U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-Y-I-T-, LLC

DATE: MAY 8, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an "import and retail" business, seeks to temporarily employ the Beneficiary as its "U.S./China Business Development Manager" under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the California Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary has been employed abroad, or would be employed in the United States, in a managerial or executive capacity.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred by overlooking relevant evidence regarding the foreign employer's personnel, and by failing to consider the Petitioner's claim that the Beneficiary will manage an essential function in the United States.[1]

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.*

"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;

[1] The Petitioner consistently claims that the Beneficiary has been employed abroad, and will be employed in the United States, in a managerial capacity and did not claim that the Beneficiary has been or would be employed in an executive capacity. Therefore, our analysis will address only the Petitioner's claim that the Beneficiary's current and proposed positions are in a managerial capacity.

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.

II. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

The first issue we will address is whether the Petitioner established that the Beneficiary has been employed abroad in a managerial capacity.

When examining the managerial capacity of a given beneficiary, we will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (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. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the foreign entity'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 has 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 has been *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 at 1533.

The Petitioner stated that the Beneficiary has served as a vice manager for its Chinese parent company since 2014, with responsibility for overseeing the operations of a Chinese subsidiary known as The Petitioner provided a letter from the foreign entity which listed the Beneficiary's "primary job duties" as follows:

[2] The Petitioner indicated that the Beneficiary concurrently co-managed the parent company's international trade department and a second Chinese subsidiary between January 2014 and June 2016. It did not describe the duties he performed in this dual role or provide information regarding the number or types of subordinates he supervised within either the international trade department or the other subsidiary. As such, our analysis of the Beneficiary's foreign employment will be limited to his role as vice manager responsible for overseeing which the Petitioner represents as his primary qualifying role for the foreign entity.

- Convene and preside with the General Manager the shareholders' meeting, organize to discuss and make decisions on [redacted] development strategies, R&D and ongoing investment projects (15%);
- Formulate [redacted] overall business plan and annual operation plan; implement and make adjustment timely according to the change of the market environment (30%);
- Monitor [redacted] financial reports and other operation reports, make the annual financial budget plan and final accounts plan of the company, and monitor and manage the assets of the company (20%);
- Take part in the projects negotiation with suppliers, signing the business contracts and dealing with the business on behalf of [redacted] (13%);
- Examine the work plans of Production/Development Manager and Office Manager and supervise and evaluate their performance (12%);
- Hire, promote and lay off Production/Development Manager and Office Manager and decide on their salaries, bonuses and dividends (10%).

Although the Director advised the Petitioner that the duties were too broad to establish what the Beneficiary does on a day-to-day basis, the Petitioner did not respond to the Director's request for additional information regarding the specific tasks the Beneficiary performs. We agree with the Director's determination that the listed responsibilities are too general to establish that the Beneficiary has primarily performed managerial duties in his role as vice manager.

The description conveys the Beneficiary's authority over the operations of [redacted] but does not clarify what he does as a part of his daily routine. For example, the foreign entity's letter indicates that the Beneficiary spends a total of 45 percent of his time on higher level operational planning and decision-making activities, but does not provide specific examples of plans, projects or strategies he has undertaken in support of its claim that business planning requires nearly half of his time. The Beneficiary's responsibility for overall financial management of the company is described in similarly vague terms, while his responsibility for negotiating with suppliers and "dealing with the business" for [redacted] without additional explanation, suggests that he is directly involved in non-managerial sales and purchasing activities. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The Petitioner has not provided any detail or explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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).

As discussed further below, the record does not contain consistent information regarding the nature of the work performed by the Beneficiary's subordinates and we cannot determine whether those employees assist him with operational activities such as sales, marketing, purchasing, and day-to-day administrative and financial duties. Without a clear picture of how work is allocated among the [redacted] employees, the Petitioner's claim that the Beneficiary spends his time primarily on personnel supervision and higher-level planning and strategy functions is not adequately supported in the record.

The fact that the Beneficiary manages a business or department of a business as its senior employee does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section 101(a)(44)(A) of the Act. Even though the Beneficiary may exercise discretion over [redacted] day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the broad overview of his responsibilities is insufficient to establish that his actual duties have been primarily managerial in nature.

B. Staffing and Organizational Structure

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.

In the denial decision, the Director acknowledged the Beneficiary's job description, but found that the Petitioner did not provide sufficient information regarding the subordinate employees who work under his supervision. On appeal, the Petitioner asserts that the Director overlooked evidence of [redacted] employees, which included payroll summaries, copies of their resumes, and their employment agreements, among other items. We agree with the Petitioner that it is unclear whether the Director reviewed all available evidence related to the foreign entity's employees. However, for the reasons discussed below, the evidence as a whole does not show that the foreign entity employs the Beneficiary in a managerial capacity.

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*).

