U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-, INC.

DATE: MAR. 13, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software development and IT operations company, seeks to temporarily employ the Beneficiary as a "Senior VoIP Engineer" in its new office[1] 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 denied the petition, concluding that the Petitioner did not establish, as required, that it satisfied the following eligibility criteria: (1) the Petitioner formed a qualifying relationship with the Beneficiary's foreign employer; (2) the Beneficiary was employed abroad in a managerial capacity; and (3) the new office would support the Beneficiary in a managerial or executive position within one year of the petition's approval.

On appeal, the Petitioner points out that where one entity – in this instance the foreign employer – is claimed as the parent in a parent-subsidiary relationship, only the subsidiary entity's ownership is relevant for the purpose of establishing the existence of a qualifying relationship. The Petitioner contends that the Director erroneously focused on the foreign parent's ownership in concluding that a qualifying relationship does not exist between that foreign and petitioning entities. Regarding the two remaining issues, the Petitioner contends that the Beneficiary assumed the role of a function manager in his position abroad and that he would continue to assume a similar position during his employment with the U.S. entity.

Upon *de novo* review, we find that the Petitioner has not established that the Beneficiary was employed abroad in a managerial capacity. Therefore we will dismiss the appeal.[2] However, the

[1] The term "new office" refers to an organization which has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation no more than one year within the date of approval of the petition to support an executive or managerial position.

[2] Because of the dispositive effect of the finding of ineligibility based on the lack of sufficient evidence showing that the Beneficiary was employed abroad for one year in a managerial capacity, we will reserve the remaining issue that pertains to the Beneficiary's proposed employment with the petitioning entity.

Petitioner has overcome the Director's finding on the issue of a qualifying relationship. As such, we will withdraw that issue as a basis for dismissing the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). 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 submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

II. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

The Petitioner claims that the Beneficiary assumed the role of a function manager during his employment abroad.

"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.

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).

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

The description of the job duties must clearly describe the duties performed by the Beneficiary and indicate whether such duties were 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 the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the Beneficiary's actual duties and role in that business. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the foreign business and its staffing levels.

A. 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 a supporting cover letter, the Petitioner stated that the Beneficiary has been employed abroad as the foreign entity's "Senior VoIP Engineer" since October 2015. It stated that in the course of managing telecommunications network and software development projects related to "Voice over Internet Protocol" ("VoIP"), the Beneficiary led a team of three telephone engineers. The Petitioner explained that this team is responsible for deploying new devices and software upgrades and troubleshooting service issues.

The Petitioner also provided a business plan containing various organizational charts for the foreign entity. One chart included the Beneficiary and depicted his position within a division of the foreign entity's organizational hierarchy. Despite claiming that the Beneficiary operates at a senior level with respect to the function he manages, the submitted chart does not support this claim and instead shows the Beneficiary as second from the bottom of the divisional hierarchy with respect to the function. Namely, the chart shows a general manager at the top of the hierarchy, followed by a CEO, who is shown as overseeing a senior director of operations, followed by a director of operations, who oversees the [redacted] Team Lead," the Beneficiary's immediate superior. The Beneficiary's placement is at the tier that is second from bottom and he is depicted as overseeing three employees who are on the bottom tier, two "telephone engineers", [redacted] and [redacted] and one "senior telephone engineer," [redacted] The Petitioner did not explain the reason for the distinction between "telephone engineer" and "senior telephone engineer" or claim that someone other than the Beneficiary oversees the work of these three individuals.

The Petitioner did not provide separate job descriptions for the telephone and senior telephone engineer positions; rather, it provide one broad job description stating that the telephone engineers collaborate with development teams and are responsible for searching and correcting technical problems and for "servicing production and pre-production environments for distributed IP telephonic system development using various technologies." Although the Petitioner provided résumés for these three individuals, none described the job duties they performed in their respective positions and only listed each employee's position title and dates of employment with the foreign entity. As such, it is unclear how, if at all, the Beneficiary's claimed subordinates helped to relieve the Beneficiary from having to primarily perform non-managerial duties.

In a separate organizational chart the Petitioner offered a different cross section of the foreign entity, which included an organizational hierarchy of department and identified his position as "TelcoSysOPS Tech Lead." In contradiction with the previously described chart, this chart included and as direct subordinates of even though these two individuals were depicted as the Beneficiary's subordinates in the other chart. Further, the titles of and are different on the two charts. This chart identified as "Telco Engineer" and was identified as "DevOPS Engineer." The Petitioner did not explain why these two individuals were listed as employees in two different departments where they had different position titles and were subject to different leadership personnel. The Petitioner must resolve this incongruity 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).

