U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-C- CORP.

DATE: MAY 15, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a consulting company, seeks to continue the Beneficiary's employment as its "President/CEO" 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 denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner contends that the Beneficiary will devote "a majority of his time and efforts" to carrying out managerial functions.

Upon *de novo* review, we find that the Petitioner has not overcome the basis for denial. Therefore, 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 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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period August 19, 2016, until August 18, 2017. 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.

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

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Petitioner claims on appeal that the Beneficiary's proposed position is managerial in nature. We note, however, that prior to filing the appeal, the Petitioner provided inconsistent statements as to the nature of the proposed position, at times claiming that the Beneficiary would "focus on sole executive duties,"[2] while later restating the statutory definition of "managerial capacity" and referring to the Beneficiary as occupying a "managerial role."[3] As the Petitioner does not pursue its executive capacity claim on appeal, we will focus exclusively on the Petitioner's latest claim that the Beneficiary's proposed employment would be in a managerial capacity.

"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. The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, USCIS examines the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business. 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.

[2] Exhibit R, initial supporting evidence.
[3] Exhibit A, response to the notice of intent to deny (NOID).

A. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS takes into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

The Petitioner in this instance claimed five employees at the time of filing. In one of several supporting statements the Petitioner explained that it currently offers its clients a "full range of [h]uman [r]esources services," executive headhunting, recruitment process outsourcing, payroll outsourcing, and project workforce outsourcing. As evidence of its current contractual obligations, the Petitioner provided a copy of its contract with [redacted] claiming that it agreed to act as the "sole representative" tasked with advising and recruiting foreign students to attend U.S.-based [redacted] programs. A review of the contract indicates, however, that the Petitioner acts as a "non-exclusive representative" of the client and thus may not be the "sole representative" as claimed. We note that the Petitioner did not provide information stating which of its employees would carry out the underlying recruitment services of this contract.

The Petitioner also provided an organizational chart depicting the Beneficiary at the top of the hierarchy, overseeing an administrative specialist, a consultant, and a business manager with the latter overseeing another consultant. The organizational chart lists each employee by name and position title and includes brief job descriptions for the listed positions and discloses each employee's educational credentials. The Petitioner also provided its payroll documents and a second organizational chart depicting its prospective staffing structure that includes the restaurant whose purchase was pending at the time the petition was filed. The prospective chart shows the business manager, administrative specialist, and a restaurant manager as the Beneficiary's direct subordinates and depicts both consultants as subordinate to the business manager.

The Director subsequently issued a NOID, stating that the Beneficiary's subordinate staff does not appear to be comprised of managerial or professional employees.

In response, the Petitioner provided a statement claiming that a clerical error was responsible for an inaccurate depiction of its current staffing structure. The Petitioner claims that despite submitting an organizational chart depicting the Beneficiary as overseeing one of the company's two consultants, both consultants are directly subordinate to the business manager. The Petition claimed that the Beneficiary's only direct subordinates are a business manager and an administrative specialist, and further stated that the previously submitted organizational chart was the result of an "honest" mistake. It offered a new organizational chart depicting both consultants as the business manager's direct subordinates. We note, however, that this claim is inconsistent with the current appeal brief, which reiterates the organizational hierarchy depicted in the original organizational chart where the Beneficiary was shown as directly overseeing a consultant as one of his three subordinates. If the original organizational chart depicted an incorrect organizational hierarchy, it is unclear why the Petitioner now restates the purportedly erroneous information on appeal. 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). Although the Petitioner claimed that the Beneficiary "would supervise a multi-tiered management structure," it did not provide sufficient credible evidence to support this claim.

The Petitioner also provided a letter from an Associate Dean of Academic Affairs at the who expressed his professional opinion about the managerial nature of the Beneficiary's proposed position. The opinion took into account the Petitioner's prospective purchase of a restaurant – a transaction that had not been finalized either at the time the petition was filed or at the time the NOID response was submitted. We note that 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). opinion was partly based on an event, i.e., the purchase of a restaurant, which had not yet taken place as of the date this petition was filed; therefore, that opinion has limited relevance in helping to establish the Petitioner's eligibility at the time of filing. The Petitioner resubmitted a copy of the proposed organizational chart that includes a restaurant and proposed restaurant staff as part of the prospective hierarchy; it stated that in the meantime, it will provide recruitment and HR outsourcing services to clients in the hospitality, automotive, and healthcare industries. With the exception of the previously submitted contract with the Petitioner did not provide further evidence to show that it has clients to whom it is currently providing consulting or HR recruitment services in any of the listed industries.

In the denial decision, the Director correctly pointed out that the Petitioner had not yet finalized its purchase of a restaurant business and thus disregarded the proposed organizational chart that included a restaurant as part of the Petitioner's organizational hierarchy. The Director concluded that the Petitioner did not establish that the Beneficiary would primarily oversee the work of managerial or professional subordinates.

On appeal, the Petitioner argues that it is "a misconception" to rely on the number of subordinate employees as a relevant factor in determining whether the Beneficiary would be employed in a managerial capacity, contending that a beneficiary can be employed in a managerial capacity even if he or she has only one subordinate, so long as that beneficiary functions at a senior level with the organization's hierarchy or with respect to the function he or she manages. We disagree with the Petitioner's emphasis on the Beneficiary's placement within the hierarchy to the exclusion of other relevant factors.

