U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R- INC.

DATE: JUNE 28, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a nutraceutical developer and distributor, seeks to temporarily employ the Beneficiary as its general manager under the L-1A nonimmigrant classification for intracompany transferees. 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 California Service Center revoked the approval of the instant petition concluding that the Petitioner did not establish that he was employed in a managerial or executive capacity.

On appeal, the Petitioner asserts that the Beneficiary supervises four subordinates and that he acts as a function manager overseeing the company's regulatory affairs, finance, and logistics functions.

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 involves 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).

Under U.S. Citizenship and Immigration Services regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, a director must issue a notice of intent to revoke that contains a

detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).[1]

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The sole issue to be addressed is whether the Petitioner has established that the Beneficiary was employed in a managerial capacity as of the date of the Director's Notice of Intent to Revoke (NOIR). The Petitioner does not claim that the Beneficiary was employed in an executive capacity. Therefore, we will restrict our analysis to whether the Beneficiary was 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 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. Duties

Based on the definition of managerial capacity, the Petitioner must first show that the Beneficiary performed 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 was *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the

[1] An L-1A nonimmigrant intracompany transferee petition filed on behalf of the Beneficiary was approved on December 15, 2015, for the period June 7, 2015, to June 6, 2017. The Director later revoked this approved petition on December 21, 2017, following the issuance of a notice of intent to revoke (NOIR) on April 20, 2017. The Director concluded that the Beneficiary was no longer eligible for the nonimmigrant classification. *See* 8 C.F.R§ 214.2(l)(9)(iii)(2).

Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner stated that it was established in 2010 to develop and distribute supplements and vitamins. The Petitioner indicated that it "plans to develop products that will be manufactured in the United States and distributed in the Philippines and other Asian market[s]." It explained that it was currently "developing" three products, a multivitamin supplement for adults, a multivitamin supplement for toddlers, and time release vitamin C supplements.

In response to a request for evidence (RFE) issued by the Director, the Petitioner stated that the Beneficiary had "discretion in developing and directing [the Petitioner's] USA policies and services." The Petitioner further explained that the Beneficiary devoted his time to the following duties:

- 17% of his time "develop[ing], direct[ing], and implement[ing] and enforce[ing] [the Petitioner's] operating budget";
- 16% of his time to "high-level client contact and contract negotiations";[2]
- 8% of his time on overseeing and developing "new innovative products in partnership with manufacturers";
- 8% of his time on developing "print, direct-mail, web and other advertising";
- 8% of his time on managing and directing the "development of the company brand";
- 9% of his time coordinating with a foreign marketing manager to develop a marketing plan;
- 5% of his time spent on training, firing, and supervising staff;
- 3% of his time on "implementing operation and project budgets";
- 7% of his time to overseeing "bidding" and "contract negotiation with high-level management of manufacturers and distributors";
- 1% of his time on recruiting a new "V.P. of U.S. operations to manage the [foreign] office"; and
- 18% of his time on supervising the "coordination of regulatory teams from the Philippines, USA, Korea and India."

The Director issued a NOIR in April 2017 requesting additional evidence relevant to whether the Petitioner was doing business and whether the Beneficiary was acting in a managerial or executive capacity. Following a site visit, the Director indicated that it could not confirm the Beneficiary's asserted duties or whether he had subordinates, emphasizing that it did not appear the Petitioner "had any brands manufactured or exported." In response, the Petitioner submitted largely the same duties provided previously in response to the RFE and submitted additional evidence relevant to its operations, business plans, and subordinates. The Director later revoked the approved petition,

[2] In its initial documents submitted with the petition, the Petitioner attributed 9% of the Beneficiary's time to "high-level contact and contract negotiations."

concluding that the Petitioner did not establish that the Beneficiary was acting in a managerial or executive capacity.[3]

On appeal, the Petitioner submits additional assertions regarding the Beneficiary's role, stating that he possesses "managerial authority over our highly qualified and professional staff members" and "Contract/Toll Manufacturers in the U.S." It also indicates that he "assigns projects, directives and instructions to subordinates in the U.S. as well as for our Philippine company."

