U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF USW-G- INC.

DATE: NOV. 1, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which is engaged in trade and retail sales of food, health, and nutrition products, seeks to continue the Beneficiary's temporary employment as its general manager under the L-1A nonimmigrant classification for intracompany transferees.[1] 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 record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner asserts that it established by a preponderance of the evidence that the Beneficiary will be employed in a managerial capacity with responsibility for managing an essential function of the organization.

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

I. LEGAL FRAMEWORK

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

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period January 12, 2017, until January 11, 2018. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation one year within the date of approval of the petition to support an executive or managerial position.

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii). This evidence must demonstrate that the beneficiary will be employed in a managerial or executive capacity, as defined at sections 101(a)(44)(A) and (B) of the Act, under the extended petition.

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The sole issue to be addressed is whether the Petitioner established that the Beneficiary will be employed in a managerial capacity, specifically as a function manager.[2]

"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.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G-Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

When examining the executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examines the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

[2] The Petitioner initially characterized the Beneficiary's duties as "executive and managerial" but in response to the Director's request for evidence, and on appeal, it specifically claims that he will be employed as a function manager. Therefore, we will restrict our analysis to whether the Beneficiary will be employed in a managerial capacity.

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. Duties

Based on the 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 at 1533.

At the time of filing, the Petitioner provided the following statement of the Beneficiary's duties:

> 20% Implement the Parent Company's resolutions, be fully responsible for the operation and management of [the Petitioner] and report work progress to the Parent Company on a regular basis;
> 20% Organize to discuss and decide on the company's development plan, business strategies, long-term and short-term work plans and major policy-making issues in day-to-day business operations;
> 20% Be responsible for grasping the latest development of health care products and nutritional supplements in the United States, timely provide feedback to the [parent] and make constructive suggestions for the Parent Company to promptly adjust the R&D and production of products;
> 15% Be fully responsible for the establishment of [the Petitioner] including office environment, office equipment, office equipment, departmental setup, recruitment of important positions, work systems, and procedures
> 15% Decide on the employment and dismissal of senior executives, timely, put on record, set up performance appraisal system, strengthen team building, and assess departmental managers and executives; and
> 10% Direct the company's daily management, sign the relevant agreements and contracts on behalf of the company, and other related matters.

This description was too broad to provide any meaningful insight into the nature of the Beneficiary's day-to-day tasks as general manager of a company that engages in the wholesale trade of food ingredients and nutritional supplements and operates a [redacted] retail store. General statements such as "be fully responsible for the operation and management of [the Petitioner]," "[d]irect the company's daily management," "[b]e fully responsible for the establishment" of the company, and "decide on the company's . . . major policy-making issues in day-to-day business operations," are nearly indistinguishable and simply convey the Beneficiary's level of authority within the company rather than describing his actual job duties. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The Petitioner did not provide sufficient detail or explanation of the Beneficiary's activities in the course of his daily routine. 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).

In response to the Director's request for evidence (RFE), the Petitioner characterized the Beneficiary's position as that of a function manager responsible for managing the essential function of developing the North American market for the Petitioner's Chinese parent company, which trades in food, health care products, and pharmaceutical ingredients. The Petitioner noted that it "imports, exports, and sells" the parent company's products to other sellers and customers in the United States.

The Petitioner re-submitted the same list of responsibilities stated above with some additions. For example, the Petitioner stated that the Beneficiary's responsibility for implementing the parent company's resolutions includes attending the parent company's board meetings, regularly reporting on the Petitioner's progress, and making recommendations to the parent company about how to increase its brand recognition in the United States. The Petitioner provided examples of an annual work report submitted to the parent company, the minutes of a meeting the Beneficiary attended by video conference, and a report on the Petitioner's purchase of a retail store. However, this additional information is not sufficiently detailed to convey the Beneficiary's actual day-to-day tasks or to explain how this responsibility requires 20% of his time.

With respect to the Beneficiary's responsibility for making decisions regarding the company's daily operations, the Petitioner elaborated by stating that this includes "final say" on the use of company funds and making decisions on store expansion and modification. The Petitioner provided copies of two one-page documents authored by the Beneficiary which detail guidelines for the operation of the retail store. Again, the Petitioner did not provide sufficient information to describe the Beneficiary's actual day-to-day tasks in support of its claim that such duties would require a significant portion of his time.

