U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-M-C-, LTD.

DATE: JUNE 15, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an international trading business, seeks to extend the Beneficiary's temporary employment as its president and chief executive officer 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 new office extension petition, concluding that the record did not establish, as required, that the Beneficiary will be employed in the United States in a managerial capacity.

On appeal, the Petitioner submits additional evidence and asserts that the Director's determination is arbitrary, capricious, and "devoid of any reasonable analysis of the evidence submitted." The Petitioner contends that the totality of the evidence overwhelmingly favors approval.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 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, executive, or specialized knowledge capacity. Section 101(a)(15)(L) of the Act.

An L-1A nonimmigrant visa petition that involved the opening of a new office may be extended by filing a new Form I-129, Petition for a Nonimmigrant Worker, accompanied by a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition, and the staffing of the new operation, including the number of

employees and types of positions held accompanied by evidence of wages paid to employees. 8 C.F.R. § 214.2(l)(14)(ii)(C) and (D).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Petitioner asserts that the Beneficiary's "job duties have been exclusively managerial," that he "holds the highest position in the management structure of the company," and that "he will not be involved in non-managerial job duties in daily operations."[1]

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.

Section 101(a)(44)(A) of the Act. Further, "[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.*

A. Duties

When examining the managerial capacity of the Beneficiary, we will look first to the Petitioner's description of the job duties. The description of the job duties must clearly describe the duties 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 definitions of managerial capacity, the Petitioner must first show that the Beneficiary performs certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second,

[1] As the Petitioner does not claim that the Beneficiary will be employed in an executive capacity, we limit our analysis to whether the Beneficiary will be employed in a managerial capacity.

the Petitioner must prove that the Beneficiary *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner initially submitted a brief description of the Beneficiary's proposed job duties and did not provide an allocation of the time the Beneficiary would spend on the duties described. In response to the Director's request for evidence (RFE), the Petitioner provided a description of duties and the approximate amount of time the Beneficiary would spend on those duties during a 40-hour week. The Petitioner stated that the Beneficiary's responsibilities would include (paraphrased and bullet points added for clarity):

- Overseeing and supervising the company's overall business operations, plans, organizing and directing the overall operations of the company in order to obtain optimum efficiency and maximize profits; developing and formulating policies and strategies for short-term and long-term development of the corporate organizational and business activities (3-5 hours);
- Developing and implementing plans and operations, directing and overseeing the operations of the business activities and provisions of products/services of the company, reviewing and analyzing information and reports about marketing conditions and trends, overseeing the company's business development programs, making critical policy decisions in marketing and distribution (5-7 hours);
- Maintaining and solidifying the management, and possible acquisitions, hiring, promoting, terminating, and reviewing the performance of key corporate personnel (3-5 hours);
- Supervising the vice president/business manager in managing operations of sourcing, marketing products, securing supplies and overseeing products/services' quality for marketing/sales, and logistics management, directing the vice president/business manager in managing the marketing efforts of the products/services of the company to improve overall efficiency, particularly in transnational operations, establishing and expanding products network in the United States and in China to achieve operational efficiency (12-15 hours);
- Reviewing the activity reports and financial statements submitted to him by the vice president/business manager to determine progress and status in attaining objectives and revising objectives and planning in accordance with current conditions and directing the purchase, sale and shipping matters through the vice president who oversees the subordinates carrying out those functions (5-7 hours);
- Making all major financial, legal decisions regarding the company's business operations, directing and coordinating formulation of financial programs to provide funding for new operations to maximize returns on investment and to increase productivity; analyzing and developing budgeting plans and requests to identify issues and allocating operating budget; and handling legal and financial matters concerning the outside professionals including lawyers, accountants in

connection with negotiating agreements, performance review of these professionals/contractors (3-5 hours);

- Exercising discretionary decision-making authority in his power to approve, negotiate and conclude major contracts, business deals and business operations (2-3 hours); and
- Promoting the organization in trade associations, preparing and submitting the operation reports to the parent company in making policy decisions in connection therewith and resolving any business problems that the new company may encounter (2-3 hours).

On appeal, the Petitioner repeats the above description and asserts that the duties described are detailed and do not re-state the regulatory definition of managerial capacity.

