U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-H-M- INC

DATE: JULY 28, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a wholesaler and exporter of scrap metal and plastic, seeks to extend the Beneficiary's temporary employment[1] as its president under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner had not, as required: (1) established that the Beneficiary would be employed in a managerial or executive capacity; and (2) provided sufficient evidence of its financial status. The Petitioner filed a motion to reopen. The Director concluded that the evidence submitted on motion overcame the second ground for denial, but the Director affirmed the first ground.

In its appeal, the Petitioner submits additional evidence relating to staffing and asserts that the Director did not sufficiently explain how its prior statements were deficient.

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 specialized knowledge capacity, for one continuous year within three years preceding the Beneficiary's application for admission into the United States. 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. Section 101(a)(15)(L) of the Act.

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period December 22, 2014, until December 21, 2015. 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 petition for L-1A nonimmigrant status must include evidence establishing that the petitioner will employ the beneficiary in an executive or managerial capacity. The petitioner must also show that, during the three years preceding the filing of the petition, the beneficiary had at least one continuous year of full-time employment abroad, in a position that was managerial, executive, or involved specialized knowledge. *See* 8 C.F.R. § 214.2(l)(3).

There are additional requirements when a petitioner seeks to extend a visa petition that involved the opening of a new office. The new petition must include evidence to show: a qualifying relationship still exists between the employers in the United States and abroad; the U.S. entity has been doing business for the previous year; and the financial status of the U.S. operation. The Petitioner must also submit statements describing the Beneficiary's past and intended future duties in the United States, and, for L-1A petitions, details of the staffing of the new operation. *See* 8 C.F.R. § 214.2(l)(14)(ii).

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

In the denial decision, the Director concluded that the Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity under the extended petition. Specifically, the Director found deficiencies in the record with respect to the Beneficiary's job duties and the staffing of the new office at the end of its initial year of operations.

A managerial capacity is an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization, and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A personnel manager supervises and controls the work of other supervisory, professional, or managerial employees; the duties of a first-line supervisor are not considered managerial unless the employees supervised are professional. A personnel manager must also have the authority to execute or recommend personnel actions such as hiring, firing, and promotions. A function manager need not directly supervise other employees, but must manage an essential function within the organization, or a department or subdivision of the organization, and function at a senior level within the organizational hierarchy or with respect to the function managed. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A).

An executive capacity is an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and 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.

A. Job Duties

The Petitioner must describe the duties performed by the Beneficiary for the previous year and the duties the Beneficiary will perform under the extended petition. 8 C.F.R. § 214.2(l)(14)(ii)(C).

1. The Beneficiary's Past Duties

In the denial notice, the Director found that "[t]he record does not establish the beneficiary's duties during the initial L-1A period." On appeal, the Petitioner states that the Director did not identify any specific deficiencies in the submitted description.

Upon review, much of the job description concerned the Beneficiary's authority over subordinates such as a "sales team" and "circulation staff," but the Petitioner had no employees before April 2015. Therefore, the Beneficiary's activities for much of the first year of operations could not have involved subordinate employees as the Petitioner has claimed. Further, the submitted description mainly listed various company functions and stated, without elaboration, that the Beneficiary supervised or oversaw them.

Accordingly, we agree with the Director's conclusion that the Petitioner did not adequately explain the duties the Beneficiary performed during the previous year.

2. The Beneficiary's Proposed Duties

The Director further found that the Petitioner did not provide a sufficient description of the duties the Beneficiary would perform under the extended petition.

The Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definitions of managerial and executive capacity each have 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 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive 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.

Regarding the Beneficiary's anticipated future duties, the Petitioner stated:

> As President of [the petitioning company], [the Beneficiary] will be responsible for further developing our relationship with American customers. The beneficiary of our petition will direct the daily activities of the corporation with the staff. He will have discretion over the daily operations and in doing so; he will hire other managers and employees. He will report to the Board of Directors and our parent company in

> China. [The Beneficiary's] duties will also include being responsible for the flowing profitability of our company:
>
> - Conferring with our organization officials to plan business objectives;
> - Develop organizational policies which help coordinate functions and operations between divisions and departments within our world organization;
> - Coordinating and formulating financial programs to provide funding for new and continuing operations in an effort to maximize returns on investment, and increase our productivity;
> - Reviewing activity reports and financial statements to determine progress and status in attaining objectives, revising such objectives in accordance with changing market conditions;
> - Reporting directly to the Board of Directors of our Parent Company ab[roa]d regarding the status of our various sales activities.