The Petitioner submits evidence indicating that the Beneficiary was primarily engaged in the performance of non-qualifying operational level tasks as of the date of the NOIR. For instance, in response to the NOIR, the Petitioner provided evidence reflecting the Beneficiary paying the company's rent. The Petitioner also submitted invoices listing the Beneficiary as the "requisitioner," including some dated as late as April 2017, or the month the NOIR was issued. Likewise, the Petitioner provided numerous emails reflecting the Beneficiary's involvement in day-to-day non-managerial duties, such as issuing purchase orders to suppliers, working on supplement bottle specifications, receiving quotes from suppliers, sending pill samples, arranging for the shipment of pills, sending information to clients on where to send payment, sending checks to suppliers, and making labels. Further, several of the aforementioned emails are dated in 2017 including some dating as late as April 2017, or the time of the NOIR. The Petitioner also submitted several invoices from freight forwarders dated in March and April 2017 that bear the Beneficiary's name as the only company contact.

In sum, the Petitioner has provided substantial documentation indicating that the Beneficiary was primarily engaged in non-qualifying operational duties and that he was delegating few of these tasks to subordinates working for it or the foreign employer. The Petitioner also submits no documentary evidence reflecting the Beneficiary's delegation of these non-qualifying tasks to his claimed subordinates.

Further, the Beneficiary's duties also suggest his performance of non-qualifying operational duties. For example, the Petitioner stated that the Beneficiary was focused on developing "print, direct-mail, web and other advertising" and overseeing "bidding" with manufacturers and distributors. This, along with the submitted emails and documentation, reinforces a conclusion that the Beneficiary was primarily focused on non-qualifying matters. Further, it is questionable that several of the operational duties reflected in the provided documentation are not mentioned in the Beneficiary's duty description, such as handling orders, billing, payment, shipment, and other day-to-day operational duties. 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, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

[3] We note that the Director did not offer a conclusion in the revocation notice as to whether the Petitioner was doing business.

The Petitioner also did not document what proportion of the Beneficiary's duties were managerial functions and what proportion was non-qualifying. As noted, the Petitioner submits evidence indicating the Beneficiary's involvement in administrative or operational tasks, but does not fully quantify the time he devoted to these duties. This lack of documentation is important because several of the Beneficiary's documented tasks do not fall directly under managerial duties as defined in the statute. For this reason, we cannot determine whether the Beneficiary was primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In contrast to the substantial evidence indicating the Beneficiary's performance of non-qualifying tasks, the Petitioner has not submitted sufficient examples or documentation to substantiate his day-to-day managerial-level duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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). The Beneficiary's duty description includes several generic duties that could apply to any manager acting in any business or industry and they do not provide insight into the actual nature of his role. The Petitioner provided insufficient examples and little supporting documentation to demonstrate the Beneficiary's performance of qualifying duties, such as operating budgets he implemented, marketing plans he established, staff he trained, or the regulatory team he coordinated. This lack of detail as to the Beneficiary's day-to-day qualifying managerial tasks is particularly noteworthy since the Petitioner asserts that he has been acting in his capacity as general manager in the United States since 2010.

We acknowledge that the Petitioner has provided evidence indicating that it executed contracts for the supply of herbal medicines both in the United States and abroad; however, this alone does not demonstrate that the Beneficiary spends a majority of his time negotiating these contracts. In fact, as we have discussed, the documentation, such as emails and transactional documents, reflects that the Beneficiary is primarily involved in several non-qualifying operational level tasks and the Petitioner has provided few examples of his qualifying managerial duties, beyond occasional negotiation and execution of agreements.

Even though the Beneficiary holds a senior position within the organization, the fact that he manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in an managerial capacity within the meaning of section 101(a)(44)(A) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. Sections 101(A)(44)(A) of the Act. 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; however, the job description alone is insufficient to establish that his actual duties were primarily managerial in nature.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

In support of the petition in June 2015, the Petitioner indicated in the Form I-129 that it only had one employee. The Petitioner stated that the Beneficiary possessed "managerial authority over our highly qualified and professional staff members in both the U.S. and the Philippines" and "Contract/Toll Manufacturers in the U.S." In response to the NOIR in May 2017, the Petitioner submitted an organizational chart indicating that the Beneficiary supervised an executive secretary, an ecommerce and business development manager, an accountant, and a raw material development consultant. The chart further indicated that the ecommerce and business development manager oversaw an [redacted] sales employee and a graphic artist. The chart also reflected that the Beneficiary oversaw the "Philippine operation," consisting of a regulatory affairs department with a registered pharmacist and product development pharmacist, a finance department with a department head and a cashier, a logistics department made up of a customs and logistic officer, and a quality control laboratory with two employees. In addition, the chart showed that the Beneficiary supervised three "contract/toll manufacturers" and listed several employees working with these contractors in its organizational chart.

