U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-D-T-, INC.

DATE: MAR. 26, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a one-employee retailer of Nepali clothing and handicrafts,[1] seeks to continue the Beneficiary's employment as its chief executive officer under the L-1A nonimmigrant classification for intracompany transferees.[2] *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 California Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner provides two statements disputing the Director's decision and contending that sufficient evidence has been provided to demonstrate the Beneficiary's managerial and executive decision-making authority. The Petitioner also points to newly hired employees and states that the Beneficiary's proposed position fits the criteria of a function manager and an executive.[3]

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

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[1] The Petitioner acquired a fictitious business name, which indicates that it is also operating as an eyebrow threading business; however, the record does not contain evidence to show that the Petitioner is providing eyebrow threading services.

[2] U.S. Citizenship and Immigration Services (USCIS) approved the Petitioner's previous "new office" petition filed on the Beneficiary's behalf. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). Although the Petitioner checked the box on the instant petition indicating that it was again seeking treatment as a "new office," it expressly stated in its initial supporting cover letter that it started its U.S. operations more than one year before the filing of this petition. As such, the Petitioner is not a new office.

[3] In support of the appeal, the Petitioner submitted two statements; however, one of the statements is erroneously titled "Notice of Motion to Reopen and Reconsider." As the Petitioner filed an appeal, not a motion to reopen and reconsider, we will consider both submissions in issuing our decision with regard to 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 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.*

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status, evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

II. DEFINITIONS

"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.

"Executive capacity" means an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

In this matter, the Petitioner claims that the Beneficiary's proposed position is both managerial and executive. The Director found that the Petitioner did not establish that the Beneficiary's proposed position qualifies as a position that is either in a managerial or an executive capacity.

When examining the managerial or executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a

managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, USCIS examines 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.

Based on the statutory definitions of managerial and executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Managerial Capacity

1. Duties

The Petitioner filed the petition claiming one employee and no gross or net income. Although an initial cover letter was provided, it did not include a description of the Beneficiary's proposed job duties. Instead, the Petitioner's initial supporting evidence included a business plan, dated April 2015, which contained a list of the Beneficiary's proposed job duties. As approximately 18 months had passed between the date on the business plan and the filing of the instant petition, it is not clear whether the job description contained in the business plan was still applicable at the time of filing, when the Petitioner no longer qualified as a "new office." In any event, the job description indicated that the Beneficiary's duties would include the following: establishing guidelines for hiring, training, and evaluating employees; establishing and implementing policies, goals, and procedures; directing and coordinating sales and marketing activities and product distribution; reviewing business performance data and financial statements to reduce costs and improve business; find and negotiate prices to buy and sell merchandise; and report to the board of directors.

In a request for evidence (RFE), the Director determined that the submitted job description was insufficient because it did not describe the Beneficiary's daily job duties or state how and at what frequency he would perform those duties.

In response, the Petitioner provided a statement in which it explained that it faced obstacles during its first year of operation and therefore relied exclusively on the Beneficiary to carry out all of the operational tasks of the organization. The Petitioner reiterated the original job description and stated that the Beneficiary "has made several executive and managerial decisions on behalf of the [Petitioner]." The Petitioner did not provide a more detailed job description or state how often the Beneficiary would perform his assigned job duties.

In the denial decision, the Director determined that the Petitioner provided a deficient job description that did not establish that the Beneficiary primarily oversees a supervisory, professional, or managerial staff or acting in the role of a function manager. The Director found that the Beneficiary would likely devote the primary portion of his time to non-managerial and non-executive job duties.

In one of its supporting statements submitted on appeal, the Petitioner misquotes the Director's decision, claiming that the Director stated, "Moreover, the evidence submitted was found insufficient documentation to demonstrate that the [B]eneficiary exercises discretionary authority over key personnel matters and decisions . . . ." In fact, the Director stated the following: "Moreover, the submitted evidence is insufficient to show the [B]eneficiary has managed the organization, department subdivision, function, or component of the organization." Thus, while the Director ultimately concluded that the Beneficiary could not be deemed as either a manager or an executive, this adverse determination was not based on the Beneficiary's lack of discretionary authority, but rather the finding that the Beneficiary would primarily perform the Petitioner's daily operational tasks.

We find that the Petitioner did not provide sufficient information about the actual job duties the Beneficiary would perform within the scope and operational phase of the retail business that existed at the time this petition was filed. The Petitioner did not disclose the specific daily tasks associated with formulating guidelines for hiring and training employees, nor did the Petitioner identify any specific guidelines. The Petitioner also did not state what information the Beneficiary would contemplate in order to establish policies, goals, and procedures, nor did it disclose any policies or procedures that the Beneficiary has put in place, or state who, if not the Beneficiary was available to carry out the organization's sales, marketing, and distribution activities at the time this petition was filed. The Petitioner also neglected to specify the underlying tasks involved in directing and coordinating the company's sales, marketing, and distribution activities.

