U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-I-O-A-, LLC
APPEAL OF CALIFORNIA SERVICE CENTER DECISION

DATE: NOV. 15, 2018

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

The Petitioner, a provider of advanced brain feedback training, seeks to temporarily employ the Beneficiary as its training center general manager 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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that: 1) the Beneficiary was employed in a managerial or executive capacity abroad, 2) the Beneficiary is qualified to perform the duties of his proposed position in the United States, and 3) the Beneficiary would be employed in a managerial or executive capacity in the United States.

On appeal, the Petitioner contends that the Beneficiary acts in a managerial capacity abroad, and that he would act in a managerial capacity in the United States, overseeing professional subordinates and an essential function of the company. The Petitioner also states that the Beneficiary is qualified to perform the duties of his proposed U.S. position and asserts that the Director improperly required that he have a specific level of education to qualify.

Upon *de novo* review, the appeal will be dismissed as the Petitioner did not demonstrate that the Beneficiary was employed abroad, or would be employed in the United States, in a managerial capacity. We will, however, withdraw the Director's finding that the Beneficiary would not be qualified to perform the duties of his proposed U.S. position.[1]

[1] We conclude that the Petitioner has submitted sufficient evidence to demonstrate that the Beneficiary has worked for affiliated companies providing its brainwave training services and that it is more likely than not that he would be qualified to perform the duties of his proposed U.S. position based on his prior experience with the company. The Petitioner need not establish that the Beneficiary has a specific level of education to perform the duties of a U.S. position, but may demonstrate that he or she is qualified based on their "prior education, training, and employment." 8 C.F.R. § 214.2(l)(3).

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.* 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 WITH THE FOREIGN EMPLOYER

We will first analyze whether the Petitioner established that the Beneficiary is employed abroad in a managerial capacity. The Petitioner does not claim that the Beneficiary is employed abroad in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary has been employed abroad 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.

When examining the foreign 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 foreign employer's organizational structure, the duties of a beneficiary's foreign subordinates, the presence of foreign employees to relieve a beneficiary from performing operational duties, the nature of the foreign business, and any other factors that will contribute to understanding a beneficiary's actual duties and role abroad. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the foreign employer'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 performs 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 is

primarily engaged in managerial duties, as opposed to ordinary operational activities alongside the foreign employer's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner stated that it and its affiliated company in Germany provide "a unique program of brain wave training." The Petitioner indicated that this brainwave training "has been used to treat conditions such as PTSD, anxiety, depression, ADHD, addiction, brain impairment associated with aging, and even stroke." The Petitioner explained that its president and founder, who is also the president and co-founder of the foreign employer, is the creator of a [redacted] The Petitioner stated that the Beneficiary co-founded the Petitioner's German affiliate in 2009 and noted that he is a [redacted] The Petitioner listed the following duties for the Beneficiary in his position of co-president and vice president of training services abroad, amongst others:

- signing authority on all of the company bank accounts,
- approves expenditures and bank wires,
- coordinates all matters of company policy and company direction,
- recruits and hires Neurofeedback Technicians, food service staff, technical support staff and cleaning staff for the training center,
- trains Neurofeedback Technicians on learning the 10-20 International Electrode Placement System, operating a EEGChart recording system, troubleshooting artifact filled EEG signals, and how to operate Cybernaut computers,
- designs, fabricates, constructs, deploys, and outfits [redacted]
- designs new training chambers or pods,
- trains technicians to troubleshoot and repair the company's proprietary software, and
- trains technicians in how to properly comport themselves as they serve the company's High End clients and how to conduct its patented [redacted]

In a request for evidence (RFE), the Director requested that the Petitioner submit a duty description for the Beneficiary describing his typical managerial decisions and duties. In response, the Petitioner submitted a letter from the president of the foreign employer stating that the Beneficiary assisted him in co-founding the foreign employer in Germany and detailed the following tasks abroad, amongst others:

- organized and supervised the teams of construction workers who followed [the president's] highly detailed, complex, high technology plans to create a [redacted] brain wave training center out of what had been a farm building, indeed a stable, where the animals had been kept,

- single-handedly found, recruited, organized and supervised the teams of construction workers, including local craftsman, tradesman, and building systems engineers,
- organized the foreign employer's banking systems, including large and small accounts and debit cards and credit cards and credit card acceptance capabilities,
- recruited and trained the small staff in Germany, including its general manager and the cooks and trainers who come from Canada and the USA,
- coordinated the international travel of these trainers and made sure that potential travel delays did not interfere with our German training schedules,
- coordinated the availability of technicians needed for supporting the Trainers,
- trained and supervised the EEG technicians,
- traveled to give talks, in English, in both Germany and Poland, which has resulted in people signing up for our training programs, and
- approved and signed all expenditures for the normal operations of the German training center.

