U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-F-U.S.A., INC.

DATE: MAY 26, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a restaurant operator and distributor of foreign specialty foods, seeks to extend the Beneficiary's temporary employment as its president 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 new office extension petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial capacity.

On appeal, the Petitioner submits a brief disputing the denial, claiming that the Beneficiary will primarily perform managerial job duties.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a managerial or executive capacity, or in a position involving 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, executive, or specialized knowledge 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).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director found that the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity. As the appeal does not include a claim that the Beneficiary will be employed in an executive capacity, we restrict our analysis to whether the Beneficiary will be employed in a managerial capacity.

The term "managerial capacity" is defined as "an assignment within an organization in which the employee primarily":

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) 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;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) 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. Further, "[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." *Id.* If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must 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.

A. Duties

When examining the managerial capacity of the Beneficiary, we will look first 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).

Based on the statutory definition of managerial 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 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 1533.

The Petitioner filed the Form I-129 claiming three employees and a projected 2016 gross income of $152,509. The Petitioner states that it operates as an importer of foreign frozen food products, which it sells through distributors and through its restaurant, which it opened for the purpose of showcasing its products and introducing them into the marketplace. In a supplemental statement, the Beneficiary, in his capacity as the Petitioner's president, provided a list of 18 duties and the percentage of time he would spend on each.[1] The following duties would require at least 10% of the Beneficiary's time:

- Establishing and implementing business strategies, business plans and operations procedures and timetables. (15%)
- Meeting with managers to discuss progress and strategies. (15%)
- Meeting with distributors and suppliers to develop the business relationship and to identify new or potential areas of development. (10%)
- Advising on the marketing plan. (10%)

The Petitioner also provided an organizational chart showing the Beneficiary overseeing two employees with managerial position titles – a restaurant manager and a wholesale distribution manager.

The Director issued a request for evidence (RFE) advising the Petitioner that it did not provide sufficient evidence to establish that it would employ the Beneficiary in a managerial capacity. The Director acknowledged the submitted job description, but stated that she was unable to determine what specific tasks the Beneficiary would perform or how the Petitioner operates on a daily basis. The Director also questioned whether the Beneficiary's subordinates with managerial position titles are actually managerial or professional employees.

In response, the Petitioner provided a statement explaining that its goal in commencing operations was to create a brand and marketing plan for its products and to find distribution channels to sell those products. The Petitioner claimed that the Beneficiary has worked with its managers and with the foreign entity's board of directors to drive up the sales of its products by setting up a distribution system and implementing a marketing plan. The Petitioner did not specify any aspects of its marketing plan or explain precisely what role the Beneficiary assumes in the marketing of the Petitioner's products.

The Petitioner also restated the job description it originally provided in its supporting statement and went on to reiterate that the Beneficiary oversees two subordinate managers, indicating that he allocates 15-30% of his time to discussing business strategies with the restaurant manager, who

[1] As the Director included the complete list of duties and the corresponding percentage breakdown in the denial, we will not restate this information in its entirety.

oversees the restaurant's daily operations and is responsible for the retail sales of the Petitioner's frozen food products. The Petitioner did not specify any strategies the restaurant manager implemented as a result of the Beneficiary's input. The Petitioner also stated that the Beneficiary maintains a constant line of communication with his subordinate, a wholesale distribution manager, stating that the Beneficiary "directs . . . and advises her on pricing levels and commitments that can be undertaken." The Petitioner explained that the Beneficiary's role with respect to distributors is "to iron-out [*sic*] the details of an agreement" in order to protect the Petitioner from entering into a contract whose terms are not beneficial for the Petitioner or would impede company growth.

In general, the Petitioner stated that the Beneficiary's supervisory duties include meeting weekly with subordinate managers to make sure that they understand and are able to implement company policies and procedures and convey job responsibilities to their respective subordinates. The Petitioner also indicated that the Beneficiary communicates with his subordinate managers regarding matters of quality control, customer satisfaction, sales targets, and time management, and further noted that the Beneficiary conducts regular performance reviews and makes sure the managers' training needs are met.

