U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-C-

DATE: MAY 26, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

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

The Director of the Vermont Service Center denied the petition, concluding that the record did not establish that the Beneficiary will be employed in the United States in a managerial or executive capacity.[1]

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary will be employed in a managerial capacity.

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 specialized knowledge capacity, for one continuous year within three years preceding the Beneficiary's application for admission into the United States. 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. Section 101(a)(15)(L) of the Act.

An individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, must include evidence that the petitioner will employ the beneficiary in an executive or managerial capacity, or in

[1] The Petitioner filed a subsequent combined motion to reopen and reconsider. The Director affirmed the denial decision.

a position requiring specialized knowledge, including a detailed description of the services to be performed. 8 C.F.R. § 214.2(l)(3)(ii).

II. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director found that the Petitioner did not establish that it will employ the Beneficiary in a managerial capacity under the petition.[2]

Section 101(a)(44)(A) of the Act defines the term "managerial capacity" 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.

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.*

A. Duties

When examining the managerial or executive 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 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

[2] The Petitioner does not assert and the record does not demonstrate that the Beneficiary will be employed in an executive capacity under this petition. Accordingly, our analysis is limited to the issue of "managerial capacity."

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 1533.

In a letter submitted in support of the petition, the Petitioner provided the following job description for the Beneficiary's proposed position:

> He will be responsible for managing the shop, including hiring and firing of stylists, managing relations with independent contractor stylists, scheduling employees and contractors, managing venders [*sic*] and suppliers to maintain retail inventory of hair care products, accounting and managing payroll, licensing and regulatory compliance, and other business operations.

In response to the Director's request for evidence (RFE) on this issue, the Petitioner emphasized that "[a]s the primary manager of the shop, [the Beneficiary] will have discretion and decision-making authority over the primary, as well as critical functions of the business." The Petitioner paraphrased the initial position description and added that the Beneficiary is also "expected to train Stylists in the latest European styles and techniques."

On motion, the Petitioner stated that the Beneficiary, in addition to scheduling and managing the company's personnel, will also "be responsible for maintaining vendor contracts and relations," "ensuring sufficient product inventory," and "marketing the business, managing its finances including payroll and tax payments." On appeal, the Petitioner asserted that the Beneficiary's "role will be to supervise the professional stylist and manicurists – all employees of the company," and that "[h]e will direct their work, assist and provide training when necessary," and that he "has the authority to hire and fire the professional stylist staff, and otherwise control the daily operations of the company."

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

The Petitioner has described the Beneficiary's position as a first-line supervisor of its employees. Although the Petitioner added that the Beneficiary is also the individual who will maintain vendor contracts and relations and ensure sufficient product inventory, these duties are operational duties. Likewise, performing marketing duties is operational in nature and not managerial task. Similarly, duties that involve the handling the accounts receivable and payable, payroll, and tax payments are

administrative in nature. The record does not include evidence that there are employees who will relieve the Beneficiary from performing these necessary operational and administrative tasks that ensure the operation of the business.

Although the Petitioner does not specifically claim that the Beneficiary in this matter is a function manager, the Petitioner initially asserted that "[a]s the primary manager of the shop, [the Beneficiary] will have discretion and decision-making authority over the primary, as well as critical functions of the business," and on motion claimed that the Beneficiary "will be performing an essential function for the [Petitioner] – that of managing its entire operations." 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 furnish a written job offer that clearly describes 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).

As noted above, the Petitioner has described the Beneficiary's duties as including first-line supervisory duties of its employees and performing duties related to marketing the business, accounts receivable and payable, payroll, and tax reporting duties. The Petitioner does not indicate who will perform these tasks allowing the Beneficiary to focus on managing these functions. The position descriptions provided are insufficient to establish that the Beneficiary will manage an essential function rather than perform duties related to the function.

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" executive or managerial in nature. Sections 101(A)(44)(A) and (B) 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, the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial or executive in nature. The position descriptions in this matter show the Beneficiary performing the Petitioner's marketing, bookkeeping, inventory, and first-line supervisory duties, duties that do not fall directly under managerial or executive duties as defined in the statute. For this reason, we cannot conclude that the Beneficiary is primarily performing the duties of a manager or an executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

B. Staffing

Beyond the required description of the job duties, we review the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, 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 Petitioner submitted an organizational chart and brief description of duties for the Beneficiary's subordinates. On the organizational chart, the Petitioner showed that the Beneficiary as the manager would report to the managing majority owner of the company. The Petitioner placed three stylists subordinate to the Beneficiary's position on the chart, noting that two of the stylists were also the Petitioner's minority owners. The three stylists' duties included providing salon services such as cutting, styling coloring, and related services to customers. The organizational chart also depicts a receptionist in a position subordinate to the three stylists. The Petitioner also submitted copies of review reports for an employer's quarterly payroll for the third and fourth quarters of 2013. The documents do not identify the Petitioner as the employer.

