U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-F- CORP.

DATE: JUNE 22, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a restaurant, seeks to temporarily employ the Beneficiary as its operations manager 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 record did not establish, as required, that the Beneficiary had been employed abroad or will be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner asserts that the Director overlooked evidence clearly establishing that the Beneficiary has been and would be employed in a managerial capacity and did not sufficiently explain her reasons for denying the petition.

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 individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, must include evidence that the petitioner will employ the beneficiary in managerial or executive capacity, including a detailed description of the services to be performed. 8 C.F.R. § 214.2(l)(3)(ii).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Petitioner asserts that the Beneficiary will be employed in a managerial capacity for the U.S. entity. As the Petitioner does not claim that the Beneficiary will be employed in an executive capacity, we restrict our analysis to whether the Beneficiary will be employed in a managerial 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.

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 definition 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, 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.

In its initial letter in support of the petition, the Petitioner stated that the Beneficiary will be "expected to work directly with employees and guests, and direct the restaurant's operation under the supervision of the company's President." The Petitioner stated further that the Beneficiary "will be required to perform the function of managing all aspects of our business activities" and that she will assist the president "in all business functions of keeping a restaurant running, which include[s] financial duties, food and safety planning, customer service, operational activities, dealing with personnel, and community involvement." The Petitioner provided an estimated breakdown of the Beneficiary's time spent on her duties as follows:

- Implementing all decisions and resolutions adopted by the Board of Directors and the President. Regularly reports on work performance to the President and Board of Directors. (15%, 6 hours)
- Directly supervise and manage the restaurant managers and leaders/supervisor/head of the various functions of the company. Supervise the restaurant managers in food preparation and handling of guest complaints. Manage the operation of the restaurant to make sure that guests have an enjoyable experience in terms of food quality and dining atmosphere. (15%, 6 hours)
- Assist President in making all decisions that affect the employees of the company. Schedule, supervise, train, and coordinate the work of managers and general personnel. Conduct initial interview of possible employees, and propose hiring and firing of employees to the President and the Board of Directors. (15%, 6 hours)
- Oversee the preparation and processing of payroll. Evaluate the performance of subordinate managers and professionals. Decide with the President the promotion and demotion of employees. Build the company's performance assessment system, strengthening the company's team building. Responsible for the assessment of the managers and the supervisors of the restaurant. (20%, 8 hours)
- Managing financing operation of the business, such as budget, payroll, and purchasing. Supervise subordinate managers and professionals to make sure controls are in place to safeguard inventory controls. Develop initiatives to build sales, profitability, and guest counts. (20%, 8 hours)
- Supervise the operation of the business to make sure of its compliance with standards of quality in all food and service operations, as well as with laws and regulations of city, county, state and the federal level. Ensure adherence to all Health Department (OSHA), and ADA regulations, and to all local, state, and federal laws. Manage the managers and subordinates to ensure the physical/aesthetic maintenance of the restaurant. (5%, 2 hours)
- Oversee the operation of the restaurant to make sure that all safety and security systems and procedures are followed to assure health and safety of employees and guests. Establish and then oversee system of supervising correct receipt, storage, and handling of food and beverage products to assure quality and freshness at all times. (10%, 4 hours)

In response to the Director's request for evidence (RFE), the Petitioner expanded upon and reorganized the duties and time allocations initially described. For example, under the heading of supervising restaurant managerial staff the Petitioner amended the description to indicate that the Beneficiary would draft and publish the managerial job announcements, schedule and lead interviews, hire, fire, discipline, and promote managerial employees, as well as, direct managerial staff training programs and assure that the managerial employees performed their job duties. The Petitioner stated that this would take 15 percent of the Beneficiary's time. Although these duties may be a part of supervising staff, both the initial description and the position description in response to the Director's RFE, limit the Beneficiary's direct supervisory tasks. If the Petitioner is claiming that the Beneficiary is a personnel manager, we note that personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Here, the record does not support a claim that supervising others will be the Beneficiary's primary duty.

In the response to the Director's RFE, the Petitioner also added a separate heading for preparing and processing payroll and indicated that the Beneficiary would spend 20 percent of her time devising a payroll-processing schedule, computing timekeeping data from time cards, paying other types of income such as bonuses, commissions, and retroactive pay, printing payroll reports to verify accuracy, and printing the paychecks. The Petitioner noted further that the Beneficiary would spend an additional 20 percent of her time maintaining accounting policies and procedures and banking relationships, managing the preparation of the budget, and ensuring that sufficient funds are available for the business' operating needs. These descriptions and the time spent show that the Beneficiary is the individual performing the payroll, accounting, and budget functions necessary for the Petitioner's operations. If the Petitioner is claiming that the Beneficiary is primarily managing these functions, the Petitioner has not established, as required, that the Beneficiary's daily duties regarding the payroll, accounting, and budget functions involve managing the function while others perform the duties related to the function. *See Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016).

