U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-E-D-

DATE: NOV. 14, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a nonprofit organization which promotes trade and investment in China's [redacted] seeks to temporarily employ the Beneficiary as assistant director of its new office[1] under the L-1A nonimmigrant classification for intracompany transferees. 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: (1) the new office will support a managerial or executive position within one year of approval of the petition, and (2) the new office will begin doing business within one year.

The matter is now before us on appeal. On appeal, the Petitioner submits advisory statements and asserts that the Director erred by making findings that the record does not support.

Upon *de novo* review, we will dismiss the appeal. We will, however, withdraw the Director's finding that the Petitioner has not established that the new office will begin doing business within one year. The entity's provision of services to government and business entities in China and the United States, with the purpose of facilitating investment between the two countries, qualifies as doing business under the existing regulations.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). In addition, the beneficiary must

[1] The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

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 submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

II. PROPOSED U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial capacity within one year. Initially, the Petitioner referred to the Beneficiary's intended position as "managerial or executive," but on appeal the Petitioner focuses exclusively on the requirements of a managerial capacity. Therefore, we restrict our analysis to whether the Petitioner will employ the Beneficiary in a managerial capacity.

"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.

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). 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 1533.

When examining the managerial capacity of a given beneficiary, we will 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. *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 and its staffing levels.

A. Duties

The Petitioner initially submitted a two-page job description. Later, in response to a request for evidence, the Petitioner expanded that description to five pages. The Beneficiary's intended duties are summarized below, with the approximate percentage of time to be devoted to each:

Duty	Time
Assist the director in establishing the company's goals, objectives, and policies, based on reports and other documents prepared by senior assistants	2.5%
Recommend organizational structure; interview job applicants and evaluate employees; make recommendations regarding hiring, firing, and promotions	2.5%
Direct and supervise the work of staff members	20%
Coordinate and provide guidance to six members of the foreign parent entity's Department of European and American Affairs; assign projects to two deputy department chiefs; review and approve their final work products	5%
Interview and consult with professional service providers and make recommendations regarding their hiring	5%
Coordinate investment and trade promotion programs between the Petitioner and its foreign parent entity	5%
Advise and provide guidance to municipal governments in relating to their investment and trade promotion activities in the area	5%
Participate in conferences and seminars organized or sponsored by the Petitioner	15%
Host or participate in official meetings between government, business, and academic officials of and the United States and neighboring countries	15%
Meet with government officials and business and academic leaders in the United States and neighboring countries	10%
Meet with investment and trade promotion officials in the United States and neighboring countries	10%
Prepare the Petitioner's annual reports for the director's approval	2.5%
Prepare the Petitioner's annual operational and financial plans for the director's approval	2.5%

The Director found that 70% of the Beneficiary's intended duties, as initially described, appear to be non-qualifying. These duties included providing advice and guidance, participating in meetings, and preparing reports and plans. On appeal, the Petitioner states that the Director stated that conclusion "without any explanation," and that the record contradicts the Director's finding.

The Petitioner submits letters from two university faculty members, both of whom repeat the Beneficiary's job description and assert that the Beneficiary's intended position meets the requirements of a managerial capacity. U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinion statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination

regarding a foreign national's eligibility. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.* We will discuss these letters in more detail below, in the context of the Petitioner's staffing.

Job descriptions in the record indicate that the Beneficiary would share many of the duties listed above, such as coordinating with foreign staff, participating in meetings, and organizing conferences, with some of his subordinates. As such, those duties cannot be inherently managerial.

The Petitioner does not explain how providing guidance and advice to government and business officials is the work of a manager, rather than someone (such as a consultant) who provides such services directly.

One of the Beneficiary's most significant responsibilities concerns his supervision of subordinate staff. As we will explain below, such supervision is managerial only if the employees supervised are managers, supervisors, or professionals, and the Petitioner has not shown this to be the case.

The Petitioner has not established that the Beneficiary's duties during the first year would be primarily those of a manager.

B. Staffing

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 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. 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) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*4*). If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(*2*)-(*3*).

A proposed organizational chart showed "10–15 Staff Members" in the United States and "Six (6) Supporting Staff Members" abroad.

1. Foreign Staffing

The Petitioner submitted a list of six foreign workers at the European and American Affairs Department of the [redacted] Board of Investment Promotion to whom, the Petitioner stated, the Beneficiary will provide guidance and coordination: two deputy chiefs; two senior staff members; and two staff members.

In an adopted decision, we found that a beneficiary's authority over foreign staff who "exclusively support the Beneficiary's work" may be considered part of that beneficiary's managerial capacity in the United States. *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 2 (AAO Apr. 14, 2016). In this instance, however, the Petitioner states that the foreign staff members have been "assigned to support the [Petitioner's] operations," but has not shown that the foreign staff exclusively support the Beneficiary's work, or even that the Beneficiary has managerial or supervisory authority over the foreign staff.

