U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-S-I- INC.

DATE: MAR. 28, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a "trade, farming, and fertilizer production" business seeks to continue the Beneficiary's temporary employment 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 denied the petition, concluding that the Petitioner did not establish, as required, that it would employ the Beneficiary in a managerial or executive capacity under an extended petition.

On appeal, the Petitioner asserts that the Director's decision was contrary to the evidence submitted. The Petitioner maintains that the Director failed to consider the nature of the business and its successful operation, and erroneously determined that the Beneficiary does not oversee managerial, supervisory, or professional employees. We issued a request for additional evidence (RFE) after our initial review of the record and have received a timely response from the Petitioner.

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

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.

The term "executive capacity" is defined as 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.

Based on the 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 at 1533.

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

The sole issue to be addressed is whether the Petitioner established that it would employ the Beneficiary in a managerial or executive capacity under an extended petition.

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 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, 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

The Petitioner submitted the following description of the Beneficiary's duties at the time of filing and re-submitted the same list of 12 duties in response to the Director's subsequent RFE:

- Provide leadership and direction for the entire company, review the general operations of [the Petitioner] with management staff of each [department] . . .; establish each department's monthly, quarterly and annual plans; . . . review major contracts and direct contract negotiations. (10%)
- Explore new business opportunities in the U.S. and international market, network at major conferences, and conduct meetings with other company executives. (4%)
- Review marketing strategy and goals and supervise their implementation both domestically and internationally, including direct marketing and wholesale, establishing storage and distribution channels for online marketing, purchasing, importing and exporting between the U.S. and foreign countries. Review market studies and identify new business opportunities and make proposals to the Board of Directors. (12%)
- Design company's development strategy . . . Review and revise each department's budget proposals, expenses and finance reports and submit reports . . . to Board of Directors. (13%)
- Direct and coordinate activities of businesses and departments concerned with the products, pricing, and service by managing department managers. Review and approve business development proposals by managerial staff. (7%)
- Create company's cultural environment . . . . Meet regularly with all employees. . . . (5%)
- Review financial statements, operation reports and imports and activity reports to measure productivity and goal achievement. In coordination with outside CPA firm, direct and coordinate organization's financial and budget activities to fund operations . . . (10%)
- Prepare work schedules and assign specific duties to department managers. (4%)
- Establish and implement department policies, objectives and procedures . . . . (10%)
- Determine staffing requirement, review, and approve each department's hiring, firing and other personnel requests. (4%)
- Attend important business and foreign affairs. Meet with executives of key customers and key government officials in charge of foreign and domestic trade to resolve issues reported by managers. (6%)

This description is overly broad as it does not list the specific tasks the Beneficiary would perform on a day-to-day basis within the context of the Petitioner's business. Although the Petitioner assigned percentages to general areas of responsibilities, the Petitioner grouped general, dissimilar activities together and as a result, the information provided does not provide insight into the nature of the Beneficiary's duties. In fact, some of the duties (accounting for more than 30% of the Beneficiary's time) were copied almost exactly from the Department of Labor's O*Net Online resource[1] and therefore are not probative descriptions of the Beneficiary's actual duties within the context of the Petitioner's business.

Further, the description as a whole is repetitive, which further diminishes the probative value of the assigned percentages. For example, the Petitioner indicates that the Beneficiary spends 10% of his

[1] *See* Summary Report for 11-1021.00 – General and Operations Managers, https://www.onetonline.org/link/summary/11-1021.00 (last visited on Mar. 27, 2019).

time reviewing the general operations of each department and establishing departmental plans; 15% of his time reviewing "weekly, monthly, quarterly and annual business reports" from each department; 13% of his time reviewing and revising each department's budget proposals, expenses and finance reports; 7% of his time directing and coordinating the departments' activities and reviewing department-level business development proposals; 10% of his time reviewing department policies, objectives and procedures; and 4% of his time reviewing and approving departmental personnel actions. While the Beneficiary may have the authority to monitor departmental activities, the Petitioner's claim that such activities would require him to spend almost 60% of his time reviewing various reports, budgets, proposals, and plans submitted by department managers on a day-to-day basis is not adequately supported by the record.