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" managerial in nature. Section 101(A)(44)(A) 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, these two

factors are not sufficient to establish that the Petitioner has the capacity to relieve the Beneficiary from having to primarily engage in the organization's daily operational tasks.

Further, the Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in a managerial or executive capacity. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company or a company that does not conduct business in a regular and continuous manner. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

In the present matter, the Petitioner describes a hierarchy that consists of a four-person support staff below the Beneficiary's position. However, the Petitioner has not provided sufficient evidence establishing that this staffing composition will relieve the Beneficiary from having to directly engage in performing its daily operational tasks. The Petitioner provided a copy of a contractual agreement where it agreed to recruit students in China and Taiwan to attend its client's U.S.-based programs; however, it did not adequately describe the duties of the Beneficiary's subordinates and explain who would carry out the underlying services of an agreement that appears to require travel to China and Taiwan for student recruitment. The Petitioner also provided two contracts titled "Overseas Education Service Agreement," which show that each client agreed to pay the Petitioner $15,000 in exchange for receiving "a relevant consulting service" regarding attending an educational institution in the United States. However, it is unclear that someone other than the Beneficiary was responsible for seeking out and ultimately retaining these clients.

Although a listed duty of one of the Petitioner's consultants – who may or may not be the Beneficiary's direct subordinate – includes acting as a liaison between clients and candidates, it does not appear that this duty would be performed within the context of education consulting; rather, it appears that the consultant's assignment is geared towards staff recruitment where the client involves a company that is looking to staff its organization. Similarly, the job description of the other consultant (whose position is subordinate to the business manager) indicates that he will assist the business manager by identifying business resources and discovering new products and service packages. In light of these subordinates' job descriptions, it does not appear that anyone has been assigned the tasks of seeking out foreign clients to purchase education-based consultation services or actually providing those consulting services once a client is obtained. Without further information, we cannot rule out the possibility that the Beneficiary will execute these operational job duties to meet the Petitioner's contractual obligations. Likewise, the Petitioner did not identify anyone within its organization who would be tasked with marketing its various services, nor did it state who would follow up on the sales leads generated by the support staff.

Although the Petitioner has expressed the desire to expand its organization in the future, the Petitioner's eligibility is based on the facts and circumstances that existed at the time of filing. In light of the deficiencies discussed above, we cannot conclude that the Petitioner's support staff at the time of filing was sufficient to relieve the Beneficiary from having to spend considerable portions of his time to carrying out the operational functions of the organization.

B. Duties

In one of two supporting cover letters, the Petitioner stated that the Beneficiary will focus on negotiating contracts with prospective clients, generating business, and supervising subordinates "to ensure high productivity and sales." In another supporting statement, the Petitioner claimed that it was in the process of purchasing an established restaurant to increase its revenues. A separate job description was provided discussing the Beneficiary's prospective job duty breakdown once the restaurant purchase becomes finalized. In the meantime, however, the Petitioner described itself as a business that offers a variety of staffing services, including "executive search, recruitment process outsourcing (RPO), payroll outsourcing and project workforce outsourcing." The Petitioner referred to the Beneficiary's "consulting career," stating that the Beneficiary "has placed numerous executives in key management roles." The Petitioner did not state whether the Beneficiary plans to continue providing these headhunting services in his proposed position with the U.S. entity. The Petitioner also provided the Beneficiary's job duty breakdown, claiming that he allocates his time as follows:

- 30% is devoted to managing daily operations by leading the company, assigning job duties, engaging in business negotiations with business partners, attending meetings and conferences in pursuit of new clients, monitoring the budget, and making decisions on company expenditures, such as supplies, staff salaries and benefits, and marketing and advertising;
- 20% is devoted to strategies and planning, which will involve setting and implementing strategies, "creating the organization's culture and set[ting] example for the staff and management team to follow";
- 25% is devoted to "business development and relation," which will involve negotiating collective bargaining agreements, agency contracts, and consulting agreements and contacting potential clients to establish business relationships;
- 20% is devoted to staffing concerns, such as providing "general guidance," evaluating performance of managerial employees, and ensuring staff compliance with procedures and company guidelines; and
- 5% is spent on miscellaneous duties that were not specifically identified.

The Petitioner provided a separate job duty breakdown, discussing the Beneficiary's prospective job duties once the purchase of the restaurant is finalized. However, as we noted above, only the facts and circumstances that were already in existence at the time of filing will be considered for the purpose of determining the Petitioner's eligibility for the benefit sought herein. As the restaurant was not part of the Petitioner's organization at the time of filing, we will not consider the proposed job duties that the Beneficiary would perform once the restaurant purchase is finalized.

In the NOID, the Director stated that the record did not contain sufficient evidence establishing that the Beneficiary would be employed in a managerial or executive capacity. The Director noted that the Petitioner had not yet finalized the purchase of a restaurant and further observed that there was no restaurant staff for the Beneficiary to oversee even once the purchase is finalized.