In denying the petition the Director determined that the Beneficiary's proposed position involves certain non-managerial job duties, including meeting with distributors and suppliers and providing advice on marketing. The Director also found that the Beneficiary would oversee employees who are not supervisors or professionals, despite their respective position titles. Based partly on these findings the Director concluded that the Beneficiary would not primarily perform managerial duties.

On appeal, the Petitioner disputes the basis for the denial, pointing out that the Director relied on only two of the Beneficiary's job duties to conclude that the Beneficiary would primarily perform non-managerial duties. The Petitioner contends that even if the Director properly characterized the two cited job duties as non-managerial, the percentage breakdown indicates that these duties only account for 20% of the Beneficiary's time and thus would not serve as a sufficient basis for denying the petition.

While we agree that the Director's conclusion is based, in part, on an incomplete analysis of the Beneficiary's job duties, we find that most of the items that comprise the job description were so vague as to make a finding based on the Beneficiary's actual job duties virtually impossible. Without meaningful content specifying what actual daily job duties the Beneficiary would perform within the context of the Petitioner's restaurant and wholesale distribution operations we cannot determine whether the Beneficiary would allocate his time primarily to managerial job duties. 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).

Here, the Petitioner indicated that 15% of the Beneficiary's time would be allocated to establishing and implementing business strategies and setting up timetables. However, the Petitioner did not specify the types of strategies the Beneficiary has implemented or identify any timetables he set for reaching specific benchmarks to explain why the Beneficiary would allocate his time to these duties

as part of his daily or even weekly routine. The Petitioner's claim that the Beneficiary would review "important business documents and company financials" is also overly broad, as it does not specify what types of "business documents" and "company financials" the Beneficiary would review or state what actions result from such review. It is also unclear how reviewing company financials is different from reviewing the Petitioner's annual, quarterly, and monthly budgets or overseeing the company's financial management, all of which were assigned separate time allocations that cumulatively account for another 15% of the Beneficiary's time.

Further, while the Petitioner claimed that the Beneficiary would make structural changes by hiring and firing personnel, its current three-person staff does not support a finding that such changes would be warranted frequently enough that this duty would be deemed part of the Beneficiary's daily or weekly routine. Likewise, the claim that the Beneficiary would make a monthly work plan and generate quarterly and yearly progress reports provides little additional insight into what the Beneficiary would be doing on a day-to-day basis. The same applies to the claim that the Beneficiary would read and understand applicable laws and regulations, meet with professionals to discuss legal matters, and see an accountant to review financial documents. The Petitioner did not explain what types of laws and regulations the Beneficiary would encounter in the course of business, nor did it specify the types of legal matters that would require the expertise of an attorney or the frequency with which such matters would arise. While we do not doubt that the Beneficiary will have responsibility over the Petitioner's financial and legal matters, the record does not establish a basis for claiming that the Beneficiary would be required to consistently perform any of these job duties as a regular part of his daily or weekly routine.

In sum, despite the Petitioner's submission of a position description that assigned percentages to areas of responsibility, the description contains few specific job duties and instead consists primarily of general information that includes actions the Beneficiary may carry out intermittently as the need arises, rather than tasks that the Beneficiary would perform on a daily basis within the context of the Petitioner's restaurant and wholesale distribution operations. Therefore we cannot conclude based on the job description that the Beneficiary's day-to-day job duties would be primarily managerial in nature.

B. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining a beneficiary's claimed managerial capacity, including 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.

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*).

In the present matter, while we do not dispute that the Beneficiary has the authority to hire and fire employees and take other personnel actions, the record does not establish that the Petitioner's organizational hierarchy at the time of filing had the management structure in place to support the Beneficiary as a personnel manager who would primarily oversee the work of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. As noted earlier, the petition indicates that the Petitioner claimed three employees at the time of filing. In its supporting statement, the Petitioner referred to its business as being "in its infancy stage" and requiring "additional strategic start-up work" to meet its sales objectives.

