U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-E-, INC.

DATE: JULY 31, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an exporter of goods ranging from auto parts to kitchen appliances, seeks to continue the Beneficiary's employment as its general manager under the L-1A nonimmigrant classification for intracompany transferees.[1] *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 did not establish, as required, that the Beneficiary would be employed in a managerial capacity under the extended petition.

On appeal, the Petitioner contends that the proposed position fits the definition of executive or managerial capacity, asserting that the Beneficiary will be responsible for directing the U.S. entity and managing its major functions through other employees and independent contractors.

Upon *de novo* review, we find that the Petitioner has not overcome the basis for denial. Therefore, 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

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period October 29, 2012, until October 28, 2013. 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. After approval of the initial new office petition, the Petitioner filed an extension petition (with receipt number [redacted] which was denied; the appeal that stemmed from the denial was dismissed and the two subsequent motions that stemmed from the dismissal of the appeal were also denied. Although the Petitioner indicated that it was seeking to extend the Beneficiary's previously approved employment, it does not appear that the Petitioner has a currently approved petition that can be extended.

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.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

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

The Petitioner originally claimed that the Beneficiary would be employed in a managerial capacity. However, on appeal the Petitioner now claims that the Beneficiary will be employed in a managerial *or* executive capacity. We will address both claims in the discussion below.

A. Managerial Capacity

First, we will address the Petitioner's original claim that the Beneficiary will 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.

1. Duties

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). The Petitioner must also 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. Accordingly, in order to establish eligibility, the Petitioner must provide a job description that clearly describes 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).

In a supporting cover letter, the Petitioner provided a job duty breakdown in which the Beneficiary's time was distributed as follows:

- 20% to being responsible "for the entire operations [*sic*]," reporting to the board of director's and implementing their decisions and initiatives;
- 10% to reviewing costs and activities and determining company progress;
- 15% to using "his sole discretion" to control the company's finances and distribute funds;
- 25% to obtaining new representation agreements, overseeing negotiations, and conducting "legal negotiating" on the Petitioner's behalf; and
- 30% to conferring with the foreign parent entity regarding "new investments," making decisions to optimize marketing efforts to expand the client base, managing the "non-senior level employees" to ensure that daily tasks are carried out, and "making things happen."

The Petitioner did not identify which daily tasks are involved in taking responsibility for the company, ensuring that daily tasks are carried out, or "making things happen," nor did it establish that it has a board of directors for the Beneficiary to report to. The Petitioner also did not explain how the Beneficiary would control the company's finances or conduct "legal negotiations," nor did it explain how he would conduct "legal negotiations" without any legal education or experience. Further, the Petitioner did not describe the types of "new investments" it plans to make or discuss investments that have already been made to justify spending time conferring with the parent company about "new investments." Lastly, the Petitioner did not explain how the Beneficiary would make marketing decisions or where he would obtain the information that would form the basis for those decisions.

Upon initial examination of the record, the Director determined that the Petitioner did not provide an adequate job description to support the initial claim that the Beneficiary would be employed in a managerial capacity. Therefore, the Director issued a request for evidence (RFE) instructing the Petitioner to supplement the record with a more detailed job description listing the Beneficiary's typical managerial job duties and the time he would allocate to each duty. The Petitioner was also asked to provide examples of the goals and strategies the Beneficiary would set and the types of decisions he would make and to address the four-prong definition of managerial capacity to establish how the Beneficiary's duties would meet each prong.

The Petitioner's response contains several translated documents that were submitted without a certified translation and contain the signature of who signed the petition in her purported capacity as "shareholder."[2] As the translated documents do not contain translations that the translator certified as complete and accurate in his or her capacity as competent to translate from the foreign language into English, the documents do not meet the regulatory requirements and will not be considered in this proceeding. 8 C.F.R. § 103.2(b)(3). We further note that the Petitioner did not comply with the Director's request for a more detailed job description. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In the denial decision, the Director determined that the Petitioner did not provide sufficient evidence to demonstrate that the Beneficiary's proposed position meets the four prongs that comprise the definition of managerial capacity. The Director found that the Petitioner provided a vague job description that did not adequately describe the specific duties the Beneficiary would perform or establish that he would primarily oversee supervisory or professional employees.

On appeal, the Petitioner does not supplement the record with any of the requested evidence pertaining to the Beneficiary's proposed job duties. Rather, the Petitioner provides an appeal brief in which it argues that the Beneficiary has been and would be employed "in an executive or managerial capacity" without pointing to specific managerial duties that meet the statutory definition or establishing that the Beneficiary would allocate his time primarily to those duties.

The Petitioner also contends that the Beneficiary would manage its "major functions," thereby indicating that the Beneficiary would assume the role of a function manager. However, the Petitioner has not articulated a basis for making this claim. The term "function manager" applies generally when a beneficiary 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).