Asked, in a request for evidence, for more detail, the Petitioner offered more general assertions:

> [T]his position is a key executive position that provided [*sic*] important support and direction to the Petitioning Company.
>
> Beneficiary will continue developing business and the financial growth of the Petitioner, as well as supervise the direction of managers. The Beneficiary's main responsibility will be to lead Petitioner into a professional and profitable operation. . . .
>
> His assignment in the organization primarily involves directing the management of the organization and/or a component or function; establishes investment/business goals and policies; exercises wide latitude in discretionary decision making

The last sentence quoted above is essentially a rephrasing of the statutory definition of "executive capacity," even including the broad, generic reference to "the organization and/or a component or function." Reiterating the regulations in this way cannot satisfy the requirement for a detailed and specific job description. *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).

In the denial notice, the Director found that the Petitioner had listed many responsibilities without explaining the tasks the Beneficiary would perform to fulfill those responsibilities, and that the job description was so vague that it "could apply to a position in any industry."

On appeal, the Petitioner repeated the initial list of responsibilities, and stated that the Beneficiary would devote 80% of his time to "managerial or executive work." The Petitioner stated that the Beneficiary would perform executive tasks such as "long-range sale plans" and "finance administration" on Mondays and Fridays, and managerial tasks such as reviewing the work of

subordinates, meeting with managers, and evaluating employees on Tuesdays, Wednesdays, and Thursdays. (The Petitioner had previously submitted a similar job description on motion.)

The Petitioner states that the Director has not identified any non-managerial duty among those listed previously. While the Director must explain the grounds for denial, the burden is on the Petitioner to establish eligibility for the benefit sought; there is no presumption of eligibility that the Director must rebut. An insufficiently detailed job description may provide sufficient grounds for denial of the petition, whether or not the Director specifically identifies non-managerial or non-executive tasks among the listed duties.

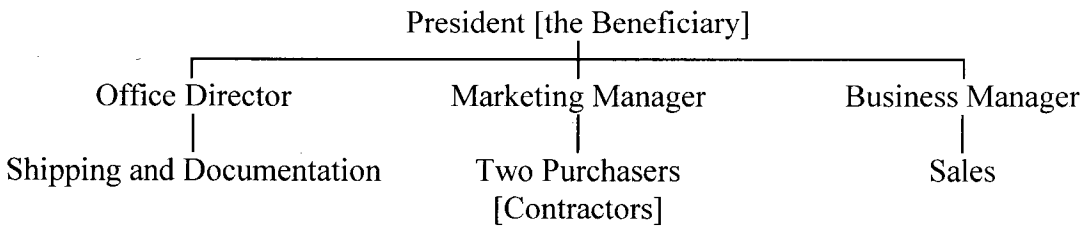
The record contains invoices and bank records showing that the Petitioner conducts business, and tax and payroll records showing the employment of subordinates, but the record does not contain enough evidence or information to illustrate specifically what the Beneficiary does or would continue to do. The Petitioner has not provided enough information to establish that the Beneficiary's duties would primarily be those of a manager or executive.

B. Staffing

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, 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 duties.

A petitioner seeking to extend a new office petition must submit a statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity. 8 C.F.R. § 214.2(l)(14)(ii)(D). A beneficiary's authority over subordinate employees counts toward managerial capacity only if those subordinates are supervisors, managers, or professionals. *See* 101(a)(44)(A)(ii) of the Act.

