U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-S-USA, INC.

DATE: JULY 18, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a manufacturer and wholesaler of sporting goods, seeks to continue the Beneficiary's temporary employment as its "Executive Director" 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 Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial capacity.[1]

On appeal, the Petitioner submits a brief disputing the denial, claiming that the Beneficiary will primarily perform managerial job duties despite the size of its organization.

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, or in a position involving 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.*

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;

[1] The instant petition seeks to continue employment of a beneficiary who came to the United States to open a new office. The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

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 OR EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity.

The term "managerial capacity" is defined as "an assignment within an organization in which the employee primarily":

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) 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;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. 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.*

Section 101(a)(44)(A) of the Act.

The term "executive capacity" is defined as "an assignment within an organization in which the employee primarily":

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

Section 101(a)(44)(B) 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 capacity of the Beneficiary, we will look first to 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 or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Based on the statutory 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 duties, 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 filed the Form I-129 claiming four employees and a gross income of $500,000. In a supporting document, the Petitioner stated that the Beneficiary's key responsibilities would include managing a "senior executive team" and hiring "senior-level management," delegating tasks to subordinate managers, leading strategy development and implementation of long- and short-term goals, assessing and managing risks, establishing and managing "information systems," communicating with the foreign parent entity, ensuring "integrity of all public disclosure," holding "special meetings" about "company status," and ensuring stability in the company's operations. The Petitioner did not specify which employees would comprise the "senior executive team" that the Beneficiary is said to manage or which positions would constitute the "senior-level management" that the Beneficiary seeks to hire. The Petitioner also did not elaborate on the specific tasks and actions that are involved in leading strategy development or identify specific risks that the Beneficiary would assess and manage within the scope of its manufacturing and wholesale business. Likewise, the Petitioner did not specify which "information systems" the Beneficiary would put in place or identify the type of information that would be subject to "public disclosures" and state how the Beneficiary would ensure its integrity.

The Director issued a notice of intent to deny (NOID) advising the Petitioner that its description of the Beneficiary's proposed position was not sufficient to determine what the Beneficiary would be doing on a daily basis. The Director also deemed the evidence insufficient to establish that the Beneficiary either manages supervisory or professional employees or that he manages an essential function.

In response, the Petitioner provided a somewhat confusing statement where it seemingly acknowledged that the Beneficiary's two subordinates are not professional, supervisory, or managerial employees. The Petitioner also stated that it was "obvious" that the Beneficiary was managing the company over the course of the past year because there were no professional, supervisory, or managerial employees, other than the Beneficiary, to manage it. The Petitioner stated that it was submitting a revised job description to demonstrate that the Beneficiary's proposed position is managerial.

We note that the Petitioner's supplemental statement did not expand on the Beneficiary's original list of job duties and instead included a vague job description that did not demonstrate the managerial nature of the proposed employment. Namely, the Petitioner stated that over the next two to three years, the Beneficiary would devote 75% of his time to overseeing the company's daily operations, managing and performing its "essential functions," supervising its staff and evaluating their performance, "manag[ing] each department," expanding the company to include an administration department, and hiring more employees. The Petitioner also stated that the remaining 25% of the Beneficiary's time would be spent performing and managing "functional duties," making decisions to set the company's marketing, sales, and financial plans, studying market conditions and updating business strategies accordingly, controlling the company's budget, and setting sales goals for the sales and marketing staff. The Petitioner did not allocate time constraints to the individual components of the job description or list specific tasks that establish the specific actions the Beneficiary would perform on a day-to-day basis in meeting his responsibility to oversee the company's daily operations. The Petitioner also did not identify which "essential functions" and "functional duties" the Beneficiary would manage and which he would perform, nor did it specify how much time the Beneficiary would allocate to performing versus managing the unidentified functions and duties. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the actual duties themselves reveal the true nature of the employment. *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).

In addition, the new job description was inconsistent with the original list of duties. The former job description included vague references to the Beneficiary's role in managing a "senior executive team," hiring "senior-level management," and delegating tasks to subordinate managers; however, the more recent job description contradicted those references by indicating that the Beneficiary's two subordinates are not professional, supervisory, or managerial employees. In any event, the Petitioner neglected to elaborate as to the positions that comprise the "senior executive team" and "senior-level management" and the evidence of record does not establish the existence of a "senior executive team" or a tier of "senior-level management." The Petitioner must resolve these incongruities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In denying the petition, the Director determined that the evidence does not establish that the Beneficiary would primarily perform managerial duties that involve overseeing professional, managerial, or supervisory employees or managing an essential function.

On appeal, the Petitioner argues that the Director's decision is erroneous and contends that the Beneficiary can meet the statutory criteria of managerial capacity by showing that he functions at a senior level within the organization or with respect to a function that he manages. We note, however, that the Beneficiary's placement within the Petitioner's organizational hierarchy is only one of several factors we evaluate in determining whether the Beneficiary would be employed in a managerial capacity. As noted above, the Beneficiary's actual job duties are also critical in making this determination. On appeal, the Petitioner claims that the Beneficiary "devotes a majority of his time . . . toward managerial functions." However, the Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). In light of the ambiguities and inconsistencies we cited above, we cannot discern the specific tasks the Beneficiary would perform on a daily basis and the amount of time the Beneficiary would devote to managerial versus operational or administrative tasks that are required to ensure the Petitioner's proper daily function.

While no beneficiary is required to allocate 100% of his or her time to managerial-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988). Due to the lack of sufficient consistent evidence establishing the actual tasks the Beneficiary would perform we cannot conclude that his duties would be primarily of a managerial nature.