We disagree. The description of the Beneficiary's proposed duties lacks detail regarding his specific tasks for the Petitioner. The broad responsibilities described could apply to any one of a number of businesses. For example, overseeing and supervising overall business operations and plans, organizing and directing overall operations to obtain efficiency and maximize profits, and developing and formulating policies and strategies to develop the company are generic duties that do not describe what the Beneficiary will actually be doing in relation to the Petitioner's international trade in materials and minerals. Likewise, developing and implementing plans and operations, directing and overseeing operations and provisions of products/services of the company, and reviewing and analyzing information and reports about marketing conditions and trends are duties that are not specific to the Petitioner. Not only are these duties non-specific to the Petitioner, based on this information, it appears the Petitioner may be providing some sort of "services," in addition to trading in specific products. The Petitioner provides an all-purpose description that does not convey an understanding of the Beneficiary's actual day-to-day duties. The record does not include sufficient information regarding the Petitioner's business or the Beneficiary's tasks to establish that the Beneficiary will perform duties primarily in a managerial capacity.

The Petitioner indicates that the Beneficiary will spend a significant portion of his time (12 to 15 hours) supervising and directing the vice president/business manager in "managing operations of sourcing, marketing products, securing supplies and overseeing products/services quality for marketing/sales, and logistics management, in managing the marketing efforts of the products/services of the company to improve overall efficiency, particularly in transnational operations, establishing and expanding products network in the United States and in China to achieve operational efficiency." The Petitioner does not further detail what the actual tasks involve. Thus, it is not clear what tasks the Beneficiary will perform in carrying out these claimed supervisory duties and whether the duties are actually supervisory duties as opposed to operational tasks.

The Beneficiary's duties that involve the review of reports and financial statements, making financial and legal decisions, negotiating major contracts and business deals, and promoting the organization are not sufficiently detailed to demonstrate that they are managerial duties rather than duties that require the Beneficiary's performance of operational, financial, and administrative duties.

Other duties, such as hiring, promoting, terminating, and reviewing the performance of key corporate personnel are short-term, responsibilities that would not make continued demands on the Beneficiary's time. The Petitioner has not provided sufficient detail to establish that these duties incorporate the duties of a managerial position as defined in the regulation.

On appeal, the Petitioner emphasizes that the Beneficiary will concentrate on the corporate governance, development of overall strategies, financial, legal, and other policy matters and that the vice president will relieve him from the management of the day-to-day operations. However, the actual tasks involved in corporate governance have not been explained, and the Petitioner does not provide evidence of the Beneficiary's development of strategies, or of other financial, legal, and policy matters. Reciting the 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 Petitioner has not provided sufficient detail or explanation of the Beneficiary's activities in the course of his daily routine. 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). Overall, the job descriptions do not specifically relate to the Petitioner's trading business but are a generic summary of responsibilities that may or may not fall within the parameters of a managerial position.

Moreover, the fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) 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 description alone is insufficient to establish that his actual duties would be primarily managerial in nature. The Petitioner has not included the specifics necessary to establish that the Beneficiary will perform primarily managerial tasks as defined in the statute.

B. Staffing

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial 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 actual duties and role in a business.

The Petitioner stated that it employed five individuals, including the Beneficiary, when the petition was filed. The Petitioner's initial organizational chart identified the vice president/business manager as reporting directly to the Beneficiary. The organizational chart identified two sales executives and one sales and shipping clerk as reporting directly to the vice president/business manager. The organizational chart indicated that the financial officer position was vacant.

In response to the Director's RFE, the Petitioner submitted a revised organizational chart which inserted the proposed positions of logistics manager and sales manager under the vice president/business manager's position and added outside lawyers and accountants as collaborating with the Beneficiary's position. However, planned positions are not relevant to the petition under review and the record does not include supporting evidence that the Petitioner contracted with lawyers and accountants for services related to the organization's business operations. Accordingly, the revised organizational chart does not assist in a determination of the Beneficiary's role when the petition was filed.

The Petitioner described the vice president/business manager's position as directing the operations of the company in purchase, sales, distributions, and logistics and directing and reviewing market research efforts and analysis reports by subordinates, as well as, setting up operating procedures, negotiating with outside sales representatives, overseeing negotiations with shipping and customs companies, and assigning tasks to subordinate purchase/sales executives and shipping personnel and reviewing their performance. The description also noted that the vice president/business manager would make financial determinations on prices and inventory, would prepare reports for the president, and until a financial officer was hired, would shoulder the financial officer's duties. The Petitioner stated the annual salary for this position as $40,000. However, the Petitioner's payroll records show that this individual was compensated at a monthly rate of pay of $1,350 which is equivalent to $16,200 annual salary.

