U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-M-, INC.

DATE: NOV. 8, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a distributor of lithographic machines and spare parts, seeks to continue the Beneficiary's temporary employment as its director of operations 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 petition, concluding that the record did not establish, as required, that the Beneficiary would be employed in a managerial capacity under the extended petition.[2]

On appeal, the Petitioner asserts that the Beneficiary primarily manages the Petitioner's marketing function and contends that, as a function manager, the Beneficiary is not required to supervise employees. The Petitioner further argues that its staffing levels are irrelevant in this case and cannot be used as a basis for denying L-1A classification to a function manager.

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.*

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[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period March 10, 2015, until March 9, 2017. 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.

[2] The Petitioner does not claim that it would employ the Beneficiary in an executive capacity.

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).

"Managerial capacity" means as 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.

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) takes 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 A MANAGERIAL CAPACITY

In the denial decision, the Director concluded that the Beneficiary's job description[3] was vague and was not supported by evidence corroborating the Petitioner's claims that he performs the listed duties. The Director also reviewed the Petitioner's staffing levels, and, noting that the Petitioner had hired just one employee during its initial year of operations, found that it did not establish that it had grown to the point where it could support a managerial position.

On appeal, the Petitioner cites to several published sources addressing "functional managers" and claims that it is "obvious" based on the Beneficiary's position description that he is primarily managing the Petitioner's marketing function, notwithstanding his "director of operations" job title. The Petitioner argues that there is no need for him to supervise subordinate staff as a function manager and notes that the company's other employee "can certainly take care of whatever non-managerial duties [the Petitioner] requires for its operation." Finally, the Petitioner claims that the Director did not request corroborating evidence of the Beneficiary's job duties and should not have denied the petition on the grounds that it did not provide such evidence.

[3] The job description referenced in the Director's decision is the Petitioner's description of the Beneficiary's duties during the company's initial year of operations. As this is a request for an extension of the Beneficiary's stay, the Director should have addressed the Petitioner's separate description of the Beneficiary's intended duties under the extended petition. As we review the record on a *de novo* basis, we will address that position description in our discussion below.

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

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Duties

Based on the definitions 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.

The Petitioner, which sells and distributes lithographic machines and spare parts, seeks to continue the Beneficiary's employment as its director of operations. In a supporting letter, the Petitioner stated that the Beneficiary will perform the following duties under the extended petition:

> [I]dentify potential new clients for the company's products and services; establish new business relationships throughout the U.S.; and negotiate terms of agreements to be entered into with new clients and vendors in accordance with the company's business plan. [The Beneficiary] will have full discretion in the development and implementation of marketing strategies and policies in order to streamline and maximize the company's growth. He will be responsible for distribution channel analysis and development; import/export development; and will interview and hire new employees as needed to ensure the company is adequately staffed.

The Petitioner indicated that the Beneficiary had recently hired an employee to perform market research, expected to hire an office administration employee "soon," and would hire positions in warehouse and logistics and customer service eventually, as the company grows.

Based on this brief description, it appears that the Beneficiary would perform a mix of managerial and non-managerial purchasing, sales, and marketing duties. For example, while the Petitioner stated that the Beneficiary is responsible for developing and implementing strategies and policies in these areas, he is also responsible for promoting the company to potential new clients and entering sales and purchase agreements. Further, based on the Petitioner's statement that it has not yet hired warehouse or logistics staff to assist him, it appeared that his duties related to distribution channels

and import/export development would also include non-qualifying duties. The description was insufficient to establish that the Beneficiary's role would involve primarily managerial duties.

In a request for evidence, the Director asked the Petitioner to submit a more detailed statement describing the Beneficiary's duties during the previous year and the duties he would perform under the extended petition. Although the Petitioner claims that the Director did not request corroborating evidence related to the Beneficiary's duties, we note that she advised that the Petitioner "may also submit any evidence in support of your statement that you deem appropriate." The Petitioner submitted two separate letters in response – one describing the Beneficiary's duties in the previous year, and one describing the duties he would continue to perform under the extended petition. The latter description includes the following duties:

> The Beneficiary will dedicate 60% of his time to the following duties:
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> Design, formulation and implementation of strategies to reposition the company at the commercial level, as a reliable and competitive company with excellent products.
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> Conduct market research in order to establishing the key aspects for competing, and design strategies for the company to be competitive in the industry and generate an increase in sales.
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> Will seek to establish relationships with approximately 100 potential customers to purchase of a minimum 30 units in graphic arts machinery with a five-time annual frequency. [redacted] was hired . . . to support marketing and sales, which will be supported by the company's advertising strategies. Greater use will be made of the warehouse in U.S. for the management of equipment and spare parts which will support the business goal and to cover the U.S. market.

The Petitioner indicated the remaining 40% of the Beneficiary's time will be allocated to: "Analysis of the logistics and plant capacity to make an investment which will improve the company's shipping capacity." The Petitioner noted that, "to fulfill this objective" the Beneficiary would hire a person "skilled in logistics management" to carry out the analysis and implement measures to improve the purchasing and shipping capacity from the United States to Latin American countries.