In his position abroad, the Beneficiary's duties included "[m]anaging and supervising the work of deputy chiefs and staff members," but in the United States he would be "[c]oordinating the work of and providing guidance to" those same individuals. Guidance and coordination are not the same as management and supervision.

The foreign staff members would not exclusively support the petitioning entity. Instead, they "support the operations of overseas offices" and their stated responsibility encompasses "programs in Europe and Americas," not just the Petitioner's office in Los Angeles. The Beneficiary's job description indicated that providing "daily support to [the Petitioner's] operations" is only "[p]art of the 6 staff members' assignments."

The Petitioner has not shown that the foreign staff would continue to be subordinate to the Beneficiary in his intended U.S. position. Rather, there would be a limited degree of continuing contact between the Beneficiary and the foreign staff in those areas where their responsibilities overlap.

2. U.S. Staffing

The Petitioner intends to eventually employ up to 15 people subordinate to the Beneficiary, but the requirements for a new office petition limit consideration to the first year of planned staffing. The Petitioner stated its intention to fill eight positions during the first year of operations, including the following six positions subordinate to the Beneficiary. On appeal, the Petitioner states that the Beneficiary "will supervise and control the work of 10-15 staff members," but the Petitioner also acknowledges that it "plans to hire six (6) employees" "during Year One." Longer-term hiring plans cannot establish eligibility under a new office petition.

The proposed duties are summarized beneath each position title:

1 Senior Assistant

- Assist in managing a division, branch, or project
- Manage and supervise research, data collection, and analysis
- Assist in planning, organizing, and hosting programs
- Draft speeches for the Beneficiary and the director
- Participate in conferences, seminars, and events

- Arrange and participate in meetings between business leaders and government officials
- Assist in making assignments and providing guidance to foreign staff members
- Draft project plans, summaries, and reports

1 Business Development Specialist
- Collect, analyze, and organize research
- Advise companies and investors in the United States and China regarding foreign investment and trade
- Communicate and consult with government agencies in the United States and China
- Arrange and participate in meetings between business leaders and government officials
- Prepare project analysis reports

1 Market and Investment Environment Research Analyst
- Research, collect, analyze, organize, and maintain data regarding market and economic conditions
- Prepare reports and illustrations

1 Legal Research Analyst
- Research, collect, analyze, organize, and maintain data regarding laws, regulations, policies and practices
- Prepare reports
- Assist with interactions with outside counsel

2 Executive Assistants/Clerks
- Bookkeeping and general clerical functions

The Petitioner did not establish that any of these subordinate employees would have managerial or supervisory responsibilities over other employees. The Petitioner stated that the senior assistant would manage and supervise research and data collection, but this is not the same as saying that the individual would primarily have supervisory oversight over the individuals performing those functions.

To determine whether the Beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a United States 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."

The Petitioner asserted that the specialist and analyst positions would be professional, but did not establish that the positions require at least a bachelor's degree.

The Director found that the Beneficiary will directly supervise six non-professional subordinates in the United States. On appeal, the Petitioner disputes this finding, but does not explain how any of the six subordinate positions qualify as managerial, supervisory, or professional.

Both of the advisory letters submitted on appeal indicate that the Beneficiary's "duties clearly demonstrate that [the Beneficiary] will be employed in a supervisory position over other supervisory and professional employees."[2] The writers do not specify which subordinates are supervisors or professionals; referring to them collectively as "supervisory and professional" cannot suffice.

The Petitioner has not established that it will employ the Beneficiary as a personnel manager within one year.

C. Function Manager

The term "function manager" applies generally when a beneficiary's managerial capacity derives not from supervising or controlling a subordinate staff, but instead from primarily 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).

The advisory letters indicate that, even if the Beneficiary will not be a personnel manager, he will be a function manager owing to his discretionary authority over the organization. Identically-worded passages in both letters state that the Beneficiary's "supervisory authority over the US-based office will place him in a senior level within [the Petitioner's] hierarchy with respect to all of the essential functions that he manages."

With respect to what those essential functions are, one letter refers to "the essential functions of business development, administration, and budgets." The other lists them as "finance and accounting oversight to marketing to legal analysis to business development." In this respect, it is significant that the Petitioner has not identified any staff responsible for performing the operational

[2] We take note of the identical wording in two letters purportedly prepared independently by writers 350 miles apart.

and administrative tasks relating to several of these functions. The only financial tasks delegated to a subordinate are bookkeeping and payments, assigned to an executive assistant/clerk. The Petitioner identified no employee responsible for marketing.

Furthermore, the Petitioner has not described the duties of its director, to whom the Beneficiary would report. Therefore, the record does not establish the extent of the Beneficiary's discretion regarding the various functions that the advisory letters describe as essential.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary would be a personnel manager or a function manager.

III. CONCLUSION

The Petitioner did not establish that it will employ the Beneficiary in a managerial capacity within one year.

ORDER: The appeal is dismissed.

Cite as *Matter of G-E-D-*, ID# 1728653 (AAO Nov. 14, 2018)