The Petitioner has not claimed that the Beneficiary acts as a function manager abroad. It states that he spends only 22% of his time on personnel functions, while many of his other duties are described in ambiguous terms that may or may not involve personnel supervision. Accordingly, the record does not indicate that the Beneficiary is primarily supervising subordinate personnel. Nevertheless, we will address the Petitioner's claim that the Beneficiary supervises subordinate managers and professionals.

The Petitioner submitted the foreign company's organizational chart, which shows that the Beneficiary supervises nine employees of [redacted] It attached another chart identifying those staff as a production/development manager, an office manager, a sales/customer service employee, a bookkeeper, and five production workers. The attached chart also included brief job descriptions for the employees. According to these job descriptions, the production/development manager develops new products based on customer requirements, schedules production, and trains new employees, while the office manager "supervises and manages the company," is responsible for the company's organization and regulations, daily management, and personnel duties such as hiring, promoting and laying off employees, duties which appear to overlap with the responsibilities assigned to the Beneficiary.

However, in response to a request for evidence (RFE), the Petitioner submitted copies of employment agreements for the foreign staff. According to the employment agreements, [redacted] hired seven of the nine staff for "laboratory staff positions." The employment agreement for the office manager indicates that this individual was hired "for laboratory staff position[] and sales executive," and the employment agreement for the bookkeeper states that he/she was hired "for laboratory staff position[] and Sales Back office." The Petitioner must resolve this inconsistency 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 Petitioner did not explain why the job titles on the employment agreements do not match the job titles provided in the foreign entity's organizational chart. Without an explanation for these discrepancies, we cannot determine whether the original job titles and job duties provided are credible. Rather, it appears that all employees may work in a laboratory setting rather than providing support for other operational activities. For this reason, we cannot determine that the employees with managerial job titles are actually acting as supervisors or managers.

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."

The Petitioner provided copies of resumes for the foreign entity's employees. The employee resumes indicate that many of them have at least a bachelor's degree in chemistry or related field, but some attended only junior college. While some of the employees are likely professionals, the record does not contain a detailed and consistent account of the foreign entity's structure or the actual duties performed by the subordinate personnel. Finally, as noted, even assuming that some of the positions qualify as professional positions, the Petitioner allocated only 22% of the Beneficiary's

[3] The Petitioner has stated at times in the record that [redacted] "has more than 20 professionals holding doctoral and master's degrees working in its R&D team." This statement is not supported by the foreign entity's organizational chart or payroll records, and the Petitioner has also stated multiple times that the company has nine employees.

time to personnel-related duties and we cannot determine that he acts primarily as a personnel manager.

In determining whether the Beneficiary has been employed in a managerial capacity abroad, we must take into account the reasonable needs of the organization and will not rely on the company's size alone. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the company in conjunction with other relevant factors, such as the absence of employees who perform the non-managerial or non-executive operations of the company. *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). The size of a company may be especially relevant when USCIS notes discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

The record indicates that [redacted] manufacturers and distributed [redacted] compounds. Even though the Petitioner established that the foreign entity has nine employees, it provided vague descriptions of the Beneficiary's duties, and did not provide a clear or consistent description of the duties performed by his subordinate staff. The foreign entity reasonably requires research and production staff, as well as sales, marketing, purchasing, customer support, distribution and administrative staff. The record does not show that the Beneficiary, whose job duties appear to include some purchasing and sales activities, is relieved from the performance of non-managerial duties required for the company's day-to-day operations. In fact, as noted, the submitted employment agreements indicate that all of his subordinates are laboratory staff. The Petitioner has not established that the foreign entity has a reasonable need for the Beneficiary to allocate his time primarily to higher-level managerial duties associated with strategy and business planning as claimed, and does not otherwise support a claim that his duties are primarily managerial in nature.

For the reasons discussed, the Petitioner has not established that the Beneficiary has been employed abroad in a managerial capacity.

III. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The remaining issue is whether the Petitioner established that it would employ the Beneficiary in a managerial capacity in the United States. Specifically, the Petitioner claims that it will employ the Beneficiary as a function manager.

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 indicates that the Beneficiary will be employed in the newly created position of U.S./China business development manager. The Petitioner, which does business as [redacted] has been focused on the import and distribution of parts used in radio-controlled toys and vehicles. The Petitioner explained that its business has recently become less profitable, so it now seeks to transfer the Beneficiary to the United States to manage "the essential function of U.S. market development for [redacted]-based . . . products."