This position description does not add additional clarity to the original job description, nor does it establish that the Beneficiary's duties, as of the date of filing, would be primarily managerial in nature. As with the earlier position description, the Petitioner indicates that the Beneficiary's responsibilities will include managerial duties such as formulating strategies, alongside non-managerial duties, such as conducting market research and direct involvement in promoting and selling the company's products to customers. While such duties are necessary for the company's commercial development in a new market, the Petitioner did not establish how such duties are managerial. The Petitioner's claim that this 60% of the Beneficiary's time would be wholly devoted to managing marketing activities is not persuasive.

Similarly, even though the Beneficiary has authority to make decisions regarding the company's logistics and distribution operations, the Petitioner has not shown that his actual duties in this area, requiring 40% of his time, were primarily managerial at the end of the Petitioner's initial year of operations. The Petitioner indicated that this portion of the Beneficiary's time would be allocated to hiring and overseeing a logistics manager in the future, but did not describe the Beneficiary's actual duties at the time of filing as they relate to the company's logistics and distribution function. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). The Petitioner stated that the proposed logistics manager position will be responsible for coordinating the supply chain, optimizing transport of goods, and planning the purchasing, transportation, warehousing, and distribution activities. The Petitioner has not established who, if not the Beneficiary, was performing these duties when it filed the petition in March 2017.

Even though the Beneficiary holds the senior position within the company, the fact that the Beneficiary will manage a 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. Section 101(A)(44)(A) of the Act.

B. Staffing

The Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it had two employees when the petition was filed. Those employees include the Beneficiary and one other employee hired to "perform market research."

The Petitioner later stated that the Beneficiary's subordinate, whose job title was never provided, performs the following duties: prepares sales plans and budgets; establishes goals and objectives in the short and long-term; calculates demand and forecasts sales; and designs, formulates and implements repositioning strategies. The Petitioner does not indicate that this employee actually assists the Beneficiary with day-to-day market research and sales activities and instead suggests that her role mainly involves developing forecasts, strategies and goals, duties which overlap with the Beneficiary's own claimed management-level sales duties. This job description tends to further support a finding that the Beneficiary himself would be marketing and selling the Petitioner's products to customers.

Further, as noted, the Petitioner indicates that it intends to hire additional staff to perform administrative, warehouse, customer service, and logistics duties in the future, but it has not indicated who currently performs these operational functions for the company. The Petitioner's claim on appeal that the Beneficiary's sole subordinate "can certainly take care of whatever non-managerial duties" the company may require is not persuasive, since this subordinate's job description did not include the administrative, warehouse, customer service, or logistics activities of the company.

On appeal, the Petitioner objects to the Director's discussion of its staffing levels and asserts that the Beneficiary "obviously" acts as a function manager. The Petitioner contends that the Beneficiary primarily manages the essential marketing function, and states that the Director overlooked the nature of his function manager role because his job title is "Director of Operations." While we agree that any analysis of a beneficiary's position should be based on his or her actual duties and not on the job title, the record here does not establish that the Beneficiary is primarily managing the Petitioner's marketing 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 describe 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).

Although the Petitioner refers to various published definitions of "functional manager," we are bound to apply the definition of "managerial capacity" found at section 101(a)(44)(A) of the Act and the criteria noted above when evaluating whether a given beneficiary is employed in a qualifying capacity for the purposes of this visa classification.

The Petitioner indicates that the Beneficiary will allocate 60% of his time to managing the marketing function under the extended petition; however, as discussed, his actual duties as described in the record would include non-managerial sales and marketing tasks, such as performing market research and entering sales agreements. In addition, the Beneficiary would be required to be significantly involved in most operational areas of the company given the company's structure at the time the petition was filed. 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 function manager turns in part on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See Z-A-*, Adopted Decision 2016-02 (AAO Apr. 14, 2016).

In addition, the Petitioner emphasizes that we should not consider staffing levels when evaluating whether a given employee is a function manager. While we do not require evidence that the Beneficiary directly supervises subordinates, we must evaluate whether someone other than the Beneficiary is available to perform the non-qualifying duties associated with the function he is claimed to manage as well as whether the Petitioner has staff to perform the other operational activities inherent to its business.

Here, the Beneficiary is responsible not only for marketing but for the organization as a whole. The Petitioner has not established that the one-person support staff in place at the time of filing was sufficient to relieve the Beneficiary from significant involvement in the day-to-day operations of the company. We must take into account the reasonable needs of the organization and a company's size alone may not be the only factor in denying an L-1A classification petition. *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 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 Petitioner does not claim that the Beneficiary's sole subordinate actually performs the company's day-to-day sales and marketing duties or any other operational tasks. As noted, the Petitioner states that it expects to hire a logistics manager, an office administrator, and warehouse and customer service staff in the future, but has not stated who, if not the Beneficiary, was performing these activities when the petition was filed. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. If a business does not have the necessary staffing after one year to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible for an extension.

III. CONCLUSION

The appeal must be dismissed as 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 V-M-, Inc.*, ID# 791280 (AAO Nov. 8, 2017)