On motion, the Petitioner asserted that its staffing levels are sufficient to relieve the Beneficiary from providing services. The Petitioner also acknowledged that a four-year or professional degree is not required for its employees' positions and noted that its employees are required to be licensed which requires training at an accredited professional training school. The Petitioner also submitted its payroll records for portions of March and April 2016. Although we have reviewed the payroll records submitted, we do not find them relevant to this petition filed more than a year earlier. 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 not submitted payroll records or tax documentation showing payment made to employees or contractors at the time the petition was filed and continuing for the following year.

On appeal, the Petitioner asserts that it has more than enough managerial work for the Beneficiary in overseeing its staff and managing its operations. The Petitioner, which is located in Virginia, also contends that licensure for a cosmetologist in Maryland requires 1,500 hours or training in an approved training facility. The Petitioner, however, does not explain the relevance of Maryland's licensing requirements for its hair stylists employed at its Virginia location.

The Petitioner does not define how much time the Beneficiary will spend supervising subordinates and how much time he will spend performing the operational and administrative tasks of the business operations. However, even if the Beneficiary will primarily supervise the Petitioner's three hair stylists and the receptionist, the Petitioner has not established that the subordinate employees are supervisory, professional, or managerial as required by section 101(a)(44)(A)(ii) of the Act. The Petitioner's organizational chart and position descriptions for the employees subordinate to the

Beneficiary's position do not show that these employees supervise other employees or that they manage a department or function, such that they can be classified as managers or supervisors.

On motion and appeal, the Petitioner appears to claim that the hair stylist positions are professional positions, even though they do not require a baccalaureate degree. However, when 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."

Therefore, we focus on the level of education required by the position, and not the degree, if any, held by subordinate employee. The Petitioner has not established that a bachelor's degree is required to perform the duties of hair cutting, styling, coloring and related services. Additionally, the Petitioner has not presented persuasive argument that the hair stylist positions should be otherwise considered professional positions under the statute and regulations. 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.

Upon review of the totality of the record, the Petitioner has not established that the Beneficiary will perform primarily managerial or executive duties on behalf of the Petitioner. The appeal must be dismissed for this reason.

III. QUALIFYING RELATIONSHIP

We also found in our preliminary review of the record that the record did not support a qualifying relationship between the Petitioner and the Beneficiary's foreign employer and notified the Petitioner in our RFE.

The record includes the Petitioner's statement that the Beneficiary and his partner each own 50 percent of the Beneficiary's foreign employer. The Petitioner's owners are [redacted] (60 percent), [redacted] (20 percent), and [redacted] (20 percent). The Petitioner also submitted evidence relating to another U.S. company, [redacted] organized in 2015 immediately prior to filing of the petition, which lists five owners, [redacted] and [redacted] (the Petitioner's three owners), and the Beneficiary and his partner (the foreign entity's owner) all holding a 20 percent interest in the company.

We advised the Petitioner that the evidence did not establish the requisite qualifying relationship between the Petitioner and the Beneficiary's foreign employer. We requested further explanation regarding the limited liability company formed in 2015 and its relevance to the qualifying relationship in this matter.

In response to our RFE, the Petitioner appears to assert that the creation of the third party company results in an affiliate relationship between the Petitioner and the Beneficiary's foreign employer. Specifically, the Petitioner states [redacted] is an affiliate of the Petitioner because the companies have three owners in common; and, that [redacted] is also an affiliate of the Beneficiary's foreign employer because those two entities have two owners in common.

To establish a "qualifying relationship" under the Act and the regulations, a petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The term "affiliate" means (1) one of two subsidiaries both of which are owned and controlled by the same parent or individual, or; (2) one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. 8 C.F.R. § 214.2(l)(1)(ii)(L).

Here, the Petitioner and the Beneficiary's foreign employer share no common ownership or control. They are not owned, in any part, by the same parent entity, individual or group of individuals and therefore do not have a qualifying relationship for the purposes of this classification. The fact that both entities have some common ownership with the same third entity, [redacted] does not overcome this fundamental deficiency, or create an affiliate relationship between two otherwise unrelated entities. The petition must also be denied on this issue.

IV. CONCLUSION

The appeal is dismissed because the Petitioner did not overcome the Director's determination that the Beneficiary's position with the Petitioner did not qualify as a manager or an executive. We also find that the Petitioner did not establish a qualifying relationship with the Beneficiary's foreign employer.

ORDER: The appeal is dismissed.

Cite as *Matter of S-C-*, ID# 318922 (AAO May 26, 2017)