The Petitioner added further that the Beneficiary will spend 15 percent of her time meeting with, reporting to, and making recommendations to the Board of Directors and the President. However, this information is not sufficiently detailed to establish the actual tasks the Beneficiary would perform as part of these reporting responsibilities. Thus, we cannot determine whether these tasks are administrative or managerial in nature. Similarly, the extent of the Beneficiary's managerial authority is unclear when she is "assisting" the president in deciding employee compensation, shifts, and schedules and in preparing the Employee Handbook and creating staff training programs and procedures.

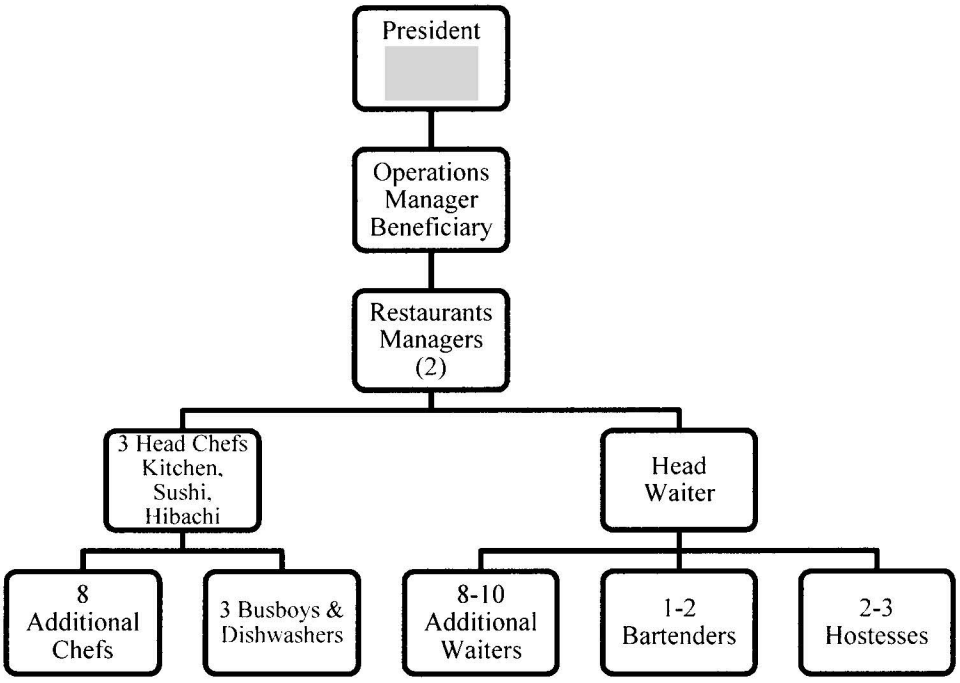
We have also reviewed the Petitioner's president's letter outlining the Beneficiary's expected managerial decisions. The Petitioner asserted that the Beneficiary will be expected to make decisions regarding: the design of the restaurant, menu, and dishes; the food and service quality to ensure customers' satisfaction; human resources; supply-chain management; and inventory management. The Petitioner, however, has not indicated who will perform the duties associated

with the design of the restaurant, menu, and dishes, with the supply-chain, and with the inventory, if not the Beneficiary. Additionally, the Petitioner does not include evidence of the president's duties and delineate the difference in the duties to be performed by the president and the duties to be performed by the Beneficiary. Thus, we cannot ascertain whether the Beneficiary's duties will overlap with the president's duties or are an additional support to the Petitioner's operations. Even if the Beneficiary may exercise some discretion over the Petitioner's day-to-day operations and may possess the requisite level of authority with respect to some discretionary decision-making, the position descriptions alone are insufficient to establish that her actual duties would be primarily managerial in nature.

B. Staffing

Beyond the required description of the job duties, we review 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 actual duties and role in a business.

The record includes the Petitioner's organizational chart which shows the Beneficiary's position as directly subordinate to the President and directly over two restaurant managers, who in turn are depicted supervising others.