Despite the Petitioner's recent shift in focusing on the Beneficiary's proposed employment in a managerial capacity, we acknowledge the Petitioner's original supporting statement where it claimed that the Beneficiary would be employed in an executive capacity. However, based on the above analysis of the job descriptions provided originally in support of the petition and subsequently in response to the NOID we similarly cannot conclude that the Beneficiary would be employed in an executive capacity.

B. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the evidence 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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) 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." Section 101(a)(44)(A)(iv) of the Act. 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*).

In the present matter, the Petitioner's initial supporting evidence included an organizational chart, which depicted the Beneficiary as overseeing a sales manager and a network and electronic commerce manager with only the sales manager depicted as a managerial or supervisory employee. We note that the organizational chart does not depict the network and electronic commerce manager supervising or managing any subordinate employees and the job description likewise does not substantiate this employee's managerial position title. That said, while the chart shows a telemarketing agent in a position that is directly subordinate to the sales manager, neither of the sales manager's two job descriptions list any managerial or supervisory tasks with respect to the telemarketing agent. Rather, one of the sales manager's job descriptions indicates that he/she would oversee the work of sales representatives. However, the organizational chart does not indicate that the Petitioner employed any sales representatives at the time of filing. Therefore, the record does not adequately and consistently support the claim that the sales manager is currently a managerial or supervisory employee. As noted above, the Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376.

The Petitioner properly points out on appeal that the Beneficiary can satisfy the personnel manager requirements if it is established that the Beneficiary oversees the work of professional employees, even if such subordinates are not managers or supervisors. *See* section 101(a)(44)(A)(ii) of the Act. However, we do not find that the Beneficiary's subordinates can be deemed professional employees based on the submitted evidence. In evaluating 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." Here, the employee job descriptions state that an associate's degree is the minimum educational requirement for the sales manager and its network and electronic commerce manager, thereby indicating that neither position requires educational credentials that rise to the level of a professional. While new information was provided in the NOID response, which indicates that the position of network and electronic commerce manager requires a bachelor's degree, the Petitioner has not provided independent, objective evidence to resolve the inconsistency between this information and the information contained in the original employee job description, where the Petitioner indicated that an associate's degree was the highest degree needed for the position. *See Ho*, 19 I&N Dec. at 591-92.

Furthermore, the Beneficiary's job description contained in the NOID response expressly states that he has "absolute power" to hire, fire, and promote all staff as well as "evaluate their performance regularly and set up goals for each staff [sic] to achieve." In the same job description, the Petitioner stated that "[a]ll staff under the departments are under [the Beneficiary]'s supervision and directions [sic]." These statements contradict the organizational chart in that they indicate that the Beneficiary, rather than the sales manager, has direct supervisory control over the Petitioner's telemarketing agent, and that the Beneficiary's supervisory duties would extend to all staff, rather than being primarily limited to the Petitioner's supervisory, professional, or managerial employees. We note that artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support a managerial position. As stated in the Director's decision, an individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In sum, while the Beneficiary may have the authority to hire and fire employees and take other personnel actions as a result of his top-most placement within the Petitioner's organizational hierarchy, the record does not establish that the Petitioner had the management structure in place at the time of filing to support the Beneficiary as a personnel manager who would primarily oversee the work of supervisory, professional, or managerial employees.

Further, the Petitioner's statements on appeal urging us to focus on its reasonable needs rather than the size of its support staff are not persuasive, as the Petitioner did not establish that it had sufficient support personnel at the time of filing to relieve the Beneficiary from allocating his time primarily to performing the organization's non-managerial functions. We note that overseeing a staff that is comprised of non-supervisory, non-professional, and non-managerial employees does not satisfy the statutory requirements of managerial capacity. *See* section 101(a)(44)(A)(ii) of the Act. Moreover, the Petitioner has not provided information to account for a number of operational and administrative duties, such as answering phones, issuing invoices, handling accounts payable and receivable, communicating with vendors, and shipping and receiving of merchandise, which are undoubtedly required within the Petitioner's manufacturing and wholesale operation. Without information as to who performs these operational tasks, we cannot exclude the possibility that the Beneficiary himself is directly involved in such tasks in addition to overseeing the Petitioner's non-supervisory, non-professional, and non-managerial employees.

In denying the petition, the Director determined that neither the Petitioner's organizational hierarchy nor the job duties of the Beneficiary's subordinates support the claim that the Beneficiary would primarily manage a staff of professional, managerial, or supervisory personnel. In light of the analysis provided above, we agree with the Director's conclusion.

Alternatively, 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, or more specifically, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties attributed 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 duties related to the function. *See Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016).

In this matter, despite making claims on appeal, the Petitioner has not provided sufficient evidence to demonstrate that the Beneficiary manages an essential function. The Petitioner has neither identified an essential function with specificity nor provided sufficient evidence to demonstrate who within its organization would perform the underlying non-managerial duties associated with an essential function. Again, the Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376.

In light of the various deficiencies catalogued above, we find that the Petitioner has not established that it would employ the Beneficiary in a managerial capacity. Likewise, the same deficiencies and lack of consistent supporting evidence also precludes a determination that the Beneficiary would be employed in a position where his primary focus would be directing the management of the organization through a managerial staff. For the reasons discussed above, the evidence submitted also does not establish that the Beneficiary would be employed in an executive capacity under the extended petition. Therefore, this appeal will be dismissed.

ORDER: The appeal is dismissed.

Cite as *Matter of S-S-USA, Inc.*, ID# 492499 (AAO July 18, 2017)