U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T- INC.

DATE: MAY 14, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a retailer and wholesaler of plumbing and drainage system products, seeks to continue the Beneficiary's temporary employment as its president under the L-1A nonimmigrant classification for intracompany transferees.[1] *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 revoked the approval of the petition, concluding that the Petitioner did not establish, as required, that: (1) the Beneficiary would be employed in a managerial or executive capacity under the extended petition; and (2) the Beneficiary was employed by a qualifying entity abroad for at least one year in the three years preceding the filing of his initial L-1A petition.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary met the one year of employment abroad requirement prior to entering the United States as a nonimmigrant in 2012. The Petitioner further claims that the evidence establishes that the Beneficiary will manage an essential function for its international organization by developing the U.S. market.

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

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period October 21, 2014, until October 20, 2015. 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). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation one year within the date of approval of the petition to support an executive or managerial position.

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). This evidence must demonstrate that the beneficiary will be employed in a managerial or executive capacity, as defined at sections 101(a)(44)(A) and (B) of the Act, under the extended petition.

Under U.S. Citizenship and Immigration Services (USCIS) regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, a director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The first issue to be addressed is whether the Petitioner established that the Beneficiary will be employed in a managerial capacity in the United States. The Petitioner does not claim that the Beneficiary will be employed in an executive capacity.

The Director revoked the approval of the petition on notice following an administrative site visit conducted by a USCIS officer in April 2016, approximately six months after the filing and approval of the petition. The Director determined that, while the business was operating, the Petitioner had not established that the Beneficiary primarily supervises the work of subordinate managers, supervisors or professionals, or that he acts as a function manager. On appeal, the Petitioner submits additional evidence in support of its claim that the Beneficiary primarily manages an essential function.

"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.

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 Petitioner's business, its staffing levels, and its organizational structure.

A. Duties

The Petitioner provided a statement of the Beneficiary's duties at the time of filing:

- Establish business policies, goals and plans according to the resolutions adopted by the board of directors of the parent company (15%);
- Fully manage the company, implementing all regulations and systems, reform solutions and measures of the US subsidiary (15%);
- Propose the organizational levels of the US subsidiary, appointing and dismissing company employees; establish a healthy and unified working team (10%);
- Put forward the business concept of the US Subsidiary, build the corporate culture, create an excellent working environment, cultivate a sense of belongings [*sic*] for employees (20%);
- Responsible for coordinating works of each department (10%);
- Responsible for selecting and identifying the company's investment projects, review the subsidiary's operating expenses (10%);
- Responsible for properly allocating the company's resources (15%); and
- Overall management of the subsidiary's other affairs (5%).

This broad description of the Beneficiary's duties did not convey what he would be doing on a day-to-day basis as the Petitioner's president. The Petitioner did not provide any concrete examples of policies, strategies, or goals the Beneficiary would develop and implement in support of its claim that he would spend his time primarily focused on higher-level planning and decision-making responsibilities. In fact, many of the duties simply paraphrase the statutory definition of executive capacity. 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).

Nevertheless, the Director initially approved the petition based on this broad description of the Beneficiary's duties and an organizational chart depicting four employees subordinate to the Beneficiary. The Petitioner has not submitted a more detailed breakdown of the Beneficiary's duties, either in response to the Director's notice of intent to revoke (NOIR), or on appeal. Instead, as discussed further below, the Petitioner now states that the Beneficiary has been primarily managing an essential function by overseeing the company's [redacted] brand wholesale program," a responsibility that is not clearly reflected in the initial description stated above.

The fact that the Beneficiary will manage 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 the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, a broad overview of his responsibilities is insufficient to establish that his actual duties would be primarily managerial in nature as of the date of filing.

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.

The Petitioner operates a retail store known as [redacted] According to a business plan dated [redacted] 2015, the Petitioner was also pursuing the creation of its own [redacted] brand of plumbing fittings. The Petitioner submitted evidence that it had a pending trademark application for this brand name at that time. The Petitioner stated that it had five employees in [redacted] 2015 and provided its organizational chart, which depicts the Beneficiary, a sales manager, a purchase department manager, a sales person, and a warehouse keeper, as well as an outsourced CPA firm.

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."[2] 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 provided position descriptions for the Beneficiary's subordinates, but those descriptions did not indicate that the two employees with managerial job titles actually perform supervisory duties. In fact, the descriptions for the salesperson and warehouse worker indicated that both employees would take assignments from the president. In addition, the Petitioner did not state that any of the subordinate positions require a bachelor's degree, such that the subordinates could be

[2] 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."

deemed professionals. The evidence submitted at the time of filing did not establish that the Beneficiary would be primarily supervising subordinate managers, supervisors, or professionals as a personnel manager.