The Petitioner also provided an organizational chart that depicted the Petitioner's staffing at the time the petition was filed. The chart shows a four-tier staffing structure with the Beneficiary at the top of the hierarchy, directly supervising a wholesale distribution manager and a restaurant manager. The next staffing tier shows a vacant wholesale distribution coordinator position subordinate to the wholesale distribution manager and a vacant assistant restaurant manager/cashier as the restaurant manager's direct subordinate. The bottom tier of the hierarchy shows a cook and a vacant housekeeping position, both restaurant-based positions. Therefore, the only employee available to staff the wholesale distribution operation was a wholesale distribution manager and the only employees depicted within the hierarchy of the restaurant operation included a restaurant manager and a cook. Aside from the vacant positions, we note that the chart did not account for any wait staff positions within the restaurant business.

In response to the Director's RFE, the Petitioner supplemented the record with a new organizational chart, which depicts a different organizational hierarchy consisting of the Beneficiary at the top of the hierarchy, followed by an accounting firm comprising a "Financial Department," a wholesale distribution manager comprising the "Whole Sale Department," and a restaurant manager heading the "Retail Department," which also includes a cook as the restaurant manager's sole subordinate. The new chart eliminated the assistant restaurant manager/cashier position, which was depicted in the original organizational chart.

The Petitioner also provided evidence of the wages it paid to employees during the 2016 third quarter, the three-month period that immediately preceded the filing of this petition in early October of that year. The quarterly wage document lists three employees, but indicates that only two were employed by September 2016. While the Petitioner claims to have had three employees at the time of filing, the record does not include evidence that substantiates that claim. Rather, it appears that one of those three employees may have left the company prior to the filing of the petition. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Furthermore, although the Petitioner initially indicated that its three employees worked on a full-time basis, the 2016 third quarter wage report shows only the restaurant manager receiving a salary that was commensurate with full-time employment. The other two employees, who, according to the organizational chart, filled the positions of the wholesale distribution manager and the restaurant's cook, respectively, received salaries that were not commensurate with those of full-time employees.

Based on the Petitioner's claim regarding the Beneficiary's limited involvement in performing the daily operational tasks, it appears that the Petitioner's wholesale distribution operation was run primarily by a single part-time employee, whose actual role in relation to that operation is questionable based on various anomalies and inconsistencies in the record. First, we note that the Petitioner provided two different lists of job duties – initially with other supporting documents at the time of filing and subsequently in response to the RFE – for the position of wholesale distribution manager. While some of the job duties are the same, others, such as searching for distributors and retailers to carry the Petitioner's products, establishing relationships with customers, and discussing marketing plans and marketing contributions with distributors, were only listed in the job description provided in the RFE response. The record also contains inconsistent information as to the position title of [redacted] whom the organizational chart and corresponding job description refer to as the wholesale distribution manager in some documents, while the Petitioner's employee training record refers to the same individual as "assistant sales and marketing manager." The record also contains the Petitioner's bank statements accompanied by canceled checks, which show payments made to [redacted] for "tips"; this anomaly seems to suggest that [redacted] may work in the Petitioner's restaurant, rather than its wholesale distribution operation as the Petitioner claims.

Further, the record is inconsistent as to information pertaining to the restaurant's cook. While the Petitioner's organizational charts refer to the cook as '[redacted]' and '[redacted]' respectively, there is no employee with this name in its payroll records or quarterly wage reports, which do identify an [redacted] The Petitioner provided cancelled checks issued to both an '[redacted]' and an [redacted] during the same month, for "outside services" and "outside sales," during months that precede the cook's claimed August 2016 start date. We cannot determine whether these names refer to the same individual or what types of "outside sales" a cook would provide to a restaurant. The record lacks independent, objective evidence resolving these numerous discrepancies in the record, thereby precluding an understanding as to the actual facts pertaining to the Petitioner's staffing. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In denying the petition, the Director determined that neither the Petitioner's organizational hierarchy nor the job duties of the Beneficiary's subordinates support the claim that the Beneficiary would primarily manage a staff of professional, managerial, or supervisory personnel. Rather, the Director found that most of the job duties assigned to the Beneficiary's subordinates are not managerial and would not require a bachelor's degree to execute.