Lastly, the Petitioner offered a variety of email communications demonstrating the Beneficiary's discretionary authority with respect to the function he is claimed to have managed. We note, however, that the tag line in the email sent by the Beneficiary prior to October 2017 identified the Beneficiary's position title as "VoIP Engineer," rather than "Senior VoIP Engineer," as he was identified in emails he sent after October 2017 and in the initial support letter. We further note that none of the communications are between the Beneficiary and his claimed subordinates. As such, the emails do not support the claim that the Beneficiary relied on three telephone engineers to relieve him from having to primarily perform the non-managerial tasks associated with the essential function he is claimed to manage.

The Director issued a request for evidence (RFE) noting that the record did not adequately describe the job duties of the Beneficiary's subordinates or explain how they relieved the Beneficiary from performing non-managerial job duties. The Petitioner was also asked to provide an organizational chart or diagram showing the foreign entity's organizational structure and staffing levels and to list the employees that are in the Beneficiary's immediate department or team.

In a response statement, the Petitioner claimed that the Beneficiary "oversees the department responsible for developing VoIP technology" asserting that such technology is an essential service offered to its clients. The Petitioner further stated that the Beneficiary functions at a senior level with respect to this function and pointed out that his position is "only two (2) direct levels below the

Director of Operations for the entire organization." The Petitioner resubmitted the organizational chart that depicted the management and staffing structures of the department where the Beneficiary was depicted as the "Senior VoIP Engineer" with three telephone engineers on the tier below him.

The Petitioner also offered a second response statement from who was identified as the Team Lead," the Beneficiary's direct superior. Although stated that engineers comprising the "Telco Network Team" executed projects for which the Beneficiary was responsible and thereby supported the Beneficiary's function management role, this information was not corroborated in the submitted organizational charts. Further, did not clarify how "Tech Lead" of the team of Telco engineers, supported the Beneficiary's position, nor did he explain why two members of team appeared in two different departmental charts or why their respective position titles did not consistently carry over from one chart to the other. Moreover, if all members of the Telco team were responsible for carrying out projects in support of the Beneficiary's function, as explained, it is unclear why only two members of that team were included in the Beneficiary's departmental chart.

further claimed that the Beneficiary collaborated "with other internal teams and third parties," but he did not specify which "other" teams or "third parties" were part of the collaboration, nor did he state what duties those "other" teams and "third parties" performed to relieve the Beneficiary from having to primarily perform non-managerial job duties. Likewise, the Petitioner did not provide more detailed job duty descriptions for the Beneficiary's claimed subordinates, as instructed in the RFE. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The response also contains what the Petitioner described as "training materials" that the Beneficiary used to train "subordinate professional employees carrying out tasks related to the essential function he manages." The Petitioner did not, however, substantiate the claim that the target audience of the training consisted of professionals who carried out the duties of the Beneficiary's essential function, nor did the Petitioner establish that training subordinates is a managerial, as opposed to an operational, job duty. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Although the Petitioner also provided additional email communications that the Beneficiary sent to the Telco Network team in his capacity as "Senior VoIP Engineer," the earliest of those emails was sent in October 2017; none of emails that were sent prior to that date included the word "Senior" as part of the Beneficiary's job title.[3] Thus, the submitted emails do not support the claim that the Beneficiary has been employed in the position of "Senior VoIP Engineer" since October 2015. Moreover, the emails indicate that there is cause to question whether the Beneficiary held the

[3] The Petitioner did not make a distinction between "VoIP Engineer" and "Senior VoIP Engineer," nor did it claim that the position of "VoIP Engineer" fits the criteria of a function manager.

position that is claimed to be managerial for at least one year out of the three years that preceded the filing of this petition.[4]

The Director denied the petition concluding that the Petitioner did not provided requested information clarifying how the Beneficiary's subordinate staff relieved him from having to perform non-managerial job duties.

On appeal, the Petitioner offers the previously submitted training materials, email communications, and organizational charts, contending that the Director did not consider these documents prior to denying the petition. We disagree with the Petitioner and find that the resubmitted evidence was insufficient to support the claim that the Beneficiary's foreign employment fit the criteria of a function manager.

