U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-M-, LLC

DATE: JUNE 14, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology company, seeks to temporarily employ the Beneficiary as an application development manager under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) § 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 record did not establish, as required, that: (1) the Beneficiary is employed abroad in a managerial or executive capacity; and (2) the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity.

On appeal, the Petitioner disputes the Director's findings, asserting that the Beneficiary's current and proposed positions are managerial.

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 involved 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.* 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. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Petitioner claimed that the Beneficiary has been and would be employed in a managerial capacity. Therefore, we will address this claim in our decision and will not contemplate whether the Beneficiary would be employed in an executive 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.

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.

When examining the claimed managerial capacity of a given beneficiary, we will look 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 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.

A. Employment Abroad

1. Duties

In a letter submitted in support of the petition, the director of the foreign affiliate stated that the Beneficiary has been employed 40 hours per week with [redacted], in [redacted] Georgia, in the position

of chief technology officer from January 10, 2016, to present. The director also stated that the Beneficiary's current monthly salary is $1,576.82[1] and provided the following job description:

> Responsibilities include, but are not limited to: Manage research and development (R&D); Identify competitive advantages and technological trends for the benefit of a company; Manage and lead teams of software developers and testers, all around knowledge of services and code of all company systems such as Customer CMS, Payment Gateway Systems, Media processing, REST API; Analyze client requirement and development challenges; Plan and architect software development and guidelines; Communication with clients discussion and analysis of development requirements; Daily scrum meetings; and Agile development methodologies . . . .

The Petitioner's initial submission also included the Beneficiary's resume. The technical skills section indicated that the Beneficiary is knowledgeable about various programming and software development products. The Beneficiary's resume's summarized duties as chief technology officer with the foreign affiliate are:

- Manage research and development (R&D).
- Maintain current information about technology standards and compliance regulations.
- Identify competitive advantages and technological trends for the benefit of a company.
- Managing and leading teams of software developers and testers . . . .
- All around knowledge of services and code of all company systems such as Customer CMS, Payment Gateway Systems, Internal Customer Support Apps and Tools . . . .
- Detailed understanding of web-based security.
- Analyze client requirement and development challenges.
- Analyze and decide best practices for various development challenges.
- Plan and architect software development guidelines.
- Continuous integration and delivery, manage new release deploys.
- Develop engines for large data search and recommendation systems.
- Communication with clients' discussion and analysis of various development requirements.
- Daily scrum meetings, agile development methodologies.
- Staff recruitment and retention.

In a request for evidence (RFE), the Director stated that the Petitioner had not sufficiently described the Beneficiary's duties abroad. The Director asked the Petitioner to explain how the Beneficiary's position meets the requirements of managerial capacity. In response, the director of the foreign affiliate provided a statement that included the Beneficiary's summarized duties abroad and the percentage of time spent on each duty:

[1] $4,300 Georgian Lari (GEL) converts to $1,576.82 US Dollars (USD). *See* https://www.xe.com/currencyconverter/ (last visited June 11, 2019).

- Communication (15%),
- Planning (30%),
- Allocate resources and lead the team (20%),
- Monitoring and evaluation (20%),
- Staging and production (10%), and
- Team expansion (5%).

The Director denied the petition, finding that the Beneficiary's duties abroad are not primarily managerial and that the Beneficiary does not oversee supervisory, professional, or managerial employees within the company. The Director also found that the Beneficiary is likely to be performing services and involved in creating products for a significant portion of his time.[2] The Director also concluded that the Beneficiary would likely be performing non-qualifying operational tasks in the United States and the Petitioner did not demonstrate that there is a team of employees to support the claimed managerial role. We agree with the Director that the Petitioner has not demonstrated that the Beneficiary was employed abroad in a managerial capacity.

The job description letter and the Beneficiary's resume both stated that the Beneficiary engages in various production-based job duties, including "analyze client requirement and development challenges," "plan and architect software development and guidelines," and "communication with clients' discussion and analysis of various development requirements." However, they do not explain how the Beneficiary carries out these duties or discuss the programming and software development services that are relevant within the scope of the foreign affiliate's application development operation. The Petitioner also did not sufficiently explain how these production-based responsibilities are higher-level duties. And despite making references to "daily scrum meetings," the Petitioner did not explain the significance of these meetings within the scope of the foreign affiliate's operation or clarify how the meetings relate to the Beneficiary's position of chief technology officer.

The Petitioner provided a lengthy list of the Beneficiary's duties abroad and the percentage of time spent on each duty in response to the Director's RFE. A review of the details provided by the Petitioner suggests that the Beneficiary has been primarily engaged in the manifestation of the foreign affiliate's products and services, as opposed to maintaining managerial or supervisory authority over subordinate employees. For example, duties such as "communicate with stakeholders to gather the requirements for the new features or projects," "analyze project or feature requirements and define technical objectives," "use knowledge of legacy code and business logic to plan new features or projects development . . ." and "create feature deploy tasks for new and existing products in production, list all the new features going online and notify stakeholders for approval" are tasks that require the Beneficiary's direct participation or involvement. Based on these duties, it appears that the Beneficiary plays an active role in the implementation of the foreign affiliate's clients' programming and software development services projects and does not delegate his responsibilities to others. 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 capacity. *See* section 101(a)(44)(A) of the Act (requiring that one "primarily" perform the enumerated managerial duties); *see also Matter of Church Scientology Int'l.,* 19 I&N Dec. 593, 604 (Comm'r 1988).