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) 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*).

First, the Petitioner has not submitted sufficient evidence to establish that it had employees in the United States subordinate to the Beneficiary. As discussed, the Petitioner asserted in response to the NOIR that it employed a business development manager, an accountant, a raw material development consultant, and an assistant to the general manager/executive secretary. In the RFE, the Director requested that the Petitioner submit tax documentation to substantiate these employees such as IRS Forms W-2 and 1099 and state quarterly wage reports. Further, in the NOIR, the Director pointed to submitted IRS Forms 1120S U.S. Income Tax Returns for an S Corporation dating from 2014 through 2016 which reflected that the company had no paid any wages or salaries during these years.

However, the Petitioner did not submit sufficient supporting documentation to corroborate its employees in the United States. The Petitioner provided internally generated payroll documentation from February 2017 indicating that it had only one employee, the asserted business development

manager. Further, internally generated payroll documentation from March 2017 reflected that the Petitioner employed the Beneficiary, the claimed business development manager, the raw material development consultant, and another unidentified employee. The Petitioner did not provide tax documentation, as requested, to substantiate its employees. In addition, the Petitioner provided IRS Forms 1120S from 2014 through 2016 reflecting that it paid no salaries and wages, leaving further need for credible and probative tax documentation to corroborate its employees.

We do not find that internally generated payroll documentation from March and April 2017 adequately supports a conclusion that the Petitioner had sufficient employees to sustain the Beneficiary in a managerial capacity, nor does it overcome the lack of tax documentation provided on the record. Even if we accept the Petitioner's asserted U.S. organizational chart as of the date of the NOIR, this evidence indicates that the company did not hire any subordinates to the Beneficiary until March 2017, approximately seven years following its creation. It is also questionable that these employees were shown as being hired in the same month as the NOIR. The Petitioner must resolve discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The organizational chart also does not indicate that the Beneficiary's U.S. subordinates oversaw subordinates of their own. The Petitioner also submits no evidence to demonstrate that his claimed U.S. subordinates had bachelor's degrees or that their duties involved professional level duties requiring specific bachelor's degrees.[4]

The Petitioner has also not provided adequate evidence to demonstrate that the Beneficiary supervised foreign employees and contractors in his U.S. capacity. For instance, the Petitioner asserts that the Beneficiary oversaw four foreign departments while assigned to the United States affiliate, including subordinate employees and professionals making up these departments. However, it provides little supporting documentation to substantiate this claim, such as foreign payroll documentation or evidence reflecting the Beneficiary delegating tasks to these foreign departments and employees. Likewise, the Petitioner submits little supporting evidence to demonstrate that manufacturers and suppliers with which it deals can be considered part of the company's organizational chart. In fact, the Petitioner provides emails and transactional documents indicating that the Beneficiary dealt with these suppliers in an arms-length fashion indicating that he does not have managerial authority over these manufacturers and suppliers.

Furthermore, the provided evidence leaves significant question as to whether the Petitioner had developed sufficiently to support the Beneficiary in a managerial capacity. For instance, the

[4] In evaluating whether a beneficiary manages professional employees, we must 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."

Beneficiary was first approved for a L-1A nonimmigrant intracompany transferee visa in July 2010. However, in response to the NOIR in April 2017, the Petitioner indicated that it was still in "Phase 1" of its business plan involving "product development and formulation in accordance with export country requirements." It also stated that Phase 1 included research and development, process validation, the preparation and submittal of a product dossier to the Federal Drug Administration (FDA), and lastly, "first commercial production." The Petitioner also mentioned a "very time-consuming FDA process" related to getting its proposed supplements approved for manufacture and sale.

