U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-I-I-&E- LLC

DATE: MAY 9, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an importer and distributor of stone cutting machines, quartz products and granite, seeks to continue the Beneficiary's temporary employment as its sales and marketing 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: (1) it would employ the Beneficiary in a managerial or executive capacity under an extended petition; and (2) the Beneficiary was employed abroad in a managerial or executive capacity.

On appeal, the Petitioner submits additional evidence and asserts that it demonstrated that all eligibility requirements have been met. The Petitioner emphasizes that the Beneficiary was previously granted L-1A status and "was recognized as an executive or manager."

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.*

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 primary 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 stated that the Beneficiary, as sales and marketing manager, has "primary executive responsibility for the promotion and sales" of the Petitioner's saw machines, manufactured quartz and natural stone products, and for establishing U.S.-based sales, with responsibility for supervising "sales executives throughout the United States" who "work on a commission only basis."

The Petitioner further described the Beneficiary's duties as follows in a supporting letter:

1. Establishing sales and marketing strategies for [the Petitioner's] machines, manufactured quartz, and natural stone. Approximately 25%
2. Develop branding and pricing according to current market trends and customer's need. Approximately 15-20%
3. Develops Sales/Marketing operating budgets. Approximately 10%
4. Analyze competitors' products, sales, and marketing activities. Approximately 10%
5. Set goals and objectives for Sales Executives. Approximately 10%
6. Prepare marketing presentation for trade shows and possible distributors. Approximately 10%
7. Directs sales forecasting activities and sets performance goals accordingly. Approximately 10%
8. Sales analysis. Up to 5%

In a request for evidence (RFE), the Director instructed the Petitioner to provide a letter explaining in more detail how the Beneficiary's position qualifies as either managerial or executive in nature, and asked that the Petitioner describe the Beneficiary's typical managerial or executive duties and the percentage of time spent on specific tasks.

In response, the Petitioner submitted a revised letter from its CEO, which included the same list of eight duties with the same percentages allocated to each area of responsibility. The Petitioner added that the Beneficiary' would be overseeing sales analysis and "the actual distribution or movement of product to the customer," traveling within the United States to "promote the brand and establish relationships with distributors," and formulating, directing, or coordinating marketing activities or policies to promote products. Finally, the CEO stated that the Beneficiary oversees "the Sales and Marketing Supervisor, who in turn, oversees four individuals, including one sales executive and three outside sales associates."

The description of the Beneficiary's duties is overly broad and does not provide sufficient information regarding the specific tasks she performs, such that they could be classified as primarily managerial or executive in nature. Many of the duties reflect the Beneficiary's authority over sales and marketing activities without providing any insight into what she primarily does as a part of her regular routine. Duties such as establishing strategies, developing branding, and setting goals and objectives are too ambiguous to establish the nature of the Beneficiary's typical duties and are insufficient to establish that she primarily performs higher-level tasks consistent with the statutory definition of either managerial or executive capacity. The Petitioner did not provide examples of the Beneficiary's actual duties or other supporting documentation that would assist in establishing the nature of the work she performs for the company, and the submitted list of duties did not meet the Petitioner's burden to submit a detailed description of the Beneficiary's position. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, some of the stated duties, including the Beneficiary's responsibility for "sales analysis," analyzing "competitors' products, sales and marketing activities," preparing marketing presentations, and traveling to "promote the brand and establish relationships with distributors," without further explanation, appear to be operational sales and marketing duties, rather than managerial or executive functions.

The fact that the Beneficiary will oversee a department of 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. While the Beneficiary may exercise discretion over the Petitioner's sales and marketing operations, the submitted position description alone is insufficient to establish that her actual duties would be primarily managerial or executive in nature. As discussed further below, the Petitioner has not provided a consistent or well-documented description of its staffing and structure, which makes it difficult to discern to what extent the Beneficiary is relieved from significant involvement in routine sales and marketing activities.

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 stated on the Form I-129, Petition for a Nonimmigrant Worker, that it had eight employees at the time of filing in September 2018. It submitted an organizational chart with 11 staff identified by name. The chart depicted the Beneficiary as sales and marketing manager, reporting to the CEO/President and directly supervising five staff: one marketing employee, two sales executives, and two outside sales employees. Although the Petitioner's CEO/President stated in his initial letter that the Beneficiary supervises commission-only sales executives throughout the United States, the chart indicates that four of the Beneficiary's subordinates are based in Florida and one is in China. The chart also shows that the U.S.-based subordinates are salaried employees, rather than commission-only staff.