The Petitioner has submitted foreign duty descriptions for the Beneficiary which indicate that he is likely primarily engaged in non-qualifying operational duties abroad. For instance, the Petitioner stated that the Beneficiary devoted his time to designing and constructing arranging for construction workers and engineers to build the company's training center in Germany, setting up bank accounts and credit card acceptance capabilities, making travel arrangements for trainers, signing clients up for the training programs, and approving *all* of the company's expenditures during normal operation. These non-qualifying duties suggest the Beneficiary's involvement with all operational aspects of the business and indicate that he is delegating few tasks to his asserted subordinates.

Whether the Beneficiary is a managerial employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See* sections 101(a)(44)(A) of the Act. Here, the Petitioner does not document what proportion of the Beneficiary's foreign duties are managerial functions and what proportion are non-qualifying. The Petitioner lists the Beneficiary's duties as including both managerial tasks and administrative or operational tasks, but does not quantify the time the Beneficiary spends on these different duties. This lack of documentation is important because several of the Beneficiary's daily tasks, as discussed above, do not fall directly under managerial duties as defined in the statute. For this reason, we cannot determine whether the Beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Even though the Beneficiary holds a senior position within the foreign employer, the fact that he manages or directs 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) of the Act. By statute, eligibility for this classification requires that the duties of a foreign position be "primarily" managerial in nature. *Id.* The Beneficiary may exercise discretion over the foreign employer's day-to-day operations and possess the requisite level of authority with respect to

discretionary decision-making; however, the position descriptions alone are insufficient to establish that his actual duties abroad are primarily managerial in nature.

B. Staffing

The Petitioner submitted an organizational chart listing a president, the Beneficiary as co-president and vice president of training services, a general manager, five trainers (one trainer being the president of the Petitioner and foreign employer), and two technicians. The chart also indicated that the Beneficiary acted as the "supervisor of technicians." The chart did not show a hierarchy or indicate whether the Beneficiary's asserted foreign subordinates acted as managers or supervisors.

On appeal, the Petitioner asserts that the Beneficiary meets the definition of a personnel manager based on his supervision of professional subordinates. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) 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." *Id.* 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*).

As noted, the Petitioner only contends that the Beneficiary oversees professional subordinates and does not indicate that he supervises subordinate managers abroad; as such, we will only analyze whether he qualifies as a personnel manager based on his supervision of professionals. To determine 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. *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."

The Petitioner has not submitted sufficient evidence to establish that the Beneficiary oversees professional subordinates abroad. First, in the RFE, the Director requested that the Petitioner submit the duties, educations, and salaries of the Beneficiary's claimed subordinates abroad. However, the Petitioner did not submit this evidence. Without sufficient duty descriptions for the Beneficiary's subordinates abroad we cannot determine whether they are professionals. In addition, although the Petitioner provided some indication that the Beneficiary's subordinates abroad held bachelor's degrees, its response was insufficient to demonstrate that these subordinates hold bachelor's degrees and work in professional positions as defined by the regulations. For instance, the submitted organizational chart indicated that the claimed general manager was a "graduate of gymnasium and university," that three of its trainers had "college degrees," and that one of its technicians held a

"college degree." Although a specific bachelor's degree is not required to establish a subordinate as a professional, the Petitioner has not sufficiently substantiated that his subordinates hold bachelor's degree. First, it has not clearly articulated their bachelor's degrees. Further, the Petitioner does not document that the Beneficiary's foreign subordinates hold bachelor's degrees and it does not explain why these positions require such degrees.

In addition, on appeal, the Petitioner appears to confirm that the positions subordinate to the Beneficiary do not require bachelor's degrees, stating that "because the [training] program is so unique, there is no specific bachelor's degree required for entry into the position of Trainer." This statement appears to indicate that the knowledge required for the trainer positions could be gained exclusively through the provision on internal training with the Petitioner and that a bachelor's degree would not necessarily be required for entry into these positions. In sum, the Petitioner has not submitted sufficient evidence to demonstrate that the Beneficiary qualifies as a personnel manager based on his supervision of professional subordinates.

Furthermore, the submitted evidence leaves question as to whether the foreign employer's operations are sufficient to sustain the Beneficiary in a managerial capacity. For example, the Petitioner submitted a foreign employer balance sheet indicating that it earned approximately €210,000 in revenue and paid around €3,000 in "personnel expenditures" in fiscal year 2016 and that it made about €224,000 in income and paid approximately €30,000 in personnel expenditures in fiscal year 2015. Although the balance sheet also indicated that the foreign employer had about €89,000 in "other operating expenditures" in 2016 and around €107,000 in 2015, it is not clear from its financial statement that it was sufficiently operational to support the Beneficiary and his claimed subordinates as of the date the petition was filed in December 2017.