The Petitioner's organizational chart showed the following full-time employees and contractors:



Like the Beneficiary's own job description, the job descriptions for his subordinates consist largely of lists of responsibilities rather than details about identifiable tasks. Apart from general references

to oversight, responsibility, and supervision, the Petitioner identified the following specific tasks for the Beneficiary's upper-tier subordinates:

> Marketing Manager:
>
> He/she negotiates pricing and takes orders from customers both in China and the US; formulating recommendations, policies and plans to aid market interpretation or solution; consulting customers and clients regarding trade and market in China and United States, forecasting future market trends.
>
> Business Manager:
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> [M]eeting and interacting with bank representatives; participating in personnel management including the hiring and firing of employees; contacting the China Company and reporting to it with regard to the business operations under his/her supervision; reporting to President regarding business operations under her control. . . . [G]athering, organizing and analyzing information on operating procedures, identifying, recommending and developing new product concepts and modifications to generate incremental sales; formulating recommendations, policies and plans to aid market interpretation or solution.
>
> Office Director:
>
> [L]iaison between Headquarter[s] in Tianjin, with Beneficiary and with our overseas customers. Specific duties: Coordinating and information exchange with the parent offices.

The Petitioner added that the office director "handles some of the work . . . until the office is profitable enough to hire" additional staff. The Petitioner did not specify the nature of this work.

In the denial notice, the Director stated that, while several of the Beneficiary's subordinates have the words "director" or "manager" in their job titles, they "are performing the services of the organization" and the Petitioner had not shown that any of the Beneficiary's subordinates are professionals, managers, or supervisors. The Petitioner has not claimed that the subordinates are professionals, and specifically argues on appeal that the Beneficiary's subordinates "NEED NOT HOLD PROFESSIONAL-LEVEL POSITIONS." Therefore, we need only examine the question of whether these individuals are managers or supervisors.

On appeal, the Petitioner states that the Director did not explain why the subordinates' job descriptions were deficient, when they "provided specific duties and not merely categories of duties." The job descriptions, however, include non-qualifying tasks such as taking orders from customers. Also, several described duties are, in fact, broad categories that lack detail, such the assertion that the office director "handles some of the work" that would ordinarily be assigned to

lower-level employees whom the Petitioner does not yet employ (and which, therefore, would not be the duties of a manager or supervisor).

The Petitioner has stated that the business manager recommends and develops "new product concepts and modifications." The Petitioner does not elaborate on this point, which is significant because the Petitioner's only identified products are scrap metal and plastic which it purchases from vendors for resale and export. The record indicates that the foreign parent company processes these waste materials into thread, powder, and other materials, but the Petitioner has neither the staff nor the facilities to undertake this processing on its own.

Some of the job descriptions include elements that are consistent with a supervisory or managerial capacity, such as the business manager's hiring authority, but the Petitioner did not provide enough information to show that the Beneficiary's direct subordinates are supervisors or managers. The structure of the organizational chart cannot compensate for the lack of specific, verifiable information in the subordinates' job descriptions. We note that the latest tax and payroll documentation, submitted on appeal, indicates that the individual identified as the Petitioner's office director no longer works for the company; the total number of employees has dropped to five. The identified office director earned only $4,615.35 in 2016, indicating either part-time employment or departure from the company early in the year. (That individual's name does not appear on the most recent tax documents.) Because the Petitioner had indicated that the office director was performing additional duties pending further hiring, the office director's own departure raises the question of who performs those duties now. Changes in staffing are relevant because the Petitioner must meet all eligibility requirements at the time of filing and continuing through adjudication. *See* 8 C.F.R. § 103.2(b)(1).

With respect to compensation, the Beneficiary was the Petitioner's only employee to earn more than $21,000 in 2016. It is not self-evident that this is a level of pay commensurate with a managerial position as the Petitioner claims. The Petitioner's one identified sales representative received $16,822.89 in 2016, which is too low for a year's employment at 40 hours per week, even at minimum wage. The Petitioner also paid two contractors in 2016, one of whom received $37,800. The other contractor received only $400.

The record presents an incomplete picture of the duties performed by the Beneficiary and his subordinates, and therefore, the Petitioner has not established that the Beneficiary supervises and controls the work of other supervisory, professional, or managerial employees. The record supports the Director's conclusion that the Beneficiary's subordinates appear to be performing operational duties necessary for the company's day-to-day business, and that therefore the Beneficiary is effectively a supervisor rather than a manager or executive.

III. CONCLUSION

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 K-H-M- Inc*, ID# 481335 (AAO July 28, 2017)