does not adequately detail how the Beneficiary primarily manages the company's essential functions. The Petitioner indicates that the Beneficiary spends 40% of his time on contract negotiation and oversight, but does not describe the specific tasks that would occupy this large portion of his time on a day-to-day basis. The Petitioner notes the Beneficiary's authority to sign sales contracts, agreements with contractors, and non-disclosure agreements, but the record does not support a finding that these are duties that he would perform with such regularity that they would require significantly more of his time than any other duty. The only other duty identified under this area of responsibility – "directs and oversees" contracts – is vague and does not provide insight into what specific activities would be involved. Further, the Petitioner did not define "contract oversight" as one of the essential functions managed by the Beneficiary.

In fact, only three of the Beneficiary's responsibilities, requiring 31% of his time, appear to directly relate to the technology and sales functions that he is claimed to primarily manage. The Petitioner's expanded description of these responsibilities also lacks detailed information regarding the specific tasks the Beneficiary performs to manage these functions. For example, the Petitioner states that his responsibility for "technology strategy decisions" includes determining information technology goals, taking responsibility for oversight of systems to meet those goals, and overseeing meetings with end customers to ensure that goals align with market trends. These statements are vague and do not specify, for example, what specific tasks are involved in "overseeing" a meeting with customers or overseeing technology systems.

Similarly, the Beneficiary's oversight of sales and marketing is stated to include direction of "direct and indirect sales teams" and developing training programs for the company's sales representatives. However, the Petitioner does not claim that it had a direct sales team or sales representatives, nor does it have anyone to deliver the training programs the Beneficiary develops. Finally, while the Petitioner stated that the Beneficiary's responsibilities include "oversight of new products" it did not identify the actual tasks he performs to "ensure proper development of products" or to ensure that the products are "of the proper quality to address customer needs." Without these details, we cannot determine that his duties would be managerial in nature.

Reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros.*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Here, the Petitioner has not provided the necessary detail or an adequate

explanation of the Beneficiary's activities in the course of his daily routine in support of its claim that he primarily manages the company's "five essential functions."

Further, as noted above, the Petitioner has not provided a consistent breakdown of how the Beneficiary would allocate his time. Absent a clear and credible breakdown of the time spent by the Beneficiary performing his duties, we cannot determine that such duties would be primarily managerial. The fact that the Beneficiary will manage the business as a whole does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of 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, the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial in nature.

B. Staffing and Organizational Structure

The Petitioner, which offers several medical software solutions, employed the Beneficiary as its sole payroll employee at the time of filing. The Petitioner explained that, although it previously had in-house employees, it found that outsourcing its day-to-day work was more efficient as the company moved from offering customers a "one-size-fits-all" solution to developing vertical markets for its products. The Petitioner did not initially provide an organizational chart or identify its outsourced service providers.

In the RFE, the Director requested: a detailed organizational chart and the names, job titles and job duties of all personnel; evidence of wages and payments made to employees and contractors; and copies of contracts for outsourced labor.

In response, the Petitioner submitted an organizational chart reflecting that a team of contractors assists the Petitioner and related entities with software, support, hardware, firmware and design. The Petitioner identified the contractors as [redacted], [redacted], [redacted] and [redacted]." It submitted letters from: (1) [redacted] of [redacted], who indicated that his company provides "engineering consulting that includes embedded programming, circuit design and associated technical advice"; (2) [redacted] of [redacted] who stated that his company performs software development for the Petitioner; and (3) a CPA, who stated that his firm provides accounting and tax services. The Petitioner did not submit additional information regarding duties performed by these contractors, evidence of payments made to them, or copies of their contracts. In the denial decision, the Director found that the Petitioner did not sufficiently document its use of contractors or demonstrate that the Beneficiary had sufficient staff available to relieve him from significant involvement in the day-to-day operations of the company.

On appeal, the Petitioner claims that its legal counsel did not fully understand the company's business and staffing model, and now provides additional information and documentation related to the company's use of contractors. It states that it relies on outsourced companies to perform the day-to-day activities of the company's "essential functions" and that the Beneficiary primarily manages these functions.

The Petitioner states that the "electronics (firmware)" function is performed by [redacted] which develops electrical designs, layouts and develops firmware for electrical components of the Petitioner's projects and products, and [redacted] which designs and builds electronic boards. The Petitioner reiterated that [redacted] performs its "software development and support" function, and explained that the "manufacturing and fabrication" function for the company's "endoscope cabinet" products is performed by [redacted], and [redacted]

The Petitioner also states that it outsources its indirect sales to three companies – [redacted] and [redacted] which it describes as "resellers." Finally, it states that its "direct sales" function would soon be filled by in-house employees, as it is in the process of hiring a "GI Lab Sales" employee and expects to hire a "Sterile Processing Sales" employee "in early 2019."

As evidence of its use of the above-referenced contractors, the Petitioner submits:

- One invoice for $680 from [redacted] dated August 2017
- One invoice for $9014.25 from [redacted] dated May 2018, subsequent to the filing of the petition
- A quotation from [redacted] for "Scope Cabinet Contract Work," dated August 2018, subsequent to the filing of the petition
- One invoice from [redacted] for the purchase of an endoscope cabinet in October 2017
- Dozens of invoices from [redacted] for design, development and testing work performed between July 2017 and August 2018, accompanied by detailed logs of tasks performed during this period
- A printout of a "Purchases [Vendor Summary]" report for the same period indicating that the Petitioner purchased $196,000 in services from [redacted] over a 13 month period.
- A printout of a "Sales [Customer Summary]" report for the period July 2017 until August 2018, which identifies [redacted] and total sales of $116,455.80.
- A printout of a "Sales [Customer Summary]" report for the same period which identifies [redacted] and one sales transaction in the amount of $1309 in August 2017.
- A printout of a "Sales [Customer Summary]" report for the same period which identifies [redacted] and eight sales transactions totaling $2676.