The sales/shipping clerk position is described as performing inventory management, collecting and verifying sales/purchase orders, preparing delivery schedules, creating bills of lading and certificates of origin, handling exchanged or returned products, following up with purchasers or buyers on quantity and satisfaction, as well as sharing clerical, secretarial, and administrative duties during the initial startup operations. The stated salary for this position is $25,000. The Petitioner's payroll records show that this individual was compensated at a monthly rate of pay of $1,350 which is also equivalent to an annual salary of $16,200.

The sales executives duties are described as carrying out the daily sourcing/purchase/sales operations of the company, implementing the marketing/sales strategies, negotiating prices with customers, visiting customers and suppliers, researching, collecting, and updating latest market conditions, handling exchange of merchandise, invoices, and customers' accounts, and ensuring customer satisfaction. The Petitioner indicated that the annual salary for one of the sales executives is $30,000 and the other is $25,000. The Petitioner's payroll records show both sales executives were paid $1,500 per month, or an annual salary of $18,000.

The Petitioner does not explain the inconsistency between the salaries it claims the positions warrant and the salaries it actually paid. Additionally, it is unclear why the claimed supervisory position of vice president/business manager with the responsibilities the Petitioner asserts he performs would receive a salary at the same level as a sales/shipping clerk and less than the two sales executives he supervises. The inconsistency between the salaries claimed and the salaries paid and the ambiguity resulting from the levels of pay in relation to the positions held raises questions regarding the role each individual actually plays in the Petitioner's organization.

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*).

Although the Petitioner's description for the vice president/business manager's position includes some supervisory duties over the sales executives and sales/shipping clerk, based on the Petitioner's allocation of this position's time spent on supervisory duties, supervision of subordinates is not the position's primary task. The responsibilities of this position include a number of tasks including market research and analysis and the duties of the financial officer. As the Director noted, and the Petitioner acknowledged, some of this position's duties also overlap with the Beneficiary's claimed responsibilities. The evidence regarding the vice president/business manager's position does not support a conclusion that the position is managerial, supervisory, or professional in nature.[2] The descriptions for the positions of sales executives and sales/shipping clerk also do not include evidence that the positions are managerial, supervisory, or professional positions. Although the Petitioner allocates a significant portion of the Beneficiary's time to supervising or directing the vice president/business manager, the record does not include consistent evidence of the nature of this position or other probative evidence of an organizational structure sufficient to elevate the Beneficiary to a position higher than a first-line supervisor of non-professional employees.

The statutory definition of "managerial capacity" also allows for "function managers." *See* sections 101(a)(44)(A)(i) and (ii) 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. 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, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties dedicated to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of a

[2] When evaluating whether a position is a professional position, we evaluate whether the position requires 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." We focus on the level of education required by the position, rather than the degree held by the employee. Here, the position descriptions do not indicate that a baccalaureate degree is required to perform the duties of the positions.

beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function.

The Petitioner does not expressly claim that the Beneficiary will manage an essential function of the organization. Rather, the Petitioner asserts that the Beneficiary will "focus on the development of company," "oversee the business operations through his subordinate vice president/business manager," and act as the Petitioner's "strategist and the top decision maker of the company." However, as determined above, the Petitioner's description of the Beneficiary's duties is not sufficiently detailed to determine what tasks will actually engage him in the pursuit of developing the company or acting as the Petitioner's strategist and top decision maker. Thus, there is also insufficient information to identify a function with any specificity or to conclude that the Beneficiary will primarily manage an essential function.

On appeal, the Petitioner asserts that the Director did not consider the reasonable needs of its organization and its particular stage of development as a new company. The Petitioner notes that it plans to hire additional managers and employees in the future. However, the regulations require that we examine the Petitioner's organizational structure and staffing levels at the end of its initial year of operations. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS' regulations that allows for an extension of this one-year period. If a business does not have the necessary staffing after one year to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible for an extension.

The record documents that the Petitioner is doing business and achieved substantial gross receipts during 2016, but it does not contain sufficient evidence of the Beneficiary's claimed work in a managerial capacity for the petitioning entity. The evidence of record does not establish that the Beneficiary's work will be primarily managerial or executive in nature. The Petitioner has not overcome the Director's determination on this issue.

III. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary will be employed in a primarily managerial capacity under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of E-M-C-, Ltd.*, ID# 407677 (AAO June 15, 2017)