Other duties, such as "provide leadership and direction for the entire company," "explore new business opportunities," "identify new business opportunities," "design company's development strategy," "create company's cultural environment," "review the general operations," and "attend important business and foreign affairs," are too vague to meet the Petitioner's burden to provide a detailed description of the duties to be performed. The Petitioner did not provide examples of the Beneficiary's actual duties, evidence of his work product, or other supporting documentation that would assist in establishing the nature of the specific tasks he performs for the company. Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *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); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Here, the Petitioner has not provided the necessary detail or an adequate explanation of the Beneficiary's proposed activities in the course of his daily routine.

As noted, we issued an RFE after an initial review of the record. We advised the Petitioner of the job description's deficiencies and requested a more detailed description of the Beneficiary's specific day-to-day duties within the context of its business. We also requested documentary evidence, such as examples of the Beneficiary's work product and evidence of reports, proposals, or other documentation prepared by subordinates for his review.

In response, the Petitioner has provided a list of 11 duties and assigned percentages adding up to 100% of the Beneficiary's time, with each duty requiring between 1% and 20% of his time. Some of the duties, such as meeting with an outside CPA firm to coordinate financial activities, consulting with attorneys, meeting with key and potential customers and suppliers, and approving major expenditure requests in the agricultural sector, were not mentioned in the previous description. Other duties remain intact, in whole or in part, and have simply been moved to different bullet points, while some duties are unchanged, but the Petitioner has assigned a different percentage of time to the duty. Finally, we note that the Petitioner added a few specific references to its business activities, products, and the names of specific trade shows where the Beneficiary would be representing the company. Overall, however, the job description does not add the requested level of detail, is not entirely consistently with the description provided previously, and is not supported by the requested evidence of the Beneficiary's work product or evidence that his subordinates prepare reports and proposals for his review.

The fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, a broad position description alone is insufficient to establish that his actual duties would be primarily managerial or executive in nature.

B. Business Activities, Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual will be acting in a managerial or executive 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.

The Petitioner states that it operates a "trade, farming, and fertilizer production" business. In its supporting letter, it explained that has been engaged in the "import, manufacturing and sales of seaweed fertilizers." In addition, the Petitioner noted that the Beneficiary decided to expand into other business sectors and purchased 132 acres of agricultural land as well as various farm equipment to be used for seaweed fertilizer product development and manufacturing, crop farming, livestock farming, fish farming, and a recreational vehicle (RV) camping park.

The Petitioner submitted property search results indicating that it owns real property at [redacted] in [redacted] Texas, as well as a satellite image of the land which indicates that it is or would be divided into separate plots or areas for cattle farming, fish farming, duck and goose farming, an office, a plant, a warehouse, and an RV park. The Petitioner indicated this location as its primary address and as the Beneficiary's worksite. Photographs of the location showed some tractors, a pickup truck, a large shed with a long table and chairs, but no office, livestock, manufacturing plant, or apparent crops. The Petitioner's tax returns reflect that it purchased the land in 2017.

The Petitioner's 2017 corporate federal tax return indicates that it had $6.57 million in gross receipts. The Petitioner's supporting business documents show that the company invoices Chinese companies for large quantities of fertilizer produced by [redacted] in Peru, with most individual transactions exceeding $100,000. It appears that the Petitioner sources the fertilizer and arranges for the shipment from Peru to China. The record did not contain supporting evidence of the Petitioner's claimed crop, livestock, fish farming, importing, fertilizer production, or other activities, so, in our RFE, we requested that the Petitioner further explain and document the nature of its business so that we could better understand its staffing needs and the duties of the Beneficiary's subordinate staff.

The evidence submitted in response to our RFE indicates that the Petitioner was likely not yet engaged in revenue-producing farming activities at the time of filing the instant petition in April 2018. The evidence reflects that the Petitioner purchased cattle, chickens, geese, ducks, and other livestock later in 2018. It also provided evidence of equipment, supplies, and services purchased in order to prepare for these farming activities. It remains unclear whether the Petitioner was producing or manufacturing any fertilizer on its property or importing and storing fertilizer or other goods there.

The Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it had eight employees when it filed the petition. Its organizational chart showed that the Beneficiary directly supervised a sales and marketing manager, a farm operation and product development manager, an import and export manager, and a finance department staffed by a contracted accountant. The chart also depicts a sales associate who reported to the sales and marketing manager, two farm/product development staff who reported to the farm operation and product development manager, and a logistic specialist who reported to the import and export manager. Finally, the chart showed vacancies for a marketing associate and for a third farm/product development employee. The Petitioner re-submitted the same organizational chart in response to the Director's RFE at the end of May 2018.

In an attached employee list, the Petitioner indicated that all employees, except for the logistics specialist, work full-time, and that every employee, except for the Beneficiary and the import and export manager, had been hired between November 2017 and April 2018. The Petitioner explained that it was challenging to find qualified employees due to its rural location and noted that it has a high level of turnover among its employees.

In our RFE, we requested additional evidence of payments made to employees in 2018 and an updated organizational chart. The Petitioner submitted the requested information, along with a master employee list showing the dates of employment for all staff hired since 2016. This list shows that the sales and marketing manager left the Petitioner in April 2018 and was likely not employed when the Petitioner filed the petition on April 27, 2018, although the Petitioner continued to list him on the organizational chart when it replied to the Director's RFE and on appeal. The only other employee in the sales and marketing department (a sales associate) left the company in July 2018, and the department remained unstaffed until the Petitioner hired a new sales and marketing manager in January 2019. Therefore, at the time of filing, it appears that the Petitioner employed the Beneficiary, the managers of the farm operations and import and export departments, and four lower-level staff.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act. The Petitioner does not claim that the Beneficiary manages an essential function of the company, but does claim that the Beneficiary supervises subordinate managers and professionals. 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."[2] *Id.* 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*).

[2] To determine 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."

The Petitioner stated that the sales and marketing department manager plans and implements sales and marketing programs for seaweed, organic fertilizers, crops, livestock, and fish. The Petitioner noted that the specific duties of the position include developing and managing the departmental budget, overseeing and evaluating research on U.S. and Chinese markets, monitoring competitor products, guiding preparation of marketing activity reports, directing sales forecasting activities, managing and evaluating the sales associate, coordinating liaison with other departments, and analyzing and controlling department expenditures. The Petitioner stated that the subordinate sales associate conducts market research on domestic and international markets; "receives inquiries, makes offers, negotiates contract terms, and places orders"; reports market conditions to manager; and works with other departments to place orders and produce/develop products."

As noted, the supporting evidence indicates that the Petitioner primarily sources seaweed fertilizer products from one company in Peru and sells these products to several Chinese companies. The descriptions provided for the sales and marketing department manager and sales associate reflect a broader range of sales and marketing activities that is not consistent with the documented scope of the Petitioner's operations. Therefore, it is unclear whether the descriptions provided for the subordinates reflect represented their actual duties.

The Petitioner has not submitted evidence that it was selling crops, livestock or fish products or any other goods in the U.S. market, engaged in marketing activities, or that it had a need for its sales staff to assist with producing and developing products at the time of filing. Further, as noted, the record now reflects that the department manager left the company in April 2018 and was not replaced until January 2019; as of the date of filing, it does not appear there was a sales and marketing department manager on staff for the Beneficiary to oversee. Although the Petitioner provided evidence that the previous sales and marketing manager has a degree in electronics and information systems, it did not establish that a technical degree is required to perform the stated duties.

The Petitioner indicated that the farm and product development manager sets budgets and production targets for the department, coordinates "operational tasks, crop management, harvest and processing," supervises and trains farm/product development staff, maintains farm equipment and buildings and supervises all field work. The Petitioner further noted that he "supervises the research, production and development of seaweed fertilizers," directs the development of organic farming and manages the general care of fish and livestock. The Petitioner stated that the two lower level employees "assess fertilizer application optimization and performance testing," determine and order inputs for crops and livestock, inspect crops and livestock, monitor the work of seasonal helpers, cultivate, spray and harvest crops and manage the maintenance of machinery, farm buildings, and systems.

The Petitioner indicates that the farm and product development manager has a degree in animal husbandry. However, absent evidence that the Petitioner was actually operating a farm with the claimed livestock, crop, fish and fertilizer production output, the submitted descriptions for the farm operations staff are not adequately supported by the record. Based on the evidence provided in response to the RFE, the Petitioner had not commenced any farming operations as of April 2018, but was in the process of preparing and dividing its land, building the necessary accommodations for the various types of livestock (which it began purchasing later in 2018). Much of the evidence submitted to document the farming activities shows retail purchases (Home Depot, Lowes, Tractor Supply, etc.)

and the Petitioner did not indicate that any of its employees were engaged in these purchasing activities.

Therefore, the record does sufficiently support the job descriptions provided for the farm manager and other farm staff, which appear to be prospective in nature. Absent a description of the actual duties performed by the farm operation manager at the time of filing, we cannot determine that he was performing managerial or supervisory duties at the time of filing, nor can we find that he was performing duties of a professional nature.

Finally, the Petitioner stated that the import and export department manager was responsible for directing inbound and outbound logistics operations (including transportation and warehouse activities), safety performance and logistics quality management, planning and implementing improvements to internal and external logistics systems, managing carrier management processes and ensuring compliance with regulatory requirements, directing the logistics specialist to maintain metrics, reports, process documentation, implementing specific customer requirements, and reporting performance to the general manager. Finally, the Petitioner indicated that the part-time logistics specialist supported the preparation and recordkeeping of import and export documentation, performed all aspects of the order process including execution, invoicing, post-shipment tracking, and status reporting, reported to the manager, and recommended alternative shipping rates and services.

The record shows that this department has been consistently staffed and that most of the Petitioner's revenue is derived from sourcing fertilizer products from Peru and arranging for their shipment to customers in China. However, it is unclear based on the documentation submitted that the Petitioner has "internal logistics systems," or established "carrier management processes," that the Petitioner is directly importing or exporting goods, or that the department manager performs all of the stated duties, which the Petitioner claims are consistent with the Department of Labor's O*Net Online position description for a "logistics manager." The description would have more probative value if it described the import and export manager's duties within the context of the Petitioner's business. The Petitioner cannot meet its burden to describe its employees' duties by relying on generic position descriptions developed by other sources.

In sum, while the Petitioner claims that the Beneficiary supervises three subordinate department managers who are all professionals, the record reflects that the sales and marketing department manager left the company around the time of filing. Most of the duties for the farm and production manager were prospective and therefore not descriptive of his actual duties at the time of filing, while the duty description for the logistics manager was vague and abstract, as it did not contain any references to the Petitioner's actual business activities. Further, even if the Petitioner submitted sufficient evidence to establish that at least one of his subordinates was working in a professional capacity, this is not sufficient to establish that the Beneficiary's actual duties as a whole are primarily managerial. The Petitioner has not established that the Beneficiary qualifies as a personnel manager.

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 beneficiary 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. Although the Petitioner has at times described the Beneficiary's duties as "executive or managerial," the submitted job descriptions are too vague to establish that he would be primarily focused on the company's broad policies and goals, and the evidence as a whole does not adequately establish how the staff would relieve him from significant involvement in the day-to-day operations of the company.

The Petitioner argues on appeal that the Director did not consider the Petitioner's organization, the nature of its business and its successful operation and growth over two years preceding the filing of the petition. Specifically, the Petitioner highlights the Petitioner's growth in revenues from $2.3 million in 2016 to $6.5 million in 2017, and its substantial investment in the land purchase and other costs related to its farm and future RV park. The Petitioner asserts that it submitted "extensive evidence demonstrating that the beneficiary had been directing the import and export business operations, fertilizer product R&D manufacturing, crop farming, livestock farming, fish farming and RV camping park development, clearly demonstrating that that the beneficiary spends essentially all of his time on managerial duties."

However, as discussed above, the Petitioner was not yet engaged in most of these activities at the time of filing. The Petitioner's sales and marketing department was unstaffed by the time the Petitioner filed the appeal and the Petitioner did not explain who would be performing the duties previously performed by the department manager and staff member. Further, the farm operations staff were not yet performing the duties attributed to them at the time of filing and it remains unclear what their actual duties were during the period of time when the Petitioner was engaged in preparations for crop and livestock farming. The Petitioner's import and export department appeared to be the only fully operational component of the company, but the duty descriptions provided for the department's staff made it difficult to determine what specific tasks they were performing or to what extent the Beneficiary was relieved from involvement in that department's operations. The Petitioner's organizational chart indicates that the Beneficiary supervises a "finance department" staffed by a contracted accountant. However, the Petitioner paid only $2,695 in accounting expenses in 2017 and the record does not establish that the accountant relieved the Beneficiary from having to engage in the day-to-day routine financial and bookkeeping matters of the company.

Finally, we acknowledge that USCIS has approved a previous petition requesting extension of the Beneficiary's L-1A status. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *3 (E.D. La. 2000), *aff'd*, 248 F.3d 1139 (5th Cir. 2001).

Based on the evidence as a whole, the Petitioner has not shown that that the subordinate staff in place at the time of filing were sufficient to support the Beneficiary in a position in which he was required to perform primarily managerial or executive duties.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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 A-S-I- Inc.*, ID# 1925356 (AAO Mar. 28, 2019)