[2] We will further address staffing issues below.

The Petitioner's response did not adequately address the Director's queries. Whether a beneficiary is a managerial employee turns on whether the petitioner has sustained its burden of proving that his or her duties are "primarily" managerial. *See* section 101(a)(44)(A) of the Act. Despite the Director's request for additional information, the Petitioner did not document what proportion of the Beneficiary's duties would be managerial functions and what proportion would be non-managerial. The Petitioner lists the Beneficiary's duties as including both managerial and operational tasks, but did not quantify the time the Beneficiary spends on them.

By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. *Id.* While the Beneficiary may exercise discretion over the foreign entity's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, these elements alone are not sufficient to establish that his actual duties would be primarily managerial in nature. The actual duties themselves will 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). As such, a detailed job description is critical to a determination of whether the Beneficiary has been employed in a managerial capacity. Here, the record lacks a job description that delineates the Beneficiary's specific tasks within the context of the foreign entity's operation.

The record indicates that the Beneficiary manages projects for the foreign affiliate's programming and software development services clients, however, without further details, we cannot find that managing projects is commensurate with the responsibilities of a manager. For instance, "break down project or feature implementation plan into specific tasks and write up in company task management system," "analyze software testing results and bug reports in development and in production," to name a few, are duties associated with managing a particular project. The technical skills section of the Beneficiary's resume specifically stated that he is knowledgeable about various "operating systems and servers," databases," and "applications and tools," to name a few; however, the Beneficiary's current job duties and technical skills section are synonymous with production-based tasks. The record does not support a finding that the Beneficiary primarily performed the duties of a manager abroad.

2. Staffing and Organizational Structure

The initial evidence included a copy of the services contract between the Petitioner and the foreign affiliate that was executed on January 1, 2016. The services contract identified the Petitioner as the "customer" and the foreign affiliate as the "provider" and stated the following:

> [1].2. The Provider shall, provide programming and software development services to the customer; also provider shall solve the Customer's Clients' problems, by rendering the following services: To receive information (notices, claims, problems etc.) from the Customer's Clients through the Customer's technical equipment (including IP telephones, Emails); to identify the Clients' problems and related issues as well as identifying the individual/company that encounters this problem; to study the obtained information (notices, claims, problems etc.) and to ensure complete data processing; to prepare a recommendation (proposal) on necessary further actions for problem solving for the Customer and to represent the

> Customer by identified, complete information. The Provider shall use Customer's technology, software and database through the entire process.
>
> 1.3. Term of the services rendering upon this Contract hereunder commences on January 1, 2016. The duration of the contract is from January 1, 2016 till December 31st, 2019 . . . .

In the RFE, the Director requested more information about the foreign affiliate's organizational structure and the Beneficiary's subordinates. In response, the Petitioner provided the foreign affiliate's organizational chart and a summary of job positions and duties, educational levels, and salary addendum for the Beneficiary's subordinates. The foreign affiliate's organizational chart identified 14 employees that consisted of the following structure:

- Director [*T.K.*]
  - Chief Technology Officer [the Beneficiary]
    - Lead Developer/Project Manager [*I.C.*]
      - Web Designer [*N.T.*]
      - QA Tester [*S.S.*]
    - Senior DevOps Engineer [*D.I.*]
      - Systems Operations Administrator [*I.K.*]
    - Full Stack Web Developer [*Z.T.*]
    - Senior Web Developer [*L.I.*]
    - Front-End Developer [*G.A.*]
    - Senior PHP Developer [*U.C.*]
    - Full Stack Web Developer [*Z.A.*]
    - Full Stack Web Developer [*N.J.*]
    - Database Administrator [*T.B.*]

The addendum for the Beneficiary's subordinates included their respective job duties and identified the following:

- From January 2016 to present, the foreign affiliate employed *I.C.* with a Bachelor's degree in Informatics from [redacted] University in the position of Lead Web Developer/Project Manager with a salary of $3,300 GEL after taxes;
- From January 2016 to present, the foreign affiliate employed *D.I.* with a Bachelor's degree in Informatics from [redacted] University in the position of Senior DevOps Engineer with a salary of $3,000 GEL after taxes;
- From January 2016 to present, the foreign affiliate employed *U.C.* with a Bachelor's degree in Computer Engineering from [redacted] University with a salary of $3,300 GEL after taxes;
- From January 2016 to present, the foreign affiliate employed *Z.T.* with a Bachelor's degree in Telecommunication and Engineering from [redacted] University with a salary of $3,250 GEL after taxes;

