U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-, INC.

DATE: MAY 31, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a seller and installer of solar energy systems, seeks to continue the Beneficiary's 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 petition concluding that the Petitioner did not establish, as required, that the Beneficiary was employed abroad would be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner states that the Beneficiary has been and will be employed in a managerial capacity. The Petitioner contends that the Director's analysis with regard to the proposed position is "misguided" because it does not take into account the Beneficiary's lack of an approved nonimmigrant visa, which precludes him from remaining in the United States to properly staff the U.S. organization. The Petitioner contends that the Director mistakenly relied on the definition of executive, rather than managerial, capacity to assess the Beneficiary's foreign employment and erroneously applied the statutory definition of managerial capacity to one of the Beneficiary's subordinates – the sales service manager – within the foreign entity.

Upon *de novo* review, we will dismiss the appeal. Although we find that the Petitioner submitted sufficient evidence to establish that the Beneficiary was employed abroad in a managerial or executive capacity,[1] we find that the Petitioner has not overcome the remaining ground for denial with regard to the Beneficiary's proposed employment.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized

[1] We will withdraw the Director's finding with respect to the Beneficiary's foreign employment.

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 or executive capacity. *Id.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. MANAGERIAL CAPACITY

The Petitioner claims that the Beneficiary will be employed in a managerial capacity; therefore, we will only address this claim in our decision.

"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 review 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 capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business, its staffing levels, and its organizational structure.

A. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we 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.

In the present matter, the Petitioner indicated that it was established in 2007, ten years prior to filing this petition, yet it claimed only three employees and no net annual income at the time of filing. In a supporting cover letter, the Petitioner stated that it has "grown progressively" as a result of a foreign-based production team upon which it relies to provide its products and services. The Petitioner explained that due to the foreign engagements of its full-time manager, it has been unable to reach its

"full potential" and has experienced a slow-down in its business development, which resulted in "stagnant sales." As a result, the Petitioner looks to the Beneficiary, as a key senior managerial employee of the foreign entity, to enhance its competitiveness in the California solar energy market based on his knowledge and experience with the foreign entity.

The Petitioner also provided a business plan in which it stated that the Beneficiary will operate with the assistance of two immediate subordinates – an office manager and a sales manager. The Petitioner indicated that more employees will be hired as the business grows. The business plan includes a "Financial Projection Table," which allocates $500,000 for salaries and wages in 2018, but does not provide a breakdown showing individual salaries for each position that will be part of the organization. The business plan also includes a "Planned Organizational Chart," which depicts the Beneficiary at the top of a hierarchy comprised of two departments – an administration department and a sales and marketing department – with a manager heading each department. The chart further indicates that the office manager, with a December 2017 projected date of hire, will oversee an independent payroll and tax service provider, an office assistant with a November 2017 projected date of hire, and an accounting clerk with a February 2018 projected date of hire. The sales department shows a similar hierarchy with the sales manager, also with a December 2017 projected date of hire, overseeing two sales specialists, a sales engineer, a marketing specialist with a January 2018 projected date of hire, and a shipping clerk with a February 2018 date of hire. The chart names a total of three employees – two sales specialists and a sales engineer – as the only staff the Petitioner had on the date this petition was filed; all other positions were projected to be filled at a future date.

In a request for evidence (RFE), the Director informed the Petitioner that the record did not adequately establish that the Beneficiary would be employed in a managerial or executive capacity and instructed the Petitioner to provide further evidence to show that the Beneficiary meets the four-prong statutory criteria.

In response, the Petitioner provided a statement claiming that the Beneficiary's proposed position would be in a managerial capacity. The Petitioner stressed that the Beneficiary would occupy the top-most position within its organization, oversee its operations and departments, and direct the employment of "qualified staff," including two managers and "other necessary positions" within the departments. Although the Petitioner acknowledged that the Beneficiary's two direct subordinate managers had not yet been hired, it contends that its organizational chart illustrates a staffing structure where the Beneficiary is the "highest level managerial position holder" and is only required to manage his immediate subordinates rather than all company employees. We note, however, that the projected date of hire for the Beneficiary's "immediate subordinates" was December 2017, approximately five months after this petition was filed. As such, the only subordinates the Beneficiary would have at his disposal are the two sales specialists and one sales engineer, as these were the only three positions that were filled at the time of filing.

In the denial decision, the Director concluded that the Petitioner did not establish that the Beneficiary would be employed in a managerial capacity. The Director found that the Petitioner

does not have a sufficient staff to relieve the Beneficiary from having to engage in performing its daily operational functions and further noted that the Petitioner's organizational structure does not establish that the Beneficiary would occupy a managerial position that would be higher than that of a first-line supervisor.

On appeal, the Petitioner accurately points out that staffing levels are only one factor of the analysis used to determine whether the Beneficiary will be acting in a managerial capacity. The Petitioner asks that we consider its reasonable needs in light of its overall purpose and stage of development. *See* section 101(a)(44)(C) of the Act. Having considered these factors within the scheme of the organization, we find that the Petitioner incorrectly relies on its current phase of development to justify its lack of a support staff. While the Petitioner's current organizational needs may be reasonable based on its phase of operation at the time of filing, those needs will not supersede the statutory criteria requiring the Beneficiary to "primarily" perform managerial job duties. *See* sections 101(a)(44)(A) of the Act. In the present matter, the Petitioner indicated that its business was not operating at an optimal level and had experienced a downturn due to certain organizational changes that were prompted by the needs of the foreign parent entity. As such, the petition is largely based on a projected support staff, including the Beneficiary's direct subordinates and an entire administrative staff, which would be hired no earlier than five months after the filing of this petition.

