U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-T- CO., LTD.

DATE: NOV. 6, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a provider of computer graphics services, seeks to continue the Beneficiary's employment as its general manager under the L-1A nonimmigrant classification for intracompany transferees.[1] *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 new office extension petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity.

On appeal, the Petitioner submits a brief claiming that the Beneficiary manages subordinates, delegates tasks, and oversees the company's overall growth. The Petitioner contends that it does not yet have the funds to hire more staff than it currently has based on its early stage of development.

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 April 21, 2015, through April 20, 2016. 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).

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity.

The statute defines the term "managerial capacity" as an assignment in which an 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; has the authority to hire and fire or recommend those as well as other 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 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 statute defines an "executive capacity" as an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

A. Staffing

USCIS reviews the totality of the record when examining a beneficiary's claimed executive capacity, including the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

In support of the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it was set up by its Chinese parent company for the purpose of expanding the client base and enhancing the services offered to existing clients. The initial supporting evidence included an organizational chart, which shows that the Beneficiary directly supervises a sales manager, a marketing manager, and an administrative manager. The chart also shows two sales representatives as the sales manager's subordinates, an outsourced certified public accountant (CPA) as the administrative manager's subordinate, and no subordinates for the marketing manager. The chart was accompanied by job descriptions for each of the listed positions.

Despite the organizational chart's depiction of the administrative manager as overseeing an outsourced CPA, the corresponding job description of the administrative manager indicates that this position would "[c]ommunicate with" the outsourced position, but does not list any duties that would support the organizational chart's depiction of the administrative manager in a supervisory role with respect to another employee. The marketing manager is not depicted on the organizational chart as overseeing anyone, and therefore, the organizational chart does not reflect that it is a supervisory or managerial position. In any event, the job description indicates that this position will carry out the Petitioner's marketing duties, but will not actually oversee the work of subordinate employees. Therefore, the record did not establish that either the marketing manager or the administrative manager qualifies as a supervisory or managerial employee.[2]

In a request for evidence (RFE), the Director instructed the Petitioner to describe its staffing composition in order to determine whom the Beneficiary would oversee and who would perform the services offered to the Petitioner's clients. The Petitioner's response included a new organizational chart that contained different information about the Beneficiary's subordinates than the information contained in the original chart. Namely, the new chart indicated that the Beneficiary's proposed position would involve oversight of an overseas production department that is part of the Chinese parent entity. The remainder of the chart depicted marketing, administration, and sales departments, which were all included in the original organizational chart. As common to both charts, the marketing manager appears to comprise the entire marketing department. The new chart depicts two vacant market researcher positions and now includes two outsourced positions – a CPA and an attorney – in the administrative department; the sales department indicates that the sales manager

[2] We acknowledge that the organizational chart depicts the sales manager position as overseeing two subordinates; however, the fact that one of the three claimed subordinates is managerial, professional, or supervisory does not lead to a conclusion that the Beneficiary *primarily* manages a managerial, professional, or supervisory staff.

position is currently vacant, but will eventually oversee a sales and a project team to be comprised of three sales representatives and two project assistants, respectively.

In the denial decision, the Director correctly noted that the marketing department had no employees for the marketing manager to oversee and further pointed out that the administrative department's only in-house employee was the department manager. The Director found that the Beneficiary would act as a first-line supervisor, whose duties would not involve overseeing subordinates that are supervisory or professional employees. The Director also properly cautioned the Petitioner that it may not make material changes in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

On appeal, the Petitioner claims that it "had to reconfigure the structure" of its organization, which experienced changes as a result of "normal layoffs," including terminating the employment of the sales manager, who was included in the original organizational chart. The Petitioner further contends that changes are to be expected within the context of a growing company. We accept that these types of staffing changes are not uncommon in any given business and find it reasonable for an entity to fire and hire employees from time to time. However, we question the Petitioner's omission of an entire production department from the organizational chart, which was presumably submitted to show the Petitioner's staffing composition at the time of filing. It is also unclear why the Petitioner chose not have this information reflected in the original organizational chart and why it did not include the production employees' job descriptions with the other employee job descriptions that were provided in support of the petition. If, as the Petitioner now claims, the production department was part of its organization all along, it should have provided us with an organizational chart that accurately reflected its entire staffing composition. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Furthermore, even if the Petitioner had included the production department in the original organizational chart, we would still be faced with the lack of overall clarity as to the logistical obstacles associated with managing a staff that is employed by an entirely separate entity that operates overseas. On appeal, the Petitioner claims that the Beneficiary would only oversee the work of the production department's managers, rather than the entire production staff. However, this claim does not explain how the Beneficiary would manage the overseas production managers and what daily or weekly tasks would be involved in such oversight. Nor does the Petitioner specify how the overseas staff would relieve the Beneficiary from having to engage in primarily nonmanagerial or nonexecutive job duties. Moreover, the Petitioner did not provide evidence to show that the foreign entity's production staff has performed or would perform work that pertains specifically to the U.S. organization and its clients. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The record also lacks sufficient evidence to establish that the marketing manager and administrative manager are professional positions. 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.[3] In doing so, we focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity.

Here, the Petitioner has not established that a bachelor's degree is actually necessary to perform the duties of an administrative or a marketing manager, nor is there any evidence to show that the two individuals who occupied these respective positions at the time of filing actually possessed bachelor's degrees.[4]

Lastly, we do not question the Beneficiary's heightened level in the organization as discretionary authority, which the Petitioner points to on appeal. However, we find that this factor must be considered alongside other evidence, including the Beneficiary's job duties, which we will discuss below, and the scope of the organization. In doing so, we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in denying a visa petition for classification as a multinational manager or executive. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the nonmanagerial or nonexecutive 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).

