U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-, INC.

DATE: NOV. 16, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an exporter and wholesaler, seeks to extend the Beneficiary's temporary employment as its chief financial and operations officer under the L-1A nonimmigrant classification for intracompany transferees. *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 California Service Center denied the petition, concluding that the Petitioner had not established, as required, that the Beneficiary would be employed in a managerial or executive capacity for the U.S. entity.

On appeal, the Petitioner submits a brief and previously submitted evidence. The Petitioner asserts that the Director overlooked the evidence previously submitted and contends that the Beneficiary supervised and controlled three managers and three staff.[1]

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] As the Petitioner does not claim that the Beneficiary will be employed in an executive capacity, we will restrict our analysis to the Beneficiary's claimed managerial capacity.

An individual L-1A petition filed on Form I-129, Petition for a Nonimmigrant Worker, must include evidence that the petitioner will employ the beneficiary in a managerial or executive capacity, including a detailed description of the services to be performed. 8 C.F.R. § 214.2(l)(3)(ii).

The Act defines the term "managerial capacity" as an assignment within an organization in which the employee primarily manages the organization or a department, subdivision, function, or component; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function; if the employee directly supervises other employees, has the authority to take personnel actions, or if no other employee is directly supervised, functions at a senior-level within the organization 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. 101(a)(44)(A) of the Act.

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director found that the Petitioner had not established that its organizational structure was sufficient to elevate the Beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees and that it had not submitted evidence to demonstrate that the Beneficiary will be employed as a function manager.

We will address both the Petitioner's description of the Beneficiary's intended duties as well as the Petitioner's staffing to determine whether the Petitioner has established this eligibility requirement. We note that when reviewing staffing levels as a factor in determining whether an individual is acting in a managerial or executive capacity, we must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

A. Duties

When examining the managerial capacity of a beneficiary, we review the description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definition of managerial capacity has two parts. First, the petitioner must show that the beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). 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, e.g., Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

The Petitioner stated on the Form I-129 that the Beneficiary will be ultimately responsible for managing and controlling all phases of financial activities and operations, exercising complete control and discretion over financial activities, and hiring and overseeing sub-managers and staff employees.

In response to the Director's request for evidence (RFE), the Petitioner provided a broad statement of the Beneficiary's duties. The Petitioner stated that the Beneficiary will spend 35 percent of his time on the following duties (bullet points added and paraphrased):

- Managing all accounting practices and being responsible for companywide financial planning, financial reporting, and accounting practices;
- Providing and distributing budgets for operating and capital expenditures and accountability for achieving the objectives and results;
- Overseeing and directing all financial management, all accounting expenses, including personnel, operational expenses and overhead expenses, and ensuring compliance with regulatory requirements of auditors and tax agencies, and maintaining relations with external auditors;
- Managing cash flow requirements, and ensuring a reliable cash flow projection process, collaborative relationships with banking and institutions, and initiating appropriate strategies to enhance cash position; and
- Preparing and submitting an annual budget and ensuring the internal control and audit against expenditure.

These duties are so broadly-stated, it is not possible to ascertain whether the Beneficiary will manage the Petitioner's financial and accounting component or perform many of the duties related to this component. Stating that the Beneficiary will manage, oversee, or direct a department or the company's operations is insufficient. The duties must be detailed so that it is evident that the duties described are managerial rather than non-qualifying. The Petitioner does not sufficiently explain how being responsible for financial planning, financial reports, and accounting practices, as well as preparing budgets and ensuring compliance with regulatory agencies, are managerial duties, as these duties include a performance element. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The Petitioner has not provided the necessary detail or explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The Petitioner claimed that the Beneficiary will spend 25 percent of his time supervising and delegating responsibilities to the subordinate financial manager and employees and conducting performance reviews. The Petitioner explained that this will include responsibility "for the allocation of the Company's fiscal, human, and physical resources" and assigning budgets to managers and staff and overseeing budget compliance and monthly cash flow. The Petitioner added that the Beneficiary will supervise and control the work of the personnel in his managerial position of chief operations officer and "will ensure efficient management of the Company's resources including management and control on human, financial, information, material resources and facilities." The Petitioner, however, does not explain what tasks will actually engage the Beneficiary in performing these duties. For example, it is not clear what the Petitioner expects the Beneficiary to do in relation to allocating its fiscal, human, and physical resources or in ensuring the effective

management of the Company's resources including management and control of human, financial, information, and material resources and facilities. The Petitioner does not adequately describe how these duties impact or affect the Beneficiary's supervisory and delegating responsibilities.

Moreover, the Petitioner added that the Beneficiary will spend an additional 10 percent of his time managing human resources, recommending appointments, hiring and firing, making decisions regarding training, determining remuneration, and assuming responsibility for the implementation of human resources policies and procedures. The Petitioner indicated that this time will also include providing leadership and ensuring that the company operates effectively within the established policies and regulations, as well as "oversee[ing] the maintenance of the facilities and all of the Company's assets." This description includes not only seemingly supervisory duties but also generic tasks such as ensuring the company operates effectively and overseeing the maintenance of facilities and company assets. The Petitioner does not explain how this 10 percent of the Beneficiary's time impacts the supervisory duties described in the previous paragraph. Moreover it is not clear whether ensuring that the company operates effectively and overseeing the maintenance of facilities and company assets is part of or different than managing human resources. The Petitioner does not delineate the Beneficiary's proposed duties and the time spent on those duties in such a way that we may ascertain and evaluate the Beneficiary's actual expected responsibilities.

The Petitioner asserted that the Beneficiary will spend 30 percent of his time reporting to the chief executive officer and the parent company, including assisting the chief executive officer in achieving global growth objectives by providing him all the information necessary to exercise his responsibilities. The Beneficiary will also be tasked with identifying and evaluating risks, ensuring that the company carries appropriate and adequate measures to control risk, as well as reporting the business and economic climate and preparing the company to meet challenges and development. The Petitioner, however, does not describe the actual daily duties that will engage the Beneficiary in meeting these objectives. It appears from this general description that the Beneficiary will perform operational tasks when assisting in achieving growth objectives and identifying and evaluating company risks.

The fact that the Beneficiary will manage or direct a department or the operations of the business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial or executive in nature.

B. Staffing

Beyond the required description of the job duties, we review the totality of the record when examining the claimed managerial capacity of a beneficiary, 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.

The Petitioner's organizational chart depicts the Beneficiary as reporting to the chief executive department and shows three departments subordinate to the Beneficiary's position. The organizational chart submitted in response to the Director's RFE and on appeal shows one employee in the accounting department, four employees in the purchasing department, and one employee in the quality assurance department. The Petitioner re-submits the 2016 third quarter state employer's quarterly report on appeal.[2] This report identifies employees working for the Petitioner in the quarter before the petition was filed. However, 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 lack of evidence regarding the Petitioner