The Petitioner submitted its state quarterly wage report for the second quarter of 2018, as well as a detailed payroll statement for the month of August 2018. These documents corroborated the Petitioner's claim that it has eight employees, but did not include all of the Beneficiary's claimed subordinates. Specifically, the payroll statement indicates that the Petitioner has a three-person sales department that includes the Beneficiary, the U.S.-based sales executive identified on the organizational chart [redacted], and an employee identified on the organizational chart as "machine assembled & installation [*sic*]" [redacted]. The Petitioner also paid wages to the individual identified on the chart as "marketing" [redacted] but the payroll record shows that she works in the "office" department with the CEO and not in the sales department.

In the RFE, the Director requested a more detailed organizational chart, summaries of job duties, the educational level for each of the Beneficiary's subordinates, and additional evidence of payments to employees and contractors working under her supervision. The Director also noted that, if the Beneficiary is a first-line supervisor, the Petitioner should provide evidence showing that her subordinates are professionals.

As noted, in response to the RFE, the Petitioner's CEO stated that the Beneficiary supervises a "Sales and Marketing Supervisor," who, in turn, supervises a sales executive and three outside sales associates. The Petitioner submitted a revised organizational chart depicting this structure. The chart identified [redacted] who was previously identified as "marketing" with no subordinates as the "sales and marketing supervisor" with four subordinate staff. The Petitioner did not explain the changes to its organizational hierarchy that occurred between the date of filing on September 14, 2018 and the date of the RFE response on October 3, 2018, nor did it explain its CEO's initial statement, made in a letter dated August 22, 2018, that the Beneficiary's subordinates are all sales executives who are paid strictly on commission.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). A petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Absent an explanation, the Petitioner has not established that [redacted] holds a supervisory position in the sales and marketing department, as indicated in the latter organizational chart. Further, the description submitted for her position does not include supervisory duties, and only states that she "helps sales executives to complete tasks successfully." The evidence must substantiate that the duties of a given beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; an organizational chart reflecting tiers of subordinate employees and employee job titles, without more, is not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position.

Further, the Petitioner's response to the RFE did not address the Director's request for additional evidence of wages paid to employees. The record does not contain evidence of wages or other payments made to three of the four sales staff included on the latter organizational chart. The Petitioner provided evidence of wages paid to [redacted] (who, as noted above, is not identified on the Petitioner's payroll as a member of the sales department), and to one outside sales executive [redacted] who is claimed to be a "commission-based only" employee).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) 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."[1] *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*).

The Petitioner has confirmed that the Beneficiary's subordinates do not possess, and are not required to possess baccalaureate degrees, and provides evidence on appeal in support of its assertion that a bachelor's degree requirement is not typical for sales employees in its industry. However, regardless of the industry norms, the Beneficiary cannot qualify as a personnel manager based on her supervisory duties if she does not supervise a staff of subordinate managers, supervisors, or professionals. The Petitioner concedes that the Beneficiary's subordinates are not professionals and, as discussed above, has not consistently claimed that the Beneficiary oversees a subordinate supervisor. Thus, the Petitioner has not shown that the Beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. Further, the Petitioner has not stated that the Beneficiary is responsible for hiring and firing employees or recommending these and other personnel actions. Accordingly, the Petitioner did not submit sufficient evidence to establish that the Beneficiary would be employed as a personnel manager.

The Petitioner has not articulated, in the alternative, how the Beneficiary qualifies 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).

Here, the Petitioner did not clearly describe the Beneficiary's actual duties, such that we can determine that they are primarily managerial in nature, nor did it establish how the Beneficiary would primarily manage, rather than perform, the company's sales and marketing functions. The Petitioner indicates that the Beneficiary has five subordinate staff to support her in the sales and marketing department, yet it has documented its employment of only two of these staff. The Petitioner has not explained this discrepancy between its claimed structure, and its documented staffing levels.

[1] 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."

For similar reasons, the Petitioner has not established that the Beneficiary would be employed in an executive capacity. 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. 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.*

Here, the Petitioner did not provide a sufficiently detailed description of the Beneficiary's actual job duties in support of a claim that her duties are primarily executive in nature. Further, although the Petitioner asserts that the Beneficiary establishes sales and marketing strategies, goals, and objectives, we cannot determine that these are her primary duties or that she would be relieved from significant involvement in the day-to-day, non-executive activities associated with the sales and marketing of the Petitioner's products. Again, the Petitioner claims that the Beneficiary has five subordinates, but documented its employment of only two of these individuals, one of whom earns a higher salary than the Beneficiary and, according to the Petitioner's payroll report, is not actually in the sales department.