- From January 2016 to present, the foreign affiliate employed *L.I.* with a Bachelor's degree in Informatics from [redacted] University in the position of Senior Web Developer with a salary of $2,400 GEL after taxes;
- From February 2016 to present, the foreign affiliate employed *Z.A.* with a Bachelor's degree in Informatics from [redacted] University in the position of Full Stack Web Developer with a salary of $1,800 GEL after taxes;
- From September 2017 to present, the foreign affiliate employed *N.J.* with a Bachelor's degree in Computer Science from [redacted] University in the position of Full Stack Web Developer with a salary of $2,000 GEL after taxes;
- From July 2016 to present, the foreign affiliate employed *G.A.* with the completion of various programming courses in the position of Front-End Developer with a salary of $2,100 GEL after taxes;
- From February 2017 to present, the foreign affiliate employed *S.S.* with a Bachelor's degree in Electronic Engineering from [redacted] University in the position of QA Tester with a salary of $1,800 GEL after taxes; and
- From October 2017 to present, the foreign affiliate employed *N.T.* with the completion of private web design courses in the position of Web Designer with a salary of $1,200 GEL after taxes.

The Beneficiary's job duties and resume, and the summary of job positions and duties addendum for the Beneficiary's claimed subordinates in [redacted] Georgia, indicated that the positions of chief technology officer (the Beneficiary), lead developer/project manager, web designer, QA tester, senior dev ops engineer, systems operations administrator, full stack web developer, senior web developer, front-end developer, and senior PHP developer all engage in various production-based job duties, including attending meetings and analyzing, developing, implementing, or maintaining the foreign affiliate's clients' satisfaction related to programming and software development projects. For instance, the foreign affiliate's services contract indicated that it is exclusively and primarily responsible for providing programming and software development services to the Petitioner. The record does not indicate that the foreign affiliate has any other clients beyond the Petitioner.

Although the Petitioner provided job descriptions for the Beneficiary's subordinates, it is not clear that these employees are sufficient to relieve the Beneficiary from having to allocate his time primarily to the foreign affiliate's client's project tasks. Given the previously noted deficiencies in the Beneficiary's job duties and the lack of a detailed statement clarifying the foreign affiliate's precise role in the programming and software development process, we are unable to determine whether the Beneficiary's subordinates carry out the non-managerial tasks that the Beneficiary is claimed to manage.

The Beneficiary's resume indicated that he "manage[s] research and development (R&D)" and oversees "staff recruitment and retention"; however, the foreign affiliate's organizational chart does not identify a R&D and human resources department or personnel. Moreover, the addendum for the Beneficiary's subordinates does not indicate that any of the foreign affiliate's personnel have job duties synonymous with "R&D" and "staff recruitment and retention" tasks. It is not clear how the Beneficiary manages the foreign affiliate's R&D and human resources operations without subordinate personnel to perform the day-to-day tasks.

The Director's RFE specifically requested "copies of performance appraisals or reviews conducted by the Beneficiary for any such subordinate employees or any evidence that demonstrates the Beneficiary has sufficient managerial authority over subordinate employees and is engaged in the hiring and firing of subordinates or recommends these and other personnel actions." No such evidence was submitted. The record does not contain evidence corroborating the Beneficiary's claimed subordinates' educational credentials. Additionally, the record does not contain evidence that the Beneficiary's subordinates are managers or supervisors as depicted on the foreign entity's organizational chart: *I.C.* as lead developer/project in a position over *N.T.* as web designer and *S.S.* as QA tester, and *D.I.* as senior devops in a position over *I.K.* as systems operations administrator.

In light of the evidentiary deficiencies described above, the Petitioner has not established that the Beneficiary primarily performed duties in a managerial capacity abroad.

B. Employment in the United States

Because of the dispositive effect of the above findings of ineligibility based on factors that pertain to the Beneficiary's employment abroad in a managerial capacity, we will provide only a brief discussion of the remaining issue that pertains to the Beneficiary's proposed employment in the United States.

The Director determined that the Petitioner did not establish that the Beneficiary will be employed in the United States in a managerial or executive capacity. Based on our review of the Petitioner's supporting evidence, including the Beneficiary's job description and the Petitioner's organizational and management structures within the scope of an information technology enterprise,[3] we find that the Petitioner has not adequately demonstrated that the Beneficiary will assume a position where the primary portion of his time will be devoted to performing duties that primarily involve managerial tasks or supervise and control the work of other supervisory, professional, or managerial employees. The record does not indicate that the Beneficiary will be employed in the United States in a managerial capacity.

Therefore, we agree with the Director's finding and will not further address this issue.

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 T-M-, LLC*, ID# 3727838 (AAO June 14, 2019)

[3] Part 5, number 12 of Form I-129 indicated that the Petitioner's type of business is "Information Technology," while Section B, Line 2(a) and (2)(b) of the Petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for 2017 indicated that its business activity and product or service are media productions.