Although the Petitioner adequately pointed to an essential function and provided evidence showing that the Beneficiary's position was likely associated with that function, it provided inconsistent organizational charts and did not adequately demonstrate that the Beneficiary's claimed subordinates relieved him from having to perform the underlying duties of the function he is claimed to have managed. 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 or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Lastly, the record does not adequately support, and in fact appears to contradict, the Petitioner's claim as to when the Beneficiary actually assumed his position as "Senior VoIP Engineer." Despite claiming that the Beneficiary assumed that position in October 2015, a number of the previously submitted email communications indicate that the Beneficiary assumed the position of "VoIP Engineer" until sometime in 2017 when his position title changed to include the term "Senior" as part of his job title. The Petitioner neither acknowledged nor addressed this anomaly, which undermines its claim as to how long the Beneficiary occupied his current position as the foreign entity's "Senior VoIP Engineer."

In light of the deficiencies described above, we find that the Petitioner has not established that the management and staffing hierarchy of the Beneficiary's department and other departments within the same organization were sufficient to relieve the Beneficiary from having to allocate his time primarily to performing the non-managerial tasks associated with the VoIP development function.

[4] The Petitioner is silent as to the Beneficiary's position as a "VoIP Engineer," which appears to have preceded his current position as "Senior VoIP Engineer."

B. Duties

We also reviewed the Beneficiary's job description and find that the Petitioner provided insufficient evidence to establish that the Beneficiary performed primarily managerial job duties in his position with the foreign entity.

In the initial support letter, the Petitioner stated that the Beneficiary directed "technical implementation of various complex telecommunications network and software projects," and managed "operational work of projects to redesign and improve current voice communications and multimedia network systems." The Petitioner also provided a job duty breakdown stating that the Beneficiary would allocate 45% of his time to managing operational work to support production stability by overseeing and monitoring project roadmaps, attending meetings with engineering teams, and directing professional subordinates to carry out projects and implement new production processes. The Petitioner stated that another 40% of the Beneficiary's time would be spent leading complex technical projects by monitoring change requests and approving network changes, reviewing network design and configuration implementation, and making technical recommendations and the remaining 15% of his time would be spent managing professional engineers by instructing them to diagnose and troubleshoot service issues and assigning on-call support rotations.

In response to the RFE, the Petitioner provided the following list of the Beneficiary's job duties with the foreign entity:

- Review tasks he assigns to other employees;
- Review and discuss "escalations" with members of his team;
- Review, plan, and schedule change requests;
- Provide feedback and respond to questions;
- Conduct weekly reviews of the "Roadmap and Performance Review portal";
- Provide written direction to those working on his projects; and
- Stay informed of current VoIP changes and trends.

Although the Petitioner's business plan contains a similar percentage breakdown describing the Beneficiary's position with the foreign entity, it lists job duties that were not included in the prior job description and are not readily identified as duties performed in the course of managing an essential function. Namely, the Petitioner stated that the Beneficiary is involved in implementing networking changes, designing "HA carrier configurations," participating in "next generation design and architecture," performing "forecast and failover modeling analysis, diagnosing and troubleshooting to resolve issues, and participating in the on-call support rotation. Although the Petitioner assigned a percentage of time to each of three main categories, it did not assign specific time allocations to individual job duties. It is therefore unclear how much time the Beneficiary spends executing these non-managerial functions.

In the foreign entity's RFE response statement, [redacted] stated that the Beneficiary manages projects that are carried out by the "Telco Network Team" and collaborates with "other internal teams and third parties." The Petitioner does not impart new information about the Beneficiary's current position; instead it restates one of the earlier job descriptions, which focused on the Beneficiary's discretionary authority but did not establish the managerial nature of some of the job duties that were listed in the business plan's foreign job description.

On appeal, the Petitioner disputes the denial, restating one of the previously submitted job duty breakdowns and asserting that the job description was adequately detailed to support the claim that the Beneficiary performed primarily managerial job duties during his foreign employment. The Petitioner also contends that performing some operational or administrative duties would not preclude the Beneficiary from establishing eligibility so long as those non-managerial tasks do not occupy the majority of his time. Here, however, it is unclear how much time the Beneficiary specifically devotes to the non-managerial job duties associated with the development of VoIP. As noted earlier, the job description in the business plan, which listed multiple non-managerial tasks, assigned a percentage of time only to the three main job categories, not to the individual job duties that comprised each category. As such, we cannot determine precisely how much time the Beneficiary devoted to performing managerial tasks. In other words, the Petitioner has not established that the non-managerial job duties that the Beneficiary performed in his position with the foreign entity were only incidental, rather than critical, to the foreign position. We therefore cannot conclude that the Beneficiary allocated his time primarily to job duties associated with managing, rather than carrying out the underlying duties of, an essential function.

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 N-, Inc.*, ID# 2288671 (AAO Mar. 13, 2019)