Due to the evidentiary deficiencies addressed above, the Petitioner has not met its burden to establish that the Beneficiary would be employed in a managerial or executive capacity under an extended petition.

IV. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director also denied the petition based on a finding that the Petitioner did not establish that the Beneficiary was employed abroad in a managerial or executive capacity prior to her transfer to the United States. *See* 8 C.F.R. § 214.2(l)(3)(iv). On appeal, the Petitioner emphasizes that it provided all requested information regarding the Beneficiary's position abroad and the foreign entity's structure. It also states that "the foreign employment has not changed since the initial L1A was approv[ed]. It is puzzling that in spite of the facts, the renewal application was denied."

At the time of filing, the Petitioner submitted a letter from its Chinese parent company stating that the Beneficiary served in the position of sales and marketing manager abroad beginning in 2009. The foreign entity's vice president stated that the Beneficiary "managed the marketing and sales department and . . . import and export activities" and further described her duties as follows (bullets added):

- Promotion and sales of our . . . Bridge Saw machines, along with our manufactured quartz and natural stones from Italy to Brazil
- In charge of the marketing analysis of the U.S.

- Arranged and attended trade shows in the U.S.
- In charge of preparing our marketing materials including our company brochures for the machines and manufactured quartz.
- Prepared the script for the trade shows as well as the proposals to our distributors along with the sales contracts.

The Beneficiary's resume submitted at the time of filing indicates that she was responsible for sales and marketing management "in Brazil," and the Petitioner provided several letters from Brazilian buyers indicating that they dealt with the Beneficiary when purchasing quartz and marble products sold by the Chinese entity.

The job description and supporting evidence submitted at the time of filing indicated that the Beneficiary, despite her job title, was primarily responsible for performing the sales and marketing duties for the foreign entity in Brazil and the United States, rather than managing these activities. The position description did not mention any subordinate personnel and it is unclear whether the foreign entity had any other staff based in Brazil. In response to the RFE, the Petitioner provided a revised foreign job description for the Beneficiary which was nearly identical to her U.S. job description, but it bore little resemblance to the description provided in the vice president's letter at the time of filing and the Petitioner did not provide an explanation for the substantial revisions.

The Petitioner also made unexplained changes to the foreign entity's organizational chart. The chart submitted at the time of filing showed the Beneficiary supervising an export control employee and a sales & logistics employee, presumably based in China. Based on the job descriptions submitted for these employees, neither one performed sales or marketing duties. In response to the RFE, the Petitioner submitted a revised chart for the foreign entity which included a third subordinate identified as a sales executive. However, the Petitioner did not explain how the past structure of the foreign entity changed subsequent to the filing of this petition.

In sum, the evidence submitted at the time of filing indicating that the Beneficiary performed non-managerial sales and marketing activities for the foreign entity in the Brazilian and U.S. markets, and that she did not have any subordinate sales staff, in Brazil or elsewhere, to assist her with these duties. The Petitioner made changes to both the Beneficiary's foreign job duties and the foreign entity's organizational chart in response to the RFE; however, as noted, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Izzumi*, 22 I&N Dec. at 176.

The Petitioner does not address this ground for denial in any detail on appeal. Rather, it emphasizes that the Beneficiary was previously granted L-1A status and states that "it is puzzling that in spite of the facts, the renewal application was denied." 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). Further, a 2017 USCIS policy memorandum, which is binding on all USCIS components, including the AAO, states: "An

adjudicator's fact-finding authority . . . should not be constrained by any prior petition approval, but instead, should be based on the merits of each case."[2]

Here, the evidence submitted with this extension petition contains deficiencies and unresolved inconsistencies regarding the Beneficiary's foreign duties and the foreign entity's structure during the period of her employment abroad. The Petitioner has not adequately addressed this issue on appeal. Accordingly, we agree with the Director's determination that the Petitioner did not establish the Beneficiary's employment abroad in a managerial or executive capacity.

V. 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 W-I-I-&E- LLC*, ID# 3475597 (AAO May 9, 2019)

[2] USCIS Policy Memorandum PM-602-0151, *Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status* (Oct. 23, 2017), https://www.uscis.gov/laws/policy-memoranda.