The Petitioner stated that the Beneficiary spends 20% of his time on "grasping the latest development of health care products" and notes that this included delegating market research duties to subordinates, providing feedback to the parent company, and meeting with executives of U.S. companies to introduce the parent company's brand. To corroborate these job duties, the Petitioner submitted market information reports ostensibly prepared by a subordinate employee, who is identified as a "merchandiser" or sales employee in the Petitioner's store. However, it is evident that she did not prepare these reports because they are dated in December 2017 and January 2018 and the Petitioner's payroll records show that this individual was last paid in October 2017. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, most of Petitioner's claimed staff were hired to work in the retail store and the Petitioner has not shown who would be available to assist the Beneficiary with this market research responsibility.

Finally, the Petitioner did not sufficiently elaborate on the Beneficiary's remaining responsibilities for "ongoing development and expansion," "directing the daily management of daily operation," or "supervising and controlling the work of managerial employees." While the Beneficiary may have

responsibility for assessing the performance of lower-level employees, the Petitioner did not supports its claim that he is continuously hiring managerial candidates, approving the purchase of office equipment, developing performance assessment systems, or setting up departments. As evidence of an expansion activity, the Petitioner noted that the Beneficiary led the "sales director and sales manager" to negotiate with an Indonesian company to act as its U.S. purchasing agent for various products that the foreign entity does not appear to sell. The Petitioner did not provide evidence of this arrangement, explain who carries out the purchasing duties, or explain how this fits within the essential function of expanding the North American market for its parent company's products.[3]

For all of these reasons, we agree with the Director's determination that the Petitioner has not provided sufficient insight into the specific tasks the Beneficiary will perform as part of his day-to-day routine. The descriptions convey the Beneficiary's discretionary decision-making authority and oversight over the operations as a whole, but are too broad to convey the types of duties he primarily performs on a daily basis. Further, many of the duties indicate that the Beneficiary either works closely with or delegates certain non-managerial tasks associated with the claimed essential function to subordinates. However, these subordinates are otherwise claimed to be engaged in the retail side of the business or were no longer employed by the Petitioner at the time of filing.

The fact that the Beneficiary will manage a business or an essential function as its senior employee 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. Even though 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, a broad overview of his responsibilities is insufficient to establish that his actual duties would be primarily managerial in nature as of the date of filing.

B. Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive 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. With respect to a function manager, the Petitioner must show that the Beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed, and that the company has sufficient staff to allow the Beneficiary to primarily manage the function, rather than engaging in the operational and administrative duties associated with the function.

As noted, the Petitioner operates a retail store (purchased in September 2017) and is engaged in the wholesale purchase and trade of nutritional supplements, food ingredients, and similar

[3] In fact, the Petitioner did not provide corroborating evidence that it sells its parent company's products to U.S. customers. The Petitioner provided evidence of purchase and sales transactions associated with its wholesale trade business, but these documents do not mention the foreign entity. Similarly, the Petitioner submitted evidence of the foreign entity's business transactions that does not appear to document any trade with the Petitioner.

products. The Petitioner claimed six employees at the time of filing and submitted an organizational chart which depicts the Beneficiary as general manager. The chart shows that he directly supervises a sales director, an outsourced accountant, and a "storeman." The sales director is depicted as supervising a sales manager, who oversees a sales employee (also identified as a merchandiser) and a service manager. The Petitioner claimed to have the same employees and structure at the time it responded to the Director's RFE.

The position description for the sales manager indicates that he manages the store. Although the service manager and merchandiser are depicted as his subordinates, and the Petitioner indicates that they work in the store, their duties as described in the record did not reflect duties associated with retail sales. In fact, the Petitioner's claims regarding both of these employees are lacking credibility. For example, the Petitioner stated that the merchandiser assists the "marketing & sales manager" to develop sales policies and sales management systems, collects and reports marketing information and discusses the expansion of the U.S. market, contacts and visits customers on a regular basis, and participates in industry exhibitions. The Petitioner claimed that the employee had a college degree, but the individual who held the position was 19 years old. The employment offer for this individual indicates that she was hired at a wage of $15 per hour and would report directly to the Beneficiary, not the sales manager. As noted the Petitioner's payroll evidence indicates that the Petitioner hired this employee at an hourly rate of $10.50, and she left the company in October 2017 after working part-time for six weeks. If she worked in the store as claimed, she more likely than not served as a cashier.

There are also credibility issues with respect to the Petitioner's claimed "service manager" employee. This employee, who is also claimed to work in the store, was to provide "after sales services in all dimensions," to draw up industry trade show plans, and to solve after-sales problems. These duties are not consistent with the nature of the Petitioner's business or this employee's claimed assignment. Although the Petitioner claims that this position reports to the sales manager, an employment offer letter indicates that the position reports to the Beneficiary. The stated wage on the employment offer is $12.00, but the payroll records for the employee show that he earned $10.50. Finally, although the Petitioner claimed to employ this individual at the time of filing in January 2018 and at the time of the RFE response in April 2018, the Petitioner's evidence shows that it hired him in September 2017 and he left the company by October 2017, after earning a total of $360 in wages. Again, doubt cast on any aspect of a petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Ho*, 19 I&N Dec. at 591.