The Petitioner also provided job descriptions for the restaurant managers, the head chefs, and the head waitress. The restaurant managers are tasked with overseeing staff operations, and working with the head chefs and head waitress to ensure timely opening and closing tasks are completed, to develop a training plan for new hires, and to meet with employees to discuss customer service and performance issues, as well as serving as the initial point of contract for customers and clients. The kitchen head chef is tasked with monitoring sanitation practices, estimating amounts, and costs of food and ingredients, and inspecting supplies, equipment, and work areas, supervising other chefs and cooks, and determining production schedules and staff. The sushi and hibachi chefs are tasked with checking the quality of products, instructing subordinates in the preparation of food, ordering food and supplies, and analyzing recipes to suggest prices, and determining presentation. The head waitress is tasked with serving food or beverages, presenting menus, informing customers of specials and food preparation, as well as ensuring customers are enjoying their meals. The Petitioner does not specify the amount of time these individuals spend on each particular task and whether the positions are primarily managerial or supervisory positions.[1]

Although the record indicates that the restaurant has employees to cook meals, and serve customers, and two managers who supervise these tasks, it has not established that the responsibilities for payroll, accounting, and budget functions, as well as the design of the restaurant, and supply chain management are assigned to subordinate staff. Additionally, as referenced above, the Petitioner does not describe the Beneficiary's position as primarily supervising employees. Accordingly, we cannot find that the Beneficiary is primarily a personnel manager.

Also, as the Petitioner does not include a position description for the company's president or distinguished the Beneficiary's duties from the duties performed by its president we cannot examine the role each individual plays within the organization. The Petitioner has not supported the organizational hierarchy it claims is in place with probative evidence. The record does not include sufficient evidence demonstrating that the Beneficiary will perform primarily managerial duties, rather than the operational and administrative tasks necessary to run the restaurant. The Petitioner has not established that the Beneficiary will be employed in a primarily managerial capacity for the U.S. entity.

III. MANAGERIAL CAPACITY FOR THE FOREIGN ENTITY

The Petitioner states that the Beneficiary is the vice general manager of its parent company, an investment and consulting company, established in 2010. The Petitioner asserts that the Beneficiary began her employment for the foreign entity in March 2015, and that since that time she has been in charge of the foreign entity's consulting, marketing, and finance departments. The Petitioner claims

[1] The record does not include evidence of the Petitioner's staffing when the petition was filed. The record included the restaurant's Texas employer's quarterly reports for the 2015 year, and the first quarter of 2016, reports submitted to the Texas government prior to the foreign entity's purchase of an interest in the petitioning company in May 2016. These reports do not depict the restaurant's number of employees after the Petitioner purchased its interest or when the petition was filed in August 2016.

that the Beneficiary's employment for the foreign entity is in a managerial capacity. Accordingly, we will limit our analysis as to whether the Petitioner has established that the Beneficiary has been employed in a managerial position. The statutory definition of managerial capacity set out above is also applicable to the analysis of the Beneficiary's foreign employment.

A. Duties

The Petitioner described the Beneficiary's duties for the foreign entity as follows:

a. Assist the General Manager in formulating the company's business development strategies, and organizing and supervising the implementation of all programs and plans;
b. Meet with potential clients to discuss objectives, whether in residential or commercial real estate;
c. Provide real estate analysis and advising services to clients such as construction developers and property investors;
d. Prepare necessary real estate market research tools and set out a schedule to perform and report to client on research results;
e. Develop, implement, and execute strategic marketing plans for the Company in order to attract potential clients and retain existing ones;
f. Manage and coordinate marketing and creative staff;
g. Lead market research efforts to uncover the viability of current and existing services;
h. Liaise with media organizations and advertising agencies;
i. Work with clients to determine budget and target market;
j. Assist in the determination of pricing in relation to services offered and competitors' pricing;
k. Oversee the operations of the financial department, including the design of an organizational structure adequate for achieving the Company's goals and objectives;
l. Manage the preparation of the Company's budget;
m. Engage in ongoing cost reduction analyses in all areas of the Company;
n. Interpret the Company's financial results to General Manager and recommend improvement activities; [and]
o. Engage in ongoing cost reduction analyses in all areas of the Company.

The foreign entity's organizational chart depicts the Beneficiary reporting directly to the General Manager and as over a consulting department with one employee, a marketing department with two employees, and a financing department with two employees. To demonstrate the Beneficiary's employment for the foreign entity, the Petitioner submitted a salary settlement list of the foreign entity's employees for the 2015 year signed by the Beneficiary and the general manager. The Beneficiary is identified as receiving a monthly salary beginning in January 2015 and continuing throughout the year. This document also identifies a supervisor as the sole employee in the

consulting department, a supervisor and an employee in the financial department, and a supervisor and employee in the marketing department. The Petitioner also submits a personnel document signed by the Beneficiary as a vice general manager in May 2014. The Beneficiary's "Certificate of Employment" signed by a representative of the foreign entity states that the Beneficiary "works and serves as the vice general manager of our company from March 2015 till now" and is dated July 2016.

