U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-USA, INC.

DATE: MAY 30, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a seller of waterproof industrial connectors, seeks to temporarily employ the Beneficiary as its national sales manager and 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 petition, concluding that the Petitioner did not establish, as required, that: (1) the Beneficiary will be employed in a managerial capacity in the United States; and (2) the Beneficiary has been employed abroad in a managerial capacity by the Petitioner's foreign parent company.

On appeal, the Petitioner asserts that the Director's decision failed to take into account all of the submitted evidence and departed from precedent decisions concerning L-1A managers.

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. 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.

The term "managerial capacity" means "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.

II. U.S. EMPLOYMENT

In denying the petition, the Director found that the Petitioner's description of the Beneficiary's proposed U.S. duties included a number of non-managerial tasks and was insufficient to establish that he would primarily perform managerial duties as the Petitioner's national sales manager and president. The Director also reviewed the Petitioner's staffing and organizational structure and determined that the record did not show that the Beneficiary would supervise a subordinate staff of professionals, managers, or supervisors, or that he would primarily manage an essential function of the U.S. company.

On appeal, the Petitioner asserts that the Director mischaracterized the Beneficiary's proposed duties as non-managerial and failed to take into account the Beneficiary's management of the essential function of "sales growth," as well as the relationship between the Petitioner and foreign entity and the organizational structure of both companies.

A. Duties

When examining whether a Beneficiary will be employed in a managerial capacity, 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 the Beneficiary performs and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). The Petitioner must first show that the Beneficiary will perform certain high-level responsibilities described in the statutory definitions.

Champion World, Inc. v. INS, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary primarily performs managerial or executive duties, as opposed to ordinary operational activities alongside the company's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner sells waterproof industrial connectors and cables for use in engineering machinery, car batteries, solar and wind energy, marine electronics, industrial automation, and LED technology. The Petitioner explained that the Beneficiary has been managing the U.S. operations from Canada, but, due to a recent growth in U.S. sales, it seeks to employ him intermittently in the United States while he maintains his primary residence in Canada.

In a letter in support of the petition, the Petitioner explained that the Beneficiary will serve as both the manager of the company and as the manager of its national sales program, an essential function within the company. The Petitioner provided the following description of duties in response to the Director's request for a detailed position description:

- Managing direct sales operations – 55%
  - This work entails [the Beneficiary] overseeing sales operations and providing sales support and education to the Regional Sales manager, independent sales agencies, and their independent sales contractors to enable them to be knowledgeable about our products and clients' needs. This includes numerous phone calls, emails, video conferences and visits to . . . clients sites, his Regional Sales Manager, and independent sales agencies to ensure performance;
  - providing technical and engineering knowledge to [the Petitioner's] customers and advising them with their design and implementation of our products into theirs;
  - meeting with clients at their worksites and businesses to ensure client satisfaction, finding additional opportunities for sales, researching new sales targets, conducting competitive market research and analysis,
  - overseeing account management, implementing growth strategies to meet the company's overall sales goals;
  - working with the company's Regional Sales Manager to ensure the successful implementation of the company's sales and marketing strategies;
  - providing training to company sales people;
  - overseeing supply chain management processes to ensure the quality of our product supplied to customers is maintained, gathered through frequent phone calls, emails, and visits to customers to ensure satisfaction;
  - negotiating pricing with our supply chain to ensure overall profitability for the company.

- Overseeing P&L, Budgeting, and corporate governance and oversight for the company's independent sales agency growth during his tenure – 20%

- overseeing the monthly, quarterly and yearly sales figures. Identifying areas for improvement and ensuring the company maintains its set budget.
- ensuring good governance of the company and good corporate citizenship;
- reviewing applicable trade laws and customs laws with legal counsel to ensure importing of goods for domestic sales runs smoothly;
- working with accounts payable / bookkeeper to ensure all financial records are maintained in an orderly and professional way;
- conducting and supervising quarterly cash flow reviews (with the accounts payable / bookkeeper) to ensure success of operations of the business.

- Attending trade shows, overseeing marketing – 15%
  - as National Sales Manager, attending trade shows and engaging in competitive analysis is vital to the company's success;
  - directing marketing funds for event sponsorship, ad placement, trade show booth rentals as needed;

- Continuing education on product development and advances in water proof connector technology – 10%
  - keeping up on new products being introduced to the connector market, investigating new solutions for our clients in a variety of industries
  - researching with our Regional Sales Manager new materials and advances in the marketplace and generally being a go-to source of knowledge for clients, company staff, and independent sales agencies for [the Petitioner's] brand.

In response to an inquiry regarding the Beneficiary's work location, the Petitioner further explained his expected duties:

> [The Beneficiary's] offered position . . . will entail him traveling extensively throughout the U.S. in support of the company's sales and growth initiatives, including to many off-site client locations for meetings. While both the Delaware and Illinois addresses will remain formal company addresses, [the Beneficiary's] time spent in the U.S. is more likely to involve
>
> 1) his meeting with major national clients at their locations through the U.S. to ensure their satisfaction,
> 2) scouting new, additional opportunities for sales with clients in the U.S., and
> 3) attending trade shows and conventions related to our firm's products.