The Petitioner's payroll evidence shows that the company's actual staffing at the time of filing included the sales manager who worked 40 hours per week and the "storeman," who worked 20 hours per week. Another employee worked 20 hours per week, but his job title and job duties are not identified in the record because the Petitioner did not include him on its organizational chart or otherwise mention him. Nevertheless, the ADP paystubs, which we find to be credible, show that this individual was hired during the pay period that ended on December 30 and still employed at the time of filing.

There is also some confusion in the record regarding the actual role held by [redacted] the claimed sales director. The record reflects that this individual signed various company documents in the capacity of "president." The Petitioner also submitted a copy of its parent company's meeting minutes (dated in 2015) which name [redacted] as the parent company's chairman and which note his or her intended transfer to the United States subsidiary. The evidence also reflects that this individual received a higher salary than the Beneficiary throughout 2017. The Petitioner indicates that the sales director is primarily focused on the sale of the parent company's products in the United States, with some oversight of the [redacted] store, but the Petitioner did not clearly define the duties of this position. As a result of these facts and potential inconsistencies, there is some question as to whether the Beneficiary would actually supervise this individual and we cannot determine that he is at the most senior level with respect to the U.S. market expansion function. Even if we determined that he does operate at a senior level with respect to that function, the Petitioner would still need to demonstrate that he would primarily perform managerial duties. As discussed further below, the Petitioner has not met that burden.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, it is appropriate to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

The Petitioner operates a retail store and engages in wholesale trade of food supplements and ingredients. While the Petitioner claims that the Beneficiary is primarily engaged in managing the essential function of expanding the North American market for the parent company's products, the record does not support the Petitioner's claims that it has a reasonable need for him to primarily engage in these duties, which as noted, were described in only general terms.

First, the Petitioner has not submitted probative supporting evidence to support its claim that it even sells the foreign entity's products, as the foreign entity's name does not appear on any business transactions in the record. Rather, the evidence shows that the Petitioner sources its products for wholesale from third parties.

Further, the Petitioner has not shown that either line of business carried out by the company is sufficiently staffed. The Petitioner states that its [redacted] store is open for 68 hours per week. The sales manager appear to work in the store 40 hours per week, and the "storeman" appears to work part-time in the stockroom. There is one other part-time employee whose duties have not been identified, and the Petitioner appears to have misrepresented its ongoing employment of two staff members who left months before the petition was filed. We cannot determine, based on these facts, that one full time and one or two part-time employees perform all operational and administrative tasks associated with the retail store. Rather, it is reasonable to believe that someone else, such as

the Beneficiary or the sales director, must perform the duties of the manager when he is not on duty in order to keep the store minimally staffed and open for business.

The Petitioner's wholesale trade of food ingredients and nutritional supplements accounted for the vast majority of its claimed income in 2017. The Petitioner also claims that it acts as the exclusive purchaser and exporter of various products for an Indonesian company, but has not stated who performs duties associated with this contract. It has not credibly supported its claim that the retail store employees are engaged in purchasing, sales, marketing, logistics, market research, or any other aspect of the wholesale side of the business, including its routine administrative and financial matters. Nor has the Petitioner established how the sales director alone would be able to relieve the Beneficiary from significant involvement in the non-managerial aspects of this side of the business, particularly given the likely need for one or both of these two senior staff to participate in the day-to-day store operations.

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 duties. *See* section 101(a)(44) of the Act. Whether a beneficiary is a "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).

The Petitioner does not credibly document what proportion of the Beneficiary's duties would be managerial functions and what proportion would be non-managerial. However, based on the nature of the company, its two lines of business, and its documented staffing levels, the Petitioner has not shown that it requires the Beneficiary to *primarily* perform the higher level planning, policy-making and business development duties attributed to him or that he would primarily manage the claimed essential function. Rather, it appears that he would more likely than not be required to perform a variety of non-managerial duties necessary for the day-to-day operations of the wholesale trade and retail businesses. Accordingly, the Petitioner has not established that he will be employed in a managerial capacity.

III. CONCLUSION

The appeal will be dismissed because 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 USW-G- Inc.*, ID# 1767366 (AAO Nov. 1, 2018)