In addition, the supplemental evidence submitted in response to our RFE includes evidence that the Petitioner hired a full-time office manager in November 2018, as well as a few additional invoices.

The Petitioner asserts that the newly submitted information and documentation establish that the Beneficiary "manages and oversees five (5) functions of [the Petitioner]," and that "his duties directly relate to his management of the five (5) functional areas of the business." The Petitioner acknowledges that staffing is a relevant consideration in determining a given beneficiary's employment in a managerial capacity, but emphasizes that it has established that the Beneficiary here has sufficient personnel to perform the software design, installation of hardware, manufacturing of components, and sales.

The newly submitted evidence does not establish that the Beneficiary is primarily managing an essential function or functions for the Petitioner. First, as discussed, the newly submitted breakdown of the Beneficiary's duties indicates that he would spend less than one-third of his time on oversight of the company's technology, sales, and marketing activities, and describes an employee who is

responsible for the company as a whole, rather than primarily responsible for managing a clearly defined essential function or functions. The description does not clearly define the Beneficiary's duties as required by the regulations and remains insufficient to establish the nature of his actual day-to-day work.

The information provided on appeal provides a clearer picture of how the company's software and solutions are developed and produced without in-house staff. However, the new evidence does not sufficiently demonstrate that all or most non-qualifying technology-related activities have been contracted out. The Director emphasized that the Petitioner did not submit copies of its contracts detailing the services to be performed by its contractors and this documentation is still not part of the record. Therefore, while the Petitioner has documented the extensive software and testing services performed by [redacted] it has not adequately supported its claim that this contractor reviews and responds to customer support inquiries, supports customers' software support teams, or engages with the Petitioner's customers. This is significant because the Beneficiary initially stated that "customer advisory" and "customer relations" duties require 21% of the Beneficiary's time. We cannot determine to what extent the Beneficiary is actually relieved from these customer support duties absent evidence showing that they have actually been assigned to contractors.

The Petitioner states that the Beneficiary "oversees" [redacted]'s work, but the terms of the arrangement, and the specific nature of that oversight, are not sufficiently documented. As noted, the Petitioner initially indicated that the Beneficiary would spend 40% of his time on duties related to "product design and direction." We cannot overlook the fact that the record indicates that the Beneficiary was the primary architect of the Petitioner's software solutions and likely possesses technical knowledge not held by the contractor. Therefore, the Petitioner's claim that he is removed from performing any day-to-day technical duties requires additional explanation. Further, coordinating the work of the manufacturing, software, firmware, and other contractors involved in product development would necessarily require performance of operational and administrative tasks that have not been clearly assigned to anyone. For example, the quotation from [redacted] stated that the Beneficiary would be responsible for submitting photos to a UL inspection company, obtaining quotes, and scheduling and contracting with a UL company for UL inspection.

The record is similarly lacking evidence that the Beneficiary is relieved from involvement in sales and marketing duties. The Petitioner describes its indirect sales team of [redacted] and [redacted] as "resellers," but the submitted "sales summaries" appears to identify them as customers. Further, only [redacted] was claimed to be responsible for any significant portion of the company's sales, and the Petitioner did not provide a copy of its agreement or contract with [redacted] to clarify the nature of the relationship. The evidence does not support the Petitioner's claim that it has been or would be primarily relying on these companies to achieve its sales, nor does the record show that the Petitioner has employed its own sales staff. In the absence of such evidence, we cannot conclude that the Beneficiary is relieved from significant involvement in the company's sales and marketing activities.

The Petitioner claims that it now employs a full-time office manager who purchases and maintains materials for inventory, organizes files, schedules appointments, "maintains customer satisfaction," fulfills and ships customer orders, liaises with suppliers and clients, manages "project goals," processes invoices and receivables, and performs "all administrative tasks." This employee was hired

nearly one year after the filing of this petition, and the Petitioner has not stated who performed the duties now assigned to this individual when 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). The record also reflects that the Petitioner had a second employee, [redacted] during the first eight months of 2017, but the Petitioner did not identify what types of duties this individual performed or explain who took over their duties after their departure.

The Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in a managerial or executive capacity. *See* section 101(a)(44)(C) of the Act. However, it is appropriate 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 or a company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The fact that a petitioner is small and relies on contractors to perform certain day-to-day duties does not prohibit a finding that it can support a managerial position. Further, performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a beneficiary as long as those tasks are only incidental to their primary duties. However, a petitioner still has the burden of establishing that a beneficiary will "primarily" perform managerial duties. *See* section 101(a)(44) of the Act. Whether a beneficiary is a "function" manager turns in part on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016).

Here, while the record establishes that the Beneficiary, as the Petitioner's ultimate owner and sole employees, has the appropriate level of authority over the company and its essential functions, the record does not sufficiently describe his actual duties and the proportion of those that are managerial in nature. Its descriptions of his duties contained inconsistencies and were not sufficiently detailed. Further, the record does not adequately document the availability of contractors to relieve the Beneficiary from involvement in certain non-managerial tasks necessary for the operation of the business, particularly administrative, sales, marketing, customer relations, and certain technical functions associated with the design of its software and solutions. For these reasons, the Petitioner has not established that it would employ the Beneficiary in a managerial capacity under the extended petition.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of S- Corp.*, ID# 2553328 (AAO July 16, 2019)