We agree with the Director's conclusion. Although the Petitioner's original organizational chart illustrates both the Beneficiary's subordinates as having at least one subordinate of their own, the record shows that the wholesale distribution manager did not have any subordinates at the time of

filing and the revised organizational chart indicates that the Petitioner no longer intends to fill the position of wholesale distribution coordinator, which was depicted as the wholesale distribution manager's subordinate at the time of filing. As such, the wholesale distribution manager does not manage or supervise anyone despite what her position title suggests, and the Petitioner has not established that her job duties, which include market research and marketing, for example, are otherwise managerial.

Further, 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." Here, the record does not establish that the Petitioner's wholesale distribution manager has the educational credentials or carries out the job duties commensurate with those of a professional employee.

The Petitioner's restaurant operation depicts a basic hierarchy consisting of a restaurant manager and a part-time cook. As indicated above, the record lacks payroll evidence that shows precisely whom the Petitioner employed at the time of filing. Therefore, it is unclear whether both the restaurant manager and the cook were part of the Petitioner's organization during the relevant time period. At best, it appears that the Petitioner's restaurant operated with one part-time cook and a full-time restaurant manager.

Therefore, it appears the restaurant manager would devote a limited portion of her time to overseeing the cook, while potentially having to operate the cash register, wait on the restaurant's patrons, and potentially engage in food preparation, as the restaurant is open for 50 hours per week. The Petitioner did not explain how a single employee could perform all of the operational duties of the restaurant during half of its hours of business, when the cook is not working. Further, we note that the Beneficiary's worksite will be at the restaurant, as the record indicates that the company had decided not to renew its office lease and instead would be headquartered at the restaurant as of October 2016. While the Petitioner claims that the restaurant manager and cook relieve the Beneficiary from having to carry out the operational tasks involved in running a restaurant, we find that the subordinate tier illustrated below the restaurant manager is not sufficient to establish that the restaurant manager qualifies as a managerial or supervisory employee or that she and a part-time cook, if still employed, would relieve the Beneficiary from involvement in the restaurant's day-to-day operations.

While the Petitioner contends on appeal that its small size "at this initial stage of operations" does not prevent the Beneficiary from assuming a managerial position, the various deficiencies described above give us reason to question the Petitioner's ability to support the Beneficiary in a primarily managerial capacity, as the record does not establish that the Petitioner would have the staffing to relieve the Beneficiary from having to allocate his time primarily to non-managerial tasks that are essential for the Petitioner's continued operation. Therefore, despite establishing that the

Beneficiary had the discretionary authority over the Petitioner's staff and its respective operations, the record is not persuasive in establishing that the Petitioner's organization at the time of filing was sufficient to support the Beneficiary in a primarily managerial position where his primary concern would be managing a supervisory, professional, or managerial staff.

Alternatively, 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a petitioner must clearly describe the duties to be performed in managing the essential function, or more specifically, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform duties related to the function. *See Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016).

In this matter, the Petitioner has not provided evidence to demonstrate that the Beneficiary manages an essential function. Although the Petitioner claims that the Beneficiary manages the essential marketing function, the limited size of the Petitioner's support staff indicates that the Beneficiary would not be managing a single function. It is unclear who, if not the Beneficiary, would oversee the employees who carry out the Petitioner's daily operational tasks. Further, as indicated above, in order to establish that the Beneficiary operates as a function manager, the Petitioner must provide a job description establishing the specific duties that the Beneficiary would perform to establish precisely how the function would be managed. Here, the Beneficiary's job description was vague and did not indicate he would assume the role of a function manager or that he would primarily perform managerial tasks related to the marketing function. Therefore, we cannot conclude that the Beneficiary would primarily manage the marketing function as the Petitioner claims on appeal. Again, the Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376.

For the reasons discussed above, the evidence submitted does not establish that the Beneficiary would be employed in a managerial capacity under the extended petition.

III. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in a managerial capacity under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of O-F-U.S.A., Inc.*, ID# 364312 (AAO May 26, 2017)