In fact, when explaining the Beneficiary's duties, the president of the foreign employer referred mostly to activities related to the initial establishment of the company in 2009, such as hiring construction workers to build a training facility, setting up bank accounts, and recruiting and training staff; however, there is little detail or documentation specific to the foreign employer's current operations and clients. The president of the foreign employer indicated that the Beneficiary coordinated the international travel of "cooks and the Trainers who come from Canada and the USA to lead our training programs there;" but, there is little evidence to substantiate these activities or the provision of any training services abroad. Indeed, the Petitioner's organizational chart makes no mention of the "cooks" discussed in the Beneficiary's duties. Likewise, the Petitioner submits no supporting documentation to substantiate that the foreign employer pays its asserted subordinates abroad and it questionably only provided two untranslated paystubs for the Beneficiary from June and July 2015. We note that the Petitioner is required to establish that the Beneficiary has been employed in a managerial capacity for at least one continuous year within the three years preceding the filing of the petition. 8 C.F.R. § 214.2(l)(3)(iii).

In total, the evidence submitted specific to the foreign employer's operations leaves doubt as to whether it is sufficiently developed to support the Beneficiary in a managerial capacity or his claimed professional subordinates.

The Petitioner also asserts on appeal that the Beneficiary qualifies as a function manager in his capacity abroad. 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 manages an essential function, it must clearly describe the duties 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 primarily *manages*, as opposed to *performs*, the function; (4) the beneficiary acts at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary exercises discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

The Petitioner has not established that the Beneficiary acts as a function manager abroad. As previously noted, the Petitioner submitted duty descriptions for the Beneficiary including several non-qualifying operational duties, including coordinating construction workers to build a training facility, setting up credit card acceptance capabilities, making travel arrangements for trainers, signing clients up for training programs, and approving all expenses. It did not clearly indicate what percentage of time he devoted to these non-qualifying tasks. For this reason, we cannot determine whether the Beneficiary primarily devotes his time to managing his asserted function rather than performing the function.

Further, the evidence reflects that the facts in this case are significantly different than those in the adopted decision cited by the Petitioner on appeal. *Id.* For instance, the petitioner in *Matter of G-Inc.* submitted ample documentation reflecting that the beneficiary in that matter directed the work of various teams across five business units and six geographic delivery areas, that he led a team overseeing a monthly revenue forecast process and the collection of financial data from delivery leads and global sales teams, and that he was supported by six direct and three indirect reports. In short, the petitioner in *Matter of G- Inc.* demonstrated that the beneficiary was primarily relieved from performing the non-qualifying duties of his function. Here, the Petitioner has not submitted sufficient detail and documentation; in fact, it provides duty descriptions for the Beneficiary indicating his substantial involvement in the non-qualifying operational tasks of the business. In addition, the Petitioner has submitted little evidence to demonstrate that the foreign employer is sufficiently operational allowing the Beneficiary to act primarily in a managerial capacity. As such, the Petitioner has not established that the Beneficiary qualifies as a function manager in his capacity abroad.

Lastly, the Petitioner also contended that the Director overemphasized the size of the foreign employer in concluding that the Beneficiary did not act in a managerial capacity abroad. The Petitioner correctly observes that 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 determining whether the Beneficiary is employed abroad in a managerial capacity. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for U.S. Citizenship and Immigration Service (USCIS) to consider the size of the foreign

employer in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial 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. We do not concur that the Director improperly considered the foreign employer's size in denying the petition. As we have discussed in this decision, the Petitioner has submitted foreign duty descriptions for the Beneficiary abroad which indicate that he more likely than not primarily performs non-qualifying operational duties. Further, it has provided insufficient evidence to substantiate the foreign employer's asserted employees and operations.

For the foregoing reasons, the Petitioner did not establish that the Beneficiary is employed in a managerial capacity abroad.

III. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The next issue we will address is whether the Petitioner established that the Beneficiary would be employed in a managerial capacity in the United States. The Petitioner does not claim that the Beneficiary would be employed in an executive capacity in the United States; as such, we will only analyze whether he would be employed in a managerial capacity. In addition, because of the dispositive effect of the above finding of ineligibility; namely, our affirmation of the Director's conclusion with respect to the Beneficiary's asserted foreign employment, we will only briefly address the remaining issue pertaining to his proposed employment in the United States.