In the present matter, the Petitioner did not establish that the subordinate staff that was in place at the time of filing would be sufficient to relieve the Beneficiary from significant involvement in the day-to-day operations of its computer graphics business. As such, the Petitioner has not supported its claim that the Beneficiary performs primarily managerial or executive job duties or that its organization has a reasonable need for a managerial employee who would spend her time primarily managing the company and its managerial, professional, or supervisory staff. For the same reasons, we also find that the Petitioner has not established that the Beneficiary would primarily direct the management of the organization or focus on the broad policies and goals of that organization, as required of someone that is employed in an executive capacity.

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[3] *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."

[4] Although the Petitioner may have undergone personnel changes since the filing of the petition, any enhancements to the Petitioner's organizational structure that took place after the petition was filed are not considered in determining eligibility. 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).

B. Duties

When examining the managerial or executive capacity of the Beneficiary, we also look to the Petitioner's description of the job duties. The Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Based on the statutory 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 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 support of the Form I-129, the Petitioner provided a breakdown of the duties the Beneficiary carried out during the company's first year of operation and included a separate breakdown of the duties the Beneficiary would perform during the Petitioner's next phase of operation. The Petitioner indicated the following breakdown:

- 30% of the Beneficiary's time would be allocated to overseeing its "overall performance," advising subordinate managers, and making discretionary decisions regarding matters of corporate policy, costs, investments, contractual agreements with business partners, and personnel issues;
- 30% of the Beneficiary's time would be allocated to supervising the work of subordinate managers by assigning them tasks, reviewing their work schedules, and monitoring their respective performances;
- 20% of the Beneficiary's time would be spent creating a financial plan, setting a budget, and determining which projects to fund;
- 10% of the Beneficiary's time would be spent directing, planning, and implementing the Petitioner's policies, objectives, and activities; and
- 10% of the Beneficiary's time would be spent liaising with the Chinese parent company's executives.

As discussed above, while the Petitioner also provided an organizational chart depicting three employees with managerial position titles as the Beneficiary's subordinates, the record does not adequately demonstrate that the duties of the marketing and administrative managers accurately reflect their respective managerial position titles.

In the RFE, the Petitioner was instructed to provide a detailed description of the Beneficiary's proposed job duties demonstrating that she would be employed in a managerial or executive capacity. In response, the Petitioner provided an additional duty breakdown that is somewhat similar to the original job description. The Petitioner stated that the Beneficiary would allocate her time as follows:

- 30% percent to personnel management, which would include supervising and monitoring the work of managerial employees and coordinating activities among the Petitioner's administration, marketing, and sales departments;
- 20% to creating a financial plan and setting a budget to decide which projects to fund based on these financial considerations. reviewing financial statements, and ensuring that proper "cost control mechanism[s]" are in place and that they are enforced by department managers;
- 20% to developing new designs and meeting with the marketing manager to make sure clients are offered designs in line with current market trends, meeting with the sales manager to ensure timely execution of contracts, and developing new market opportunities to increase the client base; and
- The remaining 30% to defining and implementing policies, negotiating contracts with "major clients," and acting as chief liaison between the Petitioner and the foreign parent entity.

In the denial decision, the Director found that the Beneficiary would act as a first-line supervisor, whose duties would not involve overseeing subordinates that are supervisory or professional employees.

In light of our prior observations pertaining to the Petitioner's original organizational chart and corresponding employee job descriptions, we agree with the Director's finding that the record does not demonstrate that the Beneficiary would allocate her time primarily to overseeing the work of supervisory, professional, or managerial employees. As such, any of the Beneficiary's tasks that are associated with overseeing nonsupervisory, nonprofessional, or nonmanagerial employees would not be deemed as tasks performed in a managerial capacity. Likewise, a beneficiary who is tasked with overseeing a nonmanagerial or nonprofessional staff would not be deemed as directing the management of the organization and thus would also not qualify as someone who is employed in an executive capacity.

We also find that the Petitioner provided an overly broad job description that does not adequately delineate the actual tasks the Beneficiary would carry out in the course of the Petitioner's daily operation. 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 the present matter, the Petitioner does not clarify what specific underlying tasks would be involved in making financial plans and budgets; nor is it apparent that conducting a "[p]eriodic review and analysis" of the Petitioner's financial statements, establishing operational budgets, and putting cost control mechanisms in place are tasks that the Beneficiary would need to perform regularly on a daily or weekly basis to meet the Petitioner's business needs. Likewise, the Petitioner did not specify what actions the Beneficiary would carry out to ensure that the company stays current with its design offerings and meets its contractual goals and timeframes. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; as previously indicated, the regulations require a detailed description of the Beneficiary's daily job duties. Here, the Petitioner has not provided sufficient detail or explanation of the Beneficiary's activities in the course of their daily routine.

In sum, the record indicates that the Beneficiary would allocate her time, in large part, to overseeing a staff that was not primarily comprised of supervisory, professional, or managerial employees at the time of filing. The Petitioner also provided a deficient job description that does not disclose the Beneficiary's actual job duties and thus precludes us from finding that the Beneficiary would spend the primary portion of her time performing tasks of a managerial or executive nature.

III. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of L-T- Co., Ltd.*, ID# 748497 (AAO Nov. 6, 2017)