The Petitioner's business plan was to manufacture supplements and vitamins in the United States and sell them on the Philippine and other Asian markets. However, there is little indication that after more than seven years from the approval of the Beneficiary's first petition in July 2010 to the date of this appeal in January 2018 that the Petitioner has successfully executed its plans to manufacture and sell vitamins and supplements in the United States. For instance, in response to the NOIR, the Petitioner referenced sales at [redacted] and through [redacted] and lists contacts from these companies as part of its organizational chart. However, there is no supporting evidence to indicate that the Petitioner is selling its supplements through these vendors. Indeed, the Petitioner's most recent IRS 1120S from 2016 indicates that it only earned $150,473 in revenue and paid no salaries or wages during that year. Otherwise, the Petitioner provides no other supporting evidence to establish that it was sufficiently developed such that it could support the Beneficiary in a managerial capacity.

Therefore, based on the foregoing, the Petitioner has not established that the Beneficiary acted as a personnel manager.

On appeal, the Petitioner also asserts that the Beneficiary qualifies as a function manager overseeing regulatory affairs, logistics, and finance functions. 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. 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).

The Petitioner has not demonstrated that the Beneficiary acted as a function manager. As discussed, the Petitioner has provided substantial evidence reflecting the Beneficiary's involvement in non-qualifying operational tasks such as issuing purchase orders to suppliers, working on supplement bottle specifications, receiving quotes from suppliers, sending supplement samples, arranging for the shipment of pills, sending information to clients on where to send payment, sending checks to

suppliers, and making labels. This documentary evidence dates up to, and after, the date of the NOIR.

Therefore, the evidence indicates that the Beneficiary was more likely performing his asserted functions rather than managing them. The Petitioner has not provided adequate evidence to demonstrate that the Beneficiary had subordinates in the United States, or that it engaged foreign employees and contractors, as of the date of the NOIR, to primarily relieve him from performing his functions. In fact, as we have discussed, the supporting documentation indicates that the Beneficiary was substantially involved in logistics and bookkeeping duties, rather than managing his asserted functions. In addition, there is little evidence to demonstrate that the Beneficiary was also relieved of regulatory matters; as submitted evidence indicates that he submitted documentation for the potential approval of supplements by the FDA and there is little evidence that he primarily delegated this function to claimed subordinates. Therefore, the Petitioner has not established that the Beneficiary acted as a function manager.

For the reasons discussed above, we conclude that the Director properly revoked the previously approved petition, as the Petitioner did not establish that the Beneficiary acted in a managerial capacity. For this reason, the appeal will be dismissed.

III. QUALIFYING RELATIONSHIP

Although not addressed by the Director in the revocation notice, we note that it does not appear the Petitioner has a qualifying relationship with the Beneficiary's former foreign employer. *See* section 101(a)(15)(L); *see also* 8 C.F.R. 214.2(l)(1)(ii)(G) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate") and 8 C.F.R. 214.2(l)(14)(ii)(A) (requiring evidence that petitioners and foreign entities are "still qualifying organizations").

The Petitioner stated in the petition that it and the foreign employer are affiliates. The regulation at 8 C.F.R. 214.2(l)(1)(ii)(L) defines affiliates as: (1) one of two subsidiaries both of which are owned and controlled by the same parent or individual, or (2) one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The Petitioner submitted evidence indicating that it is owned by three shareholders, while the foreign employer is owned by five shareholders. The evidence does not indicate that either of these entities is primarily controlled by any company or individual; for instance, the evidence reflects that the Beneficiary owns 35% of the Petitioner along with two other shareholders holding 35% and 30% interests respectively. As such, the entities cannot qualify as affiliates based on the ownership and control by a specific individual or company. Further, they cannot otherwise qualify as affiliates since the foreign employer is owned by five shareholders, while the Petitioner is owned by three. Therefore, the companies are not one of two legal entities owned and controlled by the same group of individuals with each individual owning and controlling approximately the same share or

proportion of each entity. In fact, to the extent that the Petitioner and foreign employer have common owners, these owners own differing percentages of the companies.

The record does not establish the required qualifying relationship between these entities; therefore, even if the Petitioner had overcome the ground of revocation discussed above on appeal, we would have been required to remand this matter to the Director for the issuance of a new NOIR to address this additional ground of eligibility.

IV. CONCLUSION

The Petitioner has not established that the Beneficiary was employed in a managerial capacity; therefore, the revocation of the approved petition will not be disturbed.

ORDER: The appeal is dismissed.

Cite as *Matter of R- Inc.*, ID# 1383912 (AAO June 28, 2018)