Upon review, we agree with the Director's determination that the provided position description does not establish that the duties the Beneficiary would perform during his intermittent stays in the United States would be primarily managerial in nature. While we do not doubt that the Beneficiary will exercise discretion over the day-to-day operations of the company as a whole as president and over its sales function as national sales manager, 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).

The Petitioner expressly states that the Beneficiary will spend most of his time in the United States traveling to the sites of existing and potential customers to perform sales duties and to ensure customer satisfaction, and will also market and promote the Petitioner's products at trade shows. While these duties may be critical to the company's sales growth in the United States, we do not agree with the Petitioner that such non-managerial sales duties should be classified as "managing sales operations." Further the Petitioner's claim that the Beneficiary would spend most of his time in the United States performing these types of duties appears to be inconsistent with the breakdown of duties the Petitioner provided, in which these direct sales and trade show-related duties accounted for a smaller portion of his time. While the Petitioner states that the Beneficiary will continue to oversee its operations from Canada and travel to the United States intermittently, we must evaluate what he will actually do on a day-to-day basis while in the United States. Based on the Petitioner's statements, he would be coming to the United States in his capacity as the company's sales representative.

The Petitioner has consistently stated that the Beneficiary, in addition to managing the organization as a whole, will manage the essential function of "sales growth." The Petitioner emphasized that the company is focused on sales and that the sales function is therefore its most essential function. 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 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).

The Petitioner's breakdown of the Beneficiary's duties and the amount of time he would spend on four different areas of responsibility did not support its claim that he would primarily manage an essential function. For example, the Petitioner states that the Beneficiary will allocate 55% of his time to "managing direct sales operations," a responsibility which includes "providing sales support and education" to U.S-based sales staff; providing "technical and engineering knowledge" to customers and advising on product design and implementation; meeting with clients at their worksites to ensure client satisfaction; conducting competitive market research and analysis; finding additional opportunities for sales; and providing training to company sales people. The Petitioner did not explain how the Beneficiary's direct roles in sales, training, and customer satisfaction qualify as managerial responsibilities.

Further, other duties within this area of responsibility, such as "overseeing supply chain management processes" and "overseeing account management and implementing growth strategies," are poorly defined and we cannot determine the nature of the Beneficiary's day-to-day tasks related to account management or supply chain management. The Petitioner indicates that the Beneficiary would spend an addition 15% of his time on "overseeing marketing," attending trade shows, and engaging in "competitive analysis," but again, did not explain how such duties are managerial.

Overall, while the Beneficiary may "manage sales operations" by setting goal and strategies for sales and marketing, his actual proposed duties within this area include a number of non-qualifying tasks that preclude us from finding that he will primarily manage the sales function for the Petitioner, rather than directly performing this function to a significant extent.

The Beneficiary would spend another 10 percent of his time on "continuing education in product development," including researching new products in the Petitioner's industry and "being a go-to source of knowledge for clients, company staff, and independent sales agencies." The Beneficiary's expertise with the industry and products may be a necessary quality for the offered position, but the portion of time to be spent on product research cannot be considered a managerial duty.

Finally, the Beneficiary's general management functions are indicated by his responsibility for overseeing profit and loss, budgeting, corporate governance and other financial matters. However, the Petitioner indicates that such duties would account for only 20% of his time. While performing non-qualifying tasks necessary to produce a product or service 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 an "activity" or "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). While the Petitioner asserts that the Director did not consider the Beneficiary's management of the organization as a whole or the involvement of additional sales and administrative staff in Canada, our conclusion that the Beneficiary does not qualify as a function manager is based in large part on the Petitioner's description of the duties he will perform in the United States, rather than on other factors such as the Petitioner's staffing levels or his level of authority within the organization.

B. Staffing and Organizational Structure

Beyond the required description of the job duties, USCIS reviews 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 claims that the Beneficiary qualifies as both a personnel manager and as a function manager. Personnel managers are required to primarily supervise and control the work of subordinate supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. 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. Section 101(a)(44)(iii) of the Act.

The record shows that the Petitioner employs a part-time administrative support employee, a regional sales manager responsible for the territory of Illinois and Wisconsin, and six independent sales agencies (each with assigned territories) that it pays on commission. The Director determined that the Petitioner had not shown that the subordinate employees are managers, supervisors, or professionals and therefore concluded that the Beneficiary's supervisory duties qualify as managerial duties.

On appeal, the Petitioner asserts that the Director failed to recognize that, due to the nature of the Petitioner's products, its regional sales manager and independent sales contractors are sales professionals, more comparable to sales engineers than to non-professional employees, such as retail salespersons. The Petitioner suggests that these employees must be able to assist customers with customization of orders and provides a summary description for the occupation of "Sales Engineers" from the U.S. Department of Labor's O*Net Online website.