Although we acknowledge the Petitioner's submission of a business plan and the various business projections made therein, 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). In the present matter, the Petitioner had three employees at the time of filing; it therefore follows that these three employees, rather than the administrative and sales managers that are depicted in the projected organizational chart, would be the Beneficiary's direct subordinates at the time of filing. While the Petitioner provided job descriptions for these positions, it did not establish that the sales specialist and the sales engineer positions are supervisory, professional, or managerial in nature. *See* section 101(a)(44)(A)(ii) of the Act. Therefore, the Petitioner did not establish that at the time of filing, the Beneficiary would assume a position where he would oversee a staff of supervisory, professional, or managerial employees.

We further note that the Petitioner had no administrative staff at the time of filing. This leads us to question who, if not the Beneficiary, would perform its daily administrative tasks. While the Beneficiary is not required to allocate 100% of his time to managerial-level tasks, the Petitioner must establish that the non-qualifying tasks the Beneficiary would perform would only be 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 capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988). Given the Petitioner's limited support staff at the time of filing, we find that the Petitioner did not adequately establish that it would meet the immediate needs of the organization while relieving the Beneficiary from having to allocate his time primarily to performing its operational and administrative functions.

B. Duties

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). The Petitioner must also demonstrate 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.

Further, in order to establish eligibility, the Petitioner must provide a job description that clearly describes the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

In the initial cover letter, the Petitioner stated that the Beneficiary would direct its business development strategies, act as its liaison with the foreign entity, and ensure that the foreign entity's policies and decisions are effectively implemented. The Petitioner also provided a job duty breakdown indicating that the Beneficiary would allocate 7% of his time to each set of the below listed duties for a total of 77% of the Beneficiary's time:

- Directing operations through the development and implementation of policies, strategies, and objectives to meet business expansion and sales revenue goals;
- Overseeing "general administration," developing "directions and operational procedures," advising on solutions for "internal issues," and directing resource allocation and "cooperation with the parent company";
- Managing corporate governance, determining staffing requirements, establishing "major departments," and directing "employment of qualified staff";
- Formulating policies to maintain a strong sales and marketing team and reviewing sales and marketing "compensation, tools, planning, organization[,] and structure";
- Directing and monitoring the performance of department managers;
- Assessing and controlling risks in business development strategies;
- Establishing business strategies in accordance with market conditions, government policy, and technological developments;
- Directing resource allocation through budget control and cash flow management;
- Formulating plans and strategies that promote the company's products and services, encourage "customer rapport," and increase market share;
- Developing sales by directing "business relations" and collaborating with distributors; and
- Evaluation opportunities to expand into new markets and offer more products within the "California agricultural sector."

In response to the RFE, the Petitioner resubmitted the original job description, highlighting portions that it deemed indicative of the Beneficiary's managerial role in his proposed position. We find, however, that a majority of the job duties listed above are overly broad and could apply to any

manager acting in any business or industry. Further, they rely on broad terminology, such as "direct," "oversee," "establish," "manage," and "formulate" to describe the Beneficiary's proposed employment. These generalities convey no meaningful information about the Beneficiary's actual daily tasks and focus primarily on the Beneficiary's discretionary authority, rather than the actual tasks he would perform within the scope of the petitioning organization, which, at the time of filing, included no administrative staff to carry out basic operational functions and no managers to oversee the three-person staff comprising the Petitioner's sales and marketing department. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. As previously noted, the regulations require a detailed description of the Beneficiary's daily job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

We further note that the Beneficiary's management of the business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section 101(a)(44)(A) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. Sections 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 elements alone are not sufficient to establish that his actual duties would be primarily managerial in nature. 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). As such, a detailed job description is critical to a determination of whether the Beneficiary would be employed in a managerial capacity. Here, the record lacks a job description that delineates the Beneficiary's specific tasks based on the Petitioner's staffing and scope of operations at the time of filing.

On appeal, the Petitioner claims that upon his arrival to the United States under an approved visa petition, the Beneficiary will assume the task of hiring managers to staff the sales and marketing department, contending that hiring managerial employees indicates that the Beneficiary's position is managerial in nature. We find, however, that the Beneficiary's initial hiring responsibilities upon his arrival would be for the purpose of staffing an otherwise understaffed organization, which is not currently capable of supporting the Beneficiary in a managerial capacity. Although discretionary authority over personnel actions is an element of the definition of managerial capacity, in this instance, the Beneficiary would be carrying out this duty within the scope of an entity that currently operates at a rudimentary developmental stage.

Further, while the Petitioner asserts that the Beneficiary will not spend the majority of his time performing "day-to-day functions," it has not provided evidence to support this assertion, as it has not established that it has the ability to relieve him from having to perform primarily non-managerial tasks that are common to a company that has not progressed beyond an initial phase of development. As noted 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). As such, we cannot determine the Petitioner's eligibility based on facts and circumstances that did not yet exist at the time of filing. Here, we find that a number of the assigned duties were projected for a future position that the Beneficiary could not have held when the petition

was filed, as the Petitioner had not yet attained the organizational complexity or level of business activity that was required for the Beneficiary to be able to engage in duties that are primarily managerial in nature.

In sum, we find that the Petitioner made unsupported claims about the Beneficiary's proposed job duties and provided insufficient evidence to show that it was able to relieve the Beneficiary from having to allocate her time primarily to non-managerial job duties at the time the petition was filed. Therefore, we cannot conclude that the Beneficiary would be employed in a managerial capacity under an approved petition.

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. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.

Cite as *Matter of A-, Inc.*, ID# 1229148 (AAO May 31, 2018)