In the denial decision, the Director pointed to apparent non-qualifying operational duties listed in the Beneficiary's U.S. duty descriptions. The Director also emphasized that the Beneficiary would oversee subordinate contractors as opposed to employees of the Petitioner and indicated that it did not demonstrate that his subordinates would be professionals as claimed.

On appeal, the Petitioner contends that the Director took certain duties in the Beneficiary's duty description out of context and asserts that he will not primarily perform non-qualifying duties, but manage the performance of these duties by his subordinates. The Petitioner states that the Beneficiary would qualify as a personnel manager based on his supervision of professional subordinates and that he would act as function manager.

Upon review, we concur with the Director's conclusion that the Petitioner did not establish that the Beneficiary would act in a managerial capacity in the United States. Similar to the Beneficiary's foreign duty descriptions, the Petitioner provided U.S. duty descriptions suggesting he would be widely involved in non-qualifying operational tasks, such as paying bills and responding to requests from vendors and contractors, creating tax returns, and coordinating gardeners, "cleaning people," and construction personnel. This statement indicates that the Beneficiary would likely be engaged in all of the company's bookkeeping activities. The Beneficiary's duties suggest that he would be substantially involved in the day-to-day operations of the company rather than acting at a senior level within the organization and primarily delegating non-qualifying duties to his subordinates.

Further, these operational tasks appear throughout the Beneficiary duty description; as such, although the Petitioner has submitted percentages of time he would devote to general functions, it does not properly quantify how much of his time he would devote to non-qualifying duties versus managerial tasks. For this reason, we cannot determine whether the Beneficiary would primarily perform the duties of a personnel or function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 22, 24.

Further, the Petitioner did not sufficiently demonstrate that the Beneficiary would act as a personnel manager overseeing professional subordinates as claimed. Similar to the Beneficiary's foreign employment, the Petitioner does not contend that he would oversee subordinate managers or supervisors, but only that he would manage professional subordinates. However, the Petitioner has not demonstrated that the Beneficiary would supervise professionals. The Petitioner submitted an organizational chart indicating that the Beneficiary would oversee three trainers (including the president of the Petitioner and two contractors), two technicians employed by the company, a contracted advertising and marketing employee, an employee devoted to "integrated technologies," and a bookkeeping and accounting contractor. However, the Petitioner did not submit duty descriptions for these positions to substantiate their existence or to establish that they are professional positions requiring bachelor's degrees.

The Petitioner only vaguely indicated that these employees held bachelor's or graduate degrees, but did not specifically identify, or submit supporting documentation to corroborate them. . Likewise, the Petitioner did not explain in detail why bachelor's degrees were required for these subordinate positions. In fact, on appeal, the Petitioner states that the Beneficiary's subordinates should be considered professionals based on "the high level of specific training provided to them by the petitioning company," and elsewhere the president indicated in submitted emails that they train technicians and trainers "pretty much from the ground up" and that there is "not a lot of prior experience or education that is relevant." The president also stated that "technicians do not require a University degree." In total, the Petitioner's statements appear to indicate that the positions subordinate to the Beneficiary do not require a baccalaureate degree as a minimum for entry. *Cf.* 8 C.F.R. § 204.5(k)(2).

Moreover, the Petitioner also contends that the Beneficiary would qualify as a function manager in his capacity in the United States. However, as we have discussed, the Petitioner submitted a U.S. duty description for the Beneficiary indicating that he would be substantially involved in the non-qualifying operational duties of the business. It did not sufficiently demonstrate that the Beneficiary would primarily delegate non-qualifying tasks; or more specifically, it did not establish that he would primarily manage a function as opposed to performing it. As discussed previously, the Petitioner pointed to *Matter of G- Inc.* as persuasive in demonstrating the Beneficiary's eligibility. Again, in that matter, the petitioner provided substantial evidence reflecting that the beneficiary directed the work of various teams across five business units and six geographic delivery areas and that he was sufficiently relieved of non-qualifying duties. However, here, the Petitioner does not adequately detail and document the Beneficiary's proposed subordinates nor does in demonstrate

how he would primarily delegate non-qualifying duties. As such, the Petitioner has not established that the Beneficiary would act as a function manager in the United States.

For the foregoing reasons, the Petitioner has not established that the Beneficiary would act in a managerial capacity in the United States.

IV. CONCLUSION

The appeal must be dismissed because the Petitioner has not established that Beneficiary is employed in a managerial capacity abroad or that he would be employed in a managerial capacity in the United States.

ORDER: The appeal is dismissed.

Cite as *Matter of B-I-O-A-, LLC*, ID# 1775487 (AAO Nov. 15, 2018)