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."

Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The Petitioner did not provide enough information about the sales duties to support its claim that its regional sales managers and sales agents are essentially working as sales engineers, and even if they are, the Petitioner stopped short of stating that it requires these workers to have a bachelor's degree in a related field. Therefore, the record does not support a conclusion that the Beneficiary's subordinates are professionals. It appears that the regional sales manager may assist the Beneficiary with selecting new sales people, but his role is not supervisory or managerial based on the brief description provided. The Petitioner has not shown that the Beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Further, as discussed above, the record does not show that the Petitioner's staff will relieve the Beneficiary from significant involvement in performing certain sales, marketing, market research, customer service, technical support, and training functions that do not qualify as managerial duties. The Beneficiary appears to be solely responsible for national accounts, and as discussed above, is expected to spend most of his time in the United States in client sales meetings and at trade shows and events. Again, we do not question that the Beneficiary would be responsible for managing the company as a whole, including both the U.S. and Canadian offices and staff, and overseeing sales in general; however, the record shows that his managerial responsibilities would not be his primary duties in the United States. This finding is not based on the size of the company but rather on the Petitioner's description of the Beneficiary's proposed duties.

The Petitioner cites to an unpublished decision in which we determined that a beneficiary qualified as a function manager despite finding that his subordinate employees were neither supervisors nor professionals. The Petitioner has not established that the facts of this petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on USCIS, unpublished decisions are not similarly binding.

Nevertheless, we agree with the Petitioner that supervision of non-professional employees does not preclude a finding that a beneficiary can qualify as a function manager, so long as such duties are not his primary duties. However, we have addressed the Beneficiary's eligibility as a function manager above and determined that the record does not demonstrate that he would allocate his time primarily to managerial duties associated with the sales function.

For these reasons, the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial capacity.

III. FOREIGN EMPLOYMENT

The Director also found that the Petitioner did not establish that the foreign entity has employed the Beneficiary in a managerial capacity. The Director determined that the duties described, which are very similar to those attributed to his proposed U.S. position, included a number of non-managerial tasks. The Director also determined that the record did not show that the Beneficiary has been managing an essential function or supervising a subordinate staff of professional, supervisory, or managerial employees.

On appeal, the Petitioner asserts that the Beneficiary's duties are primarily managerial "both in terms of management of the organization and of an essential function." The Petitioner further restates its argument that the Beneficiary can qualify as a function manager even if USCIS determines that his subordinates are not managers, supervisors, or professionals.

Upon review, the Petitioner has not overcome the Director's findings. The foreign entity provided a letter describing the Beneficiary's duties and, as noted, those duties are nearly identical to those provided for the U.S. position, with 55% of his time spent on "managing direct sales operations," 20% on overseeing financial and budget matters, 15% on attending trade shows, and 10% on

continuing education. Therefore, we incorporate, and will not repeat, our analysis of the U.S. position description. The position description included too many sales, research, customer support, training and marketing tasks for us to conclude that it involves primarily managerial duties.

We have also reviewed the Beneficiary's job description in the context of the foreign entity's organizational structure. The foreign entity employs a vice president operations, an inside/outside sales employee, an inside sales/controller whose duties are primarily bookkeeping related, a warehouse manager, and an independent sales agent. The vice president is depicted as a subordinate supervisor on the foreign entity's organizational chart, but the attached job descriptions indicate that the sales employees also report directly to the Beneficiary.

The vice president's duties are similar to those assigned to the U.S. regional sales manager. His duties also include overseeing import and export of products in Canada, and do not clearly include supervisory duties beyond a general statement that he "oversees the daily operations" of the foreign entity. Nor do the job duties attributed to the other Canadian staff establish that these employees are professional or managerial staff. The warehouse manager, despite his job title, has no claimed subordinates. Therefore, the record does not establish that the Beneficiary is employed abroad as a personnel manager.

Further, because the Beneficiary's job description includes a significant number of non-qualifying duties, the record does not establish that the Beneficiary's role with the foreign entity is primarily that of a function manager. Again, while we recognize the Beneficiary's authority over the organization as a whole and overall responsibility for sales, we cannot overlook his performance of a number of non-managerial duties that appear to account for at least half of his time. Whether the Beneficiary is a managerial employee turns on whether the Petitioner has sustained its burden of proving that his duties are "primarily" managerial. *See* section 101(a)(44)(A) of the Act. Here, while the foreign entity has staff to assist with various administrative and operational functions, it still requires the Beneficiary to perform direct sales, support, training, and research-oriented tasks that are not managerial in nature.

IV. CONCLUSION

The Petitioner has not established that it will employ the Beneficiary in a managerial capacity or that the foreign entity has employed the Beneficiary in a managerial capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of C-USA, Inc.*, ID# 346743 (AAO May 30, 2017)