We further find that procuring merchandise or negotiating prices to purchase and sell such merchandise are not managerial- or executive-level tasks; thus, any time the Beneficiary would devote to these activities would be deemed as time spent performing operational duties that are outside the scope of what is deemed to be managerial or executive. As the Beneficiary was the Petitioner's only employee at the time of filing, it is likely that the Beneficiary was allocating his time primarily to the performance of the organization's operational tasks in order to meet the immediate needs of the organization. While no beneficiary is required to devote 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. 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* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

We also question the claim that the Beneficiary would regularly report to a board of directors. The record shows that the Beneficiary is the sole owner of the parent entity and president of a board of directors that includes two other members – a secretary and vice president – whose position titles indicate that they are subject to the will of the board's president. These circumstances lead us to question whether the Beneficiary is actually subordinate to a board of directors and whether he would actually have to report his actions to a board of which he is the presiding member. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

On appeal, the Petitioner contends that the Beneficiary, in his capacity as the Petitioner's president and chief financial officer, "manages the utmost essential function" and has "general authority to determine the [Petitioner's] overall policy." We note that the Petitioner's reference to the Beneficiary as president and chief financial officer is inconsistent with the RFE response, where the Petitioner stated that the Beneficiary has been employed in the position of chief executive officer since it started its operations in December 2015. 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).

Further, 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).

Here, while the Petitioner broadly claims that the Beneficiary will manage "the utmost essential function" as a result of his top position within the organization, it has not identified the specific function the Beneficiary would manage or supported that claim with a detailed description of duties stating how he would manage that function. As noted earlier, a detailed job description is critical to an analysis of the Beneficiary's managerial employment. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. As Petitioner has not provided any detail or explanation of the Beneficiary's activities in the course of their daily routine, it has not adequately supported the claim that the Beneficiary would assume the role of either a function or a personnel manager.

2. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS takes 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.

As indicated earlier, 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*).

In the petition, the Petitioner claimed the Beneficiary as its only employee,[4] and in response to the RFE, the Petitioner stated that it hired two employees to help the Beneficiary expand the business. It also provided an organizational chart and employment contracts showing the new hires. However, the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). Given that the employment contracts for a sales associate and a "distribution/office manager" show that both employees were hired several months after the petition was filed, these contracts do not establish that at the time of filing the Petitioner had sufficient staffing to support the Beneficiary in a managerial position. The Petitioner has not explained how it planned to relieve the Beneficiary from having to primarily perform its operational and administrative tasks at the time of filing when the Beneficiary was its only employee.

On appeal, the Petitioner asserts that the Director placed undue emphasis on its staffing levels and claims that it is "illogical" to conclude that the Beneficiary is not managing or directing the management of the organization. However, the Petitioner does not explain how the Beneficiary would *primarily* perform duties that are consistent with managing an essential function or overseeing a supervisory, professional, or managerial staff within an organization where the Beneficiary was the only employee available to carry out the duties that may otherwise be assigned to a subordinate staff, if such a staff had been present at the time of filing.

Further, the Petitioner's contention that Congress contemplated unforeseen circumstances, such as the earthquake that the Petitioner mentions in its brief, is unfounded. The Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a

[4] The Petitioner provided a quarterly tax return that is consistent with its claim that it had one employee at the time of filing.

company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in a managerial or executive capacity. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company or a company that does not conduct business in a regular and continuous manner. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, the Director did consider these relevant factors and properly questioned how the Petitioner would support the Beneficiary in a managerial or executive capacity when it had no subordinate personnel for the Beneficiary to manage or perform the underlying operational tasks of the organization. The Petitioner's reasonable needs do not excuse it from having to meet the fundamental statutory criteria, which in this instance calls for a beneficiary who can allocate his time to primarily managerial or executive job duties.

As previously noted, only an employee who "primarily" carries out tasks of a managerial nature can be deemed as someone who is primarily employed in a managerial capacity. *See, e.g.*, sections 101(a)(44)(A) of the Act. Here, the Petitioner has not established that it is adequately staffed and could relieve the Beneficiary from having to primarily devote his time to the organization's operational and administrative functions at the time of filing.

B. Executive Capacity

On appeal, the Petitioner reiterates the claim that the Beneficiary has made executive decisions. Aside from providing a job description that referred to the Beneficiary's policy-making role and discretionary authority, the Petitioner does not offer evidence to demonstrate the executive nature of the proposed position.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and they must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

As we discuss in this decision, the Petitioner did not adequately describe the Beneficiary's proposed daily job duties or demonstrate that at the time of filing it had the organizational complexity that would elevate the Beneficiary to the level of an executive. Therefore, we find that the Petitioner has

not provided sufficient evidence to show that the Beneficiary would be employed in an executive capacity under an extended petition.

IV. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial or executive capacity under an extended petition. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.

Cite as *Matter of H-D-T-, Inc.*, ID# 1008726 (AAO Mar. 26, 2018)