In response to the Director's RFE, the Petitioner submitted a letter signed by a representative of the foreign entity noting that the Beneficiary's decisions included personnel decisions for the marketing, financial, and consulting departments, company budget and marketing strategies decisions, and consulting strategies decisions. The representative also re-organized the initially stated duties into four categories. The representative stated that the Beneficiary spent: 10 percent of her time implementing company policies and procedures established by superiors; 30 percent of her time overseeing the consulting department operations; 30 percent of her time overseeing the marketing department operations; and 30 percent of her time overseeing the financial department operations.

The Petitioner also provided a revised salary receipt document for 2015 which showed that the Beneficiary had not received a salary for January and February of 2015. The Petitioner does not explain why the initial record included two documents signed by the Beneficiary showing that she was employed in January and February of 2015. The ambiguity in the record regarding the Beneficiary's employment date casts doubt on the legitimacy of the Beneficiary's actual employment and suggests that some of the documents may have been copied from another individual's employment records. Nevertheless, we will review the duties the foreign entity claimed the Beneficiary performed while in its employ.

The foreign entity's job description, for the most part, describes the Beneficiary as performing specific functions. For example, although the foreign entity indicated that the Beneficiary "oversees" the consulting department, her tasks include meeting with potential clients, providing real estate analysis and advice, developing and preparing client reports evaluating the performance, allocation, and strategy of their real estate holdings, and conducting special research on real estate topics. These are the duties of a financial or real estate consultant, not the duties of a manager as defined in the statute. Similarly, developing, implementing, and executing marketing plans, liaising with media organizations and advertising agencies, and working with clients on their budget and target market, are the duties of an individual performing marketing and consulting duties. Again, to satisfy the statutory definition of managerial capacity, 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, e.g.*, *Family Inc. v. USCIS*, 469 F.3d at 1316. Here, the descriptions of duties and allocation of the Beneficiary's time indicates that the Beneficiary spends a significant portion of her time performing the consulting, financial, and marketing duties for the foreign entity.

Other duties, such as leading market research and managing the preparation of the company's budget do not provide sufficient detail to determine if these tasks are primarily managerial tasks or require

the Beneficiary's performance of market research and preparing the budget. The description of the Beneficiary's marketing subordinate's duties does not specifically address the market research necessary to uncover the viability of current and existing services. Likewise, the Beneficiary's financial subordinate performs basic bookkeeping duties, not duties related to the foreign entity's budget. In response to the Director's RFE, the foreign entity claimed that the Beneficiary supervised and controlled the work of her subordinates by being available and engaging in frequent meetings. However, the foreign entity does not allocate the Beneficiary's time to supervising others, and references, without detail, her management and coordination of the marketing and creative staff.

The Petitioner has not submitted sufficient probative evidence to establish that the Beneficiary's duties for the foreign entity are primarily managerial in nature.

B. Staffing

We have also reviewed the foreign entity's organizational structure, staffing, and the Beneficiary's subordinates' duties. Although the foreign entity identifies one individual in each of the consulting, marketing, and financial departments as a supervisor, none of the descriptions for the supervisory employees show that they primarily supervise other employees. The consultant department supervisor appears to perform duties similar to the Beneficiary's duties related to the consulting department. The marketing supervisor analyzes trends, leads the promotion of the company, identifies new markets, and prepares and implements the marketing budget and marketing plans. These duties also do not include the supervision of others. As noted above, the financial department supervisor's duties include bookkeeping tasks, not supervising others. The record is insufficient to establish that the Beneficiary's subordinates are supervisors. Likewise, the Beneficiary's subordinates' duties, as described, do not include managerial duties.

On appeal, the Petitioner references the list of employees it claims the Beneficiary supervises and identifies them as "professional" employees. Although a beneficiary is not required to supervise personnel, if a petitioner claims that a beneficiary's duties involve supervising employees, then a petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* section 101(a)(44)(A)(ii) of the Act.

In evaluating whether a beneficiary manages professional employees, we 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." Therefore, we focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity.

In this matter, the Petitioner has not established that a bachelor's degree is required to perform the duties the foreign entity attributed to the Beneficiary's subordinates. If the Beneficiary is a personnel manager for the foreign entity, she is at most a first-line supervisor of non-professional employees. Although the Petitioner does not appear to claim that the Beneficiary performs as a function manager for the foreign entity, we find that the description of the Beneficiary's duties shows that she is primarily performing the consulting, financial, and marketing tasks, and is not managing these functions. The record in this matter does not establish that the Beneficiary has been performing in a managerial capacity for the foreign entity.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary has been employed abroad, or would be employed in the United States, in a managerial capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of N-F- Corp.*, ID# 388284 (AAO June 22, 2017)