In this matter, the Petitioner has not identified an essential function that the Beneficiary would manage, nor has it provided a detailed job description listing the job duties that explain how the Beneficiary would manage an essential function. In sum, the Petitioner provided a vague job description that does not delineate the Beneficiary's daily tasks or establish that the Beneficiary

[2] The Petitioner provided its 2015 tax return, complete with schedule G, which identified the foreign entity as owner of 51% of its stock and the Beneficiary as owner of the remaining 49%. The Petitioner did not, however provide evidence to substantiate capacity as "shareholder."

would spend his time primarily performing managerial job duties that would entail either managing supervisory or professional personnel or managing an essential function.

2. Staffing

Beyond the required description of the job duties, we also examine the company's organizational structure, the duties of the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, and the nature of the business along with any other factors that will contribute to understanding the Beneficiary's actual duties and role within the petitioning organization.

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 its overall purpose and stage of development. *See* section 101(a)(44)(C) of the Act.

The Petitioner claimed four employees at the time of filing and submitted its 2015 tax return, which shows that it paid nearly $115,000 in wages and salaries in the year prior to filing the petition.

In the RFE, the Director determined that the Petitioner did not provide sufficient evidence to demonstrate that the scope of its operation and its organizational structure would support the Beneficiary in a primarily managerial position. Therefore, the Petitioner was instructed to provide an organizational chart or diagram illustrating its organizational structure and staffing levels.

In response, the Petitioner provided W-2 statements and Forms 1099 to show salaries and wages paid to employees and contractors in 2015. However, as noted above, the instant petition was filed in December 2016. 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, any evidence showing that the Petitioner paid wages to employees and contractors in 2015 is not relevant for the purpose of illustrating the Petitioner's organizational composition and staffing hierarchy at the end of the following year, when this petition was filed.

Here, the Petitioner did not comply with the Director's request for an organizational chart or diagram and therefore did not adequately document its ability to relieve the Beneficiary from having to perform primarily non-managerial functions while operating with a four-person staff. The Petitioner did not identify the positions that comprise its organization or state the job duties of the positions that are subordinate to the Beneficiary. Without this information, we have no means of determining how the Petitioner's organization functions and who performs its daily operational tasks so that the Beneficiary is free to allocate his time primarily to performing managerial functions. As noted earlier, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, the Petitioner claims that it has four full-time employees and further states that the Beneficiary relies on "other employees" to meet its objectives. However, the Petitioner does not

provide evidence to show precisely whom it employed at the time of filing, nor does it specify which duties the Beneficiary's support staff performed to explain how the Beneficiary would be relieved from having to primarily perform non-managerial job duties. 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 overall lack of evidence illustrating the Petitioner's staffing structure and organizational hierarchy at the time of filing, the Petitioner has not established that it was ready and able to employ the Beneficiary in a managerial capacity at the time this petition was filed.

B. Executive Capacity

Finally, although not previously claimed, on appeal the Petitioner asserts that the Beneficiary will be employed in an executive capacity.

"Executive capacity" means 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.

Although the Petitioner claims that the Beneficiary would direct the U.S. organization through independent contractors who would report to "the group managing director in Brazil," it does not identify the services that the independent contractors would perform or explain the Beneficiary's role given the claim that the contractors would report to managers in Brazil rather than to the Beneficiary. Further, the Petitioner does not provide evidence to corroborate the claim that it employs independent contractors to perform operational tasks within its organization.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and they must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Although the Petitioner claims that it is "a complex business with numerous highly specialized organizational departments," it has not provided evidence to support this claim. As previously noted, the Petitioner was given an opportunity to supplement the record with evidence illustrating its staffing and organizational hierarchy in response to the RFE; however, it did not provide the requested evidence and does not list the "organizational departments" it claims as part of its "complex business." The Petitioner also names a company that it claims is in charge of storing and exporting its products; however, it does not provide evidence to show that it used a third party entity to carry out the export function within its organization, nor did it establish that a company that offers export and storage services provides the Petitioner with the organizational complexity to allow the Beneficiary to allocate his time primarily to duties that are indicative of directing the management of the organization and establishing its goals and policies. In light of the deficiencies described above, the Petitioner has not established that the Beneficiary would be employed in an executive capacity.

III. QUALIFYING RELATIONSHIP

In addition, while not previously discussed in the Director's decision, we find that the Petitioner did not provide sufficient evidence to establish that it has a qualifying relationship with the Beneficiary's foreign employer and the petition is not approvable for this additional reason. To establish a "qualifying relationship," the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See* section 101(a)(15)(L) of the Act; *see also* 8 C.F.R. § 214.2(l)(1)(ii) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate").

Regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities. *See, e.g., Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (Comm'r 1988); *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). Ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595. In the petition, the Petitioner stated that it is majority owned by the Beneficiary's foreign employer, thereby indicating that a parent-subsidiary relationship exists. Although the Petitioner made this claim in its 2015 tax return, it did not provide corroborating evidence of this relationship such as stock certificates, a stock registry, or a stock transfer ledger.

IV. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial or executive capacity or that it has the parent-subsidiary relationship with the Beneficiary's foreign employer, as claimed. The appeal will be dismissed for these reasons.

ORDER: The appeal is dismissed.

Cite as *Matter of T-E-, Inc.*, ID# 1258625 (AAO July 31, 2018)