In response, the Petitioner resubmitted one of its previously provided statements and offered a new statement claiming that the Beneficiary will assume a managerial role that will involve "working with managers" and supervising the U.S. entity. However, the Petitioner's organization had no more than a single manager subordinate to the Beneficiary at the time of filing. As such, the record does not support the claim that the Beneficiary would be "working with managers" in the course of his daily routine. Likewise, the Petitioner has not provided sufficient evidence to support the claim that the Beneficiary's subordinate business manager will act as the first-line supervisor who will relieve the Beneficiary from daily non-supervisory duties. In order to conclude that the Beneficiary would be relieved from primarily carrying out the Petitioner's operational tasks, the Petitioner must first provide a detailed job description that adequately identifies the Beneficiary's daily activity, as the actual duties themselves 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). We further note that 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. *See* 8 C.F.R. § 214.2(l)(3)(ii).

In the present matter, the Petitioner has not provided a sufficiently detailed job description that identifies the Beneficiary's routine tasks with adequate specificity and demonstrates that the primary portion of his time would be devoted to job duties of a managerial nature. For instance, the Beneficiary's job duty breakdown broadly states that the Beneficiary's responsibility with respect to daily operation management includes leading the company, assigning tasks, attending client meetings, and monitoring the budget. The Petitioner did not, however, list the specific elements that are entailed in leading the company. Further, in light of the Petitioner's submission of inconsistent organizational charts, we are unable to determine who the Beneficiary will manage and to whom he will assign tasks as a routine part of his day or week.

The Petitioner also indicated that the Beneficiary would engage in client communications as a component of managing daily operations and also as part of his role in business development. Although we recognize that meeting with potential clients is a necessary component of a consulting business, the Petitioner has not distinguished this sales component from the sales tasks performed by its business manager and consultants; it is therefore unclear that meeting with clients to forge business relationships and negotiate contracts are managerial tasks. Due to the generalities in this job description, we are unable to determine whether the Beneficiary would continue providing headhunting services as is claimed to have been part of his earlier career path. We note that providing headhunting services would indicate that the Beneficiary performs a key operational task that would not be deemed as managerial. Likewise, while the Beneficiary is only charged with monitoring the company's budget, it is unclear who, if not the Beneficiary, would carry out the underlying operational tasks associated with gathering the information necessary to create the

budget. While no beneficiary is required to devote 100% of his or her time to managerial-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988). Here, the Petitioner has not determined precisely how much time would be allocated to managerial versus the non-managerial functions.

Next, we find that the Petitioner's discussion of the Beneficiary's role with respect to strategies and planning is vague and non-descriptive. Although the Petitioner claims that the Beneficiary has discretionary authority to determine the company's strategic direction and oversee strategy implementation, it does not describe what the company's strategy is or identify any specific actions the Beneficiary took to establish and execute such strategy. The Petitioner also broadly referred to "the organization's culture," but did not define that phrase within the context of the Petitioner's consulting business or specify the Beneficiary's specific role in creating a business culture. Broadly stating that the Beneficiary will lead by example is not sufficient, as this phrase does not describe any actual tasks that the Beneficiary would undertake in his role as key strategist and planner.

The Petitioner is equally vague in stating that the Beneficiary will provide guidance and supervision to the company's staff. Although this conveys a sense of the Beneficiary's discretionary authority over the Petitioner's personnel, it lacks information about specific actions that are related to staffing issues and are part of the Beneficiary's daily or weekly routine. We also question the validity of the Petitioner's claim that the Beneficiary will evaluate "each manager's" performance, in light of the fact that at the time the petition was filed the Petitioner did not have multiple managers for the Beneficiary to oversee. It sum, it is unclear whom the Beneficiary oversees and what actual tasks he performs in meeting his oversight responsibility.

On appeal, the Petitioner argues that the Director misconstrued the term "primarily," stating that it only needs to establish that the "majority" of the Beneficiary's time would be allocated to managerial tasks. Even if the Petitioner's contention were true, as we discussed, the job duty breakdown is deficient both in its vague content and its time allocations. Thus, even if the Petitioner was only obligated to establish that the majority of the Beneficiary's time would be devoted to managerial tasks, the lack of supporting evidence would preclude us from issuing a favorable finding. Despite claiming that the Beneficiary "devotes a majority of his time and efforts toward managerial functions," the Petitioner has not provided sufficient evidence to support this claim.

Alternatively, the Petitioner has not established that the Beneficiary would assume the role of 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).

In the present matter, the Petitioner has not specifically identified an essential function that the Beneficiary would manage, nor has it provided a detailed job description determining that he would manage, rather than perform the underlying duties of, an essential function. As discussed above, the Petitioner has provided a deficient job description that does not state the Beneficiary's routine managerial tasks with specificity and assigns a percentage of time to groups of broadly stated duties so that we are unable to determine what tasks the Beneficiary would perform as a routine part of his day or week. Without this critical information we cannot conclude that the Beneficiary would primarily perform tasks of a managerial nature.

III. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of P-C- Corp.*, ID# 1184257 (AAO May 15, 2018)