Further, at the time of the USCIS site visit in April 2016, the Petitioner employed only two subordinate workers – the individuals identified as the warehouse keeper and the salesperson. As noted by the Director, the Beneficiary stated during that site visit that "his supervisory role is directly overseeing the work of his two employees." Further, as noted by the Director in the NOIR, the salesperson stated that the Beneficiary's role involves "working in the front of the store . . . talking with customers, maintaining relationships of the company, planning improvements, and overseeing the operation of the plumbing supply business." Based on this information it appears that, while the Beneficiary was overseeing the business as a whole, he was also significantly involved in non-managerial duties associated with its day-to-day operations.

In its response to the NOIR, the Petitioner emphasized that it had experienced only a temporary reduction in staffing and submitted an updated organizational chart showing a sales department manager, logistics and purchase department manager, secretary, two salespeople, a driver, and outsourced service providers working for the company as of September 2017. However, the payroll evidence in the record shows that the company employed only three workers (including the Beneficiary) for a considerable period of time. The Petitioner was without a sales manager between November 2015 and August 2016, and without a logistics and purchasing department manager from October 2015 until May 2016. A 50 percent reduction in staff is significant in a company with only four subordinates and the Petitioner did not explain how two lower-level staff were able to remove the Beneficiary from significant involvement in the day-to-day operations of the Petitioner's business at the time of the site visit.

On appeal, the Petitioner shifts its claim away from a focus on the Beneficiary's supervision of personnel and claims that the Beneficiary has been primarily managing an essential function for the U.S. subsidiary. 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).

Specifically, the Petitioner claims that the Beneficiary acted as a function manager by managing the U.S. subsidiary, which is an essential function of the wider qualifying international organization. The Petitioner states that this role "primarily consists of managerial duties associated with development of the United States market" for the organization as a whole. More specifically, the Petitioner notes that the Beneficiary "managed the research and product development of its

products, , implemented of all policies and strategies and established goals pertaining to the import, sales and marketing of the parent company's plumbing products."

In support of this claim, the Petitioner provides new organizational charts and states that 11 of the parent company's employees have been supporting the Petitioner's "day-to-day operational needs . . . with marketing and product research and development" as well as providing financial, and administrative support for duties related to production planning, technical support, sales, logistics and distribution for the U.S. market." The Petitioner maintains that the Beneficiary did not mention his supervision of the Chinese staff at the time of the site visit because he was not aware of their relevance and the USCIS officer did not ask about overseas staff. In addition, the Petitioner emphasizes that the "counter salesperson" interviewed during the site visit did not have full knowledge of the Beneficiary's responsibilities, his supervision of the Chinese employees, the wholesale program, or the Chinese departments that support that program's efforts. The Petitioner maintains that the Beneficiary's responsibility for supervising staff in the Petitioner's store at the time of the site visit was merely incidental to his primarily responsibility for managing the wholesale program.

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). The Petitioner has provided a general timeline of the evolution of its product program, but has not shown how the Beneficiary primarily managed this program at the time this petition was filed in October 2015. First, the position description and organizational charts submitted at the time of filing did not support a determination that the Beneficiary would be primarily managing an essential function and supervising a staff of employees based in China under the extended petition. The Petitioner explained why the Beneficiary did not mention the foreign employees at the time of the site visit, but it has not explained why it did not mention the essential function or the foreign employees in the statements it made to USCIS in October 2015.

At that time, the Petitioner briefly mentioned the products and provided evidence that it had applied for a trademark, but that was the extent of its claims regarding the program. The Petitioner indicates that it imported its first products in May 2016. On appeal, the Petitioner provides a summary of the duties the Beneficiary performed in relation to managing the program in 2016, but does not further elaborate upon his duties at the time of filing to support a claim that he primarily acted as a function manager at that time. Therefore, although a company-wide organizational chart submitted on appeal shows that the Beneficiary supervised a financial manager, a sales manager, a production control manager, and various other staff based in China in 2015, there is insufficient evidence to corroborate that this structure was in place when this petition was filed.

Further, even if the Beneficiary was performing duties related to the management and coordination of the products, the records still lacks a detailed description of the Beneficiary's duties at the time of filing and the amount of time he allocated to specific tasks. The Petitioner states that the salesperson interviewed at the time of the site visit was unaware of the full range of the Beneficiary's duties, but the fact remains that the Beneficiary was spending some portion of his time

"working in the front of the store," "talking with customers," supervising non-professional employees, and likely performing other administrative and operational duties in the absence of a sales manager, a purchase manager, and administrative staff.

While performing non-qualifying tasks 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 "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). Here, the Petitioner did not adequately document what proportion of the Beneficiary's duties would be managerial functions and what proportion would be non-managerial. Absent a clear and credible breakdown of the time spent by the Beneficiary performing specific tasks, we cannot determine what proportion of the duties would be managerial, nor whether the Beneficiary, as of the date of filing, would be primarily performing the duties of a function manager. *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

For the reasons discussed, the Petitioner has not established that it would employ the Beneficiary in a managerial capacity under the extended petition.

III. ONE YEAR FOREIGN EMPLOYMENT REQUIREMENT

The Director revoked the approval of the petition, in part, based on a finding that the Petitioner did not establish that the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the initial new office petition in October 2014.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) defines "intracompany transferee" as:

> An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary . . . . Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

Further, the regulation at 8 C.F.R. § 214.2(l)(3) requires a petitioner to provide "[e]vidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years *preceding the filing of the petition.*"

The Petitioner states that the Beneficiary was employed by its Chinese parent company from 2008 until June 2012. The Beneficiary entered the United States as an F-1 nonimmigrant student in July 2012 and the Petitioner later filed the initial L-1A petition on his behalf in October 2014.

In the revocation decision, the Director emphasized that the Beneficiary was not employed abroad for a full year in the three years preceding the filing of the initial petition (between October 2011 to October 2014), and therefore does not meet this eligibility requirement.

The Petitioner maintains that the Beneficiary's two years and three months in F-1 status, which immediately preceded the filing of the initial L-1A petition, was non-interruptive because he was "studying U.S. English to gain English proficiency for the parent company's expansion into the U.S. market." The Petitioner further contends that "it was the intent of Congress to require that the Beneficiary's [qualifying foreign employment] occurred within the three year period immediately preceding his application for admission to the U.S. and not . . . preceding the filing of the petition."

We do not agree with the Petitioner's assertion that USCIS should reach over the Beneficiary's July 2012 admission in F-1 status and subsequent stay of more than two years to determine whether he meets the one year of foreign employment requirement.

As noted, the language of the statute indicates that the relevant three-year period to be used as a reference point in determining whether the beneficiary had one year of continuous full-time employment with a qualifying entity abroad is the three years "preceding the time of his application for admission into the United States." Section 101(a)(15)(L) of the Act. The statute, however, is silent with regard to those beneficiaries who have already been admitted to the United States in a different nonimmigrant classification.

The regulation at 8 C.F.R. § 214.2(l)(3)(iii) clearly requires that an individual petition filed on Form I-129 be accompanied by evidence that the beneficiary "has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition." The definition of "intracompany transferee" also indicates that, if the beneficiary has been employed abroad continuously for one year by a qualifying organization within three years preceding the time of the beneficiary's "application for admission into the United States," the beneficiary may be eligible for L-1 classification. 8 C.F.R. § 214.2(l)(1)(ii)(A).

When the definition of "intracompany transferee" is construed together with the regulation at 8 C.F.R. § 214.2(1)(3) and section 101(a)(15)(L) of the Act, the phrase "preceding the time of his or her application for admission into the United States" refers to a beneficiary whose admission or admissions were "for a branch of the same employer or a parent, affiliate, or subsidiary thereof" or for "brief trips to the United States for business or pleasure."

Therefore, according to the plain purpose of the Act and regulations, USCIS will not reach back to the three-year period preceding the Beneficiary's admission as a nonimmigrant in all circumstances. Unless the authorized period of stay in the United States is either brief or "for" a qualifying employer, the period of stay will be interruptive. It logically follows that any non-

qualifying period of stay in the United States that is longer than two years would prevent a Beneficiary from meeting the "one-in-three" requirement at 8 C.F.R. § 214.2(l)(3)(iii).

The principal focus of section 101(a)(15)(L) of the Act and 8 C.F.R. § 214.2(l) is on the continuity of the beneficiary's employment with the same international qualifying organization in the United States. The three-year window established by the statute ensures that there will be no significant interruptions in employment within the same organization and is consistent with the purpose of this nonimmigrant classification. Allowing the "transfer" of employees who had not worked for the organization for over two years would be contrary to Congress' intent that international businesses will use this nonimmigrant classification solely to temporarily transfer their foreign executive, managerial, and specialized knowledge employees to their United States operations.

The Beneficiary in this case had been in the United States for the purpose of attending college for over two years at the time of the Petitioner filed the initial L-1A petition. For the reasons discussed above, we find that the statute and regulations support a finding that only time spent in the United States *working* for a branch, subsidiary, affiliate, or parent of the foreign employer will be deemed non-interruptive. Here, at the time the Petitioner filed the petition, more than two years had passed since the Beneficiary terminated his employment with the foreign entity.

Therefore, we consider the Beneficiary's period of stay as an F-1 nonimmigrant student to be interruptive. The Petitioner did not establish that the Beneficiary had at least one year of full-time continuous employment with a qualifying foreign entity in the three years preceding the filing of the initial L-1A petition. *See* 8 C.F.R. § 214.2(l)(3)(iii).

IV. CONCLUSION

The appeal will be dismissed because the Petitioner did not establish that it will employ the Beneficiary in a managerial capacity under the extended petition or establish that the Beneficiary had one year of employment abroad with a qualifying entity in the three years preceding the filing of his initial L-1A petition.

ORDER: The appeal is dismissed.

Cite as *Matter of T- Inc.*, ID# 1242552 (AAO May 14, 2018)