The Petitioner described the Beneficiary's proposed duties as:

1. Identify business objectives and financial targets for the U.S. company (20%);
2. Oversee the process of identifying new customers in the U.S. for [redacted]-based chemicals, [redacted] reagents, its chemical derivatives and products (15%);
3. Oversee the process of identifying the potential needs for U.S. products, such as high purity chemical reagents and mechanical and electrical products, to be exported to China (15%);
4. Monitor the research and production process in China for developing new technologies and customized products per the requirements of U.S. customers (8%);
5. Oversee the team of scientists, researchers and support staff in China to develop new technologies and customized products per the requirements of U.S. customers (12%);
6. Collaborate with the General Manager in the U.S. company and oversee the process of developing a sales team as well as expanding the company's current support team, including utilizing external professional consultants to help grow the U.S. business (20%);
7. Maintain regular communications with the parent company's International Trade Department to help manage sales, production planning, export and distribution activities in furtherance of the U.S. business (10%).

The Petitioner emphasized that the Beneficiary's primary focus will be on "opening the U.S. market for the [redacted] products" and that he will not have any immediate supervisory responsibilities, although the company intends to recruit one or two salespersons with a chemistry background to support [redacted] and to assist the Beneficiary with operational and administrative tasks. The Petitioner also stated that the Beneficiary will work primarily with the foreign entity's sales and customer service employee and rely on other China-based [redacted] staff to help carry out operational and administrative tasks.

The Petitioner's initial letter included a narrative three-year business plan describing the company's planned business activities and sales goals on a quarterly basis through 2020 for its [redacted] and RC-related products. This business plan indicated that the company would hire "one or two" sales staff shortly after the Beneficiary's arrival, but later, in response to the RFE, the Petitioner stated that it would not hire a sales person until "US business begins to pick up." At that time, the Petitioner also noted that it had not yet applied to the Chinese government authorities to export [redacted]

products to the United States, and indicated that it had just begun "researching the permitted chemicals per U.S. customs, the documents required and the processes involved."

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). Here, the Petitioner has not shown that it was prepared to sell the foreign entity's products in the United States or shown how a business still at the research phase would require the Beneficiary to perform primarily managerial duties upon his arrival. Many of the business development duties outlined in the business plan require direct interactions with potential customers to market and promote the products and determine customer requirements and the Petitioner has not shown how the foreign employees would assist the Beneficiary with these non-managerial duties.

We agree with the Petitioner that it is appropriate to consider staff employed within the broader international organization when analyzing whether a Beneficiary will be relieved from performing non-managerial duties. Here, although the Petitioner indicates that the Beneficiary will rely on the foreign entity's staff to relieve him from primarily performing the duties associated with the development of the U.S. market, we have already addressed the deficiencies in the record with respect to the foreign entity's staffing. As noted, the Petitioner has not provided a consistent description of the duties performed by the foreign staff, and it has not indicated the specific tasks individual employees would perform with respect to the development of the U.S. market. Simply stating that the foreign employees "would provide an important administrative function to the beneficiary in his proposed role" is not sufficient.

Although the Petitioner indicates that it is seeking to expand into a new market, it must still show that it can immediately employ the Beneficiary in a position in which he would primarily perform managerial duties. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a beneficiary as long as those tasks are not the majority of a beneficiary's duties, a petitioner still has the burden of establishing that a beneficiary will "primarily" perform managerial or executive duties. *See* section 101(a)(44) of the Act. Whether a beneficiary is a "function" manager turns in part on whether the petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See Matter of Z-A-*, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016).

The Beneficiary may possess the authority to set goals for this new division of the U.S. business, but the Petitioner has not shown that it has an immediate need for him to perform primarily managerial duties associated with the market development function, rather than non-managerial market research, promotional, and sales functions. The Beneficiary's proposed duties are described in broad terms and the Petitioner does not include a description of the actual tasks he will perform on a day-to-day basis upon his arrival to the United States.

Finally, in support of its claim that the development of the U.S. market for the foreign entity's products is an "essential function" within the international organization, the Petitioner submits several documents that discuss the market for products worldwide. This evidence does not support the Petitioner's business expansion plans or support its claim that there is an untapped

market for Chinese-manufactured [redacted] products in the United States. According to these documents, the United States is the world's largest producer of [redacted], most of the [redacted] products consumed in the United States are manufactured domestically, and half of the [redacted] produced in the United States is exported. The Petitioner highlights a passage in a U.S. Geological Survey report indicating that China is among the countries that have imported the largest quantities of refined [redacted] from the United States, with imports to China likely to rise because that country has "low-grade [redacted] reserves" and an increasing demand for [redacted]. The Petitioner's emphasis on the market for U.S.-produced [redacted] in China is unclear, because the Petitioner does not claim that it intends to export U.S.-made [redacted] products to China. Further, this information raises questions about the feasibility of the Petitioner's plan to import Chinese-produced [redacted] products to the United States, and its need for a function manager to develop the U.S. market for these products.

For the reasons discussed, the Petitioner has not established that it will employ the Beneficiary as a function manager in the United States.

IV. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of T-Y-I-T-, LLC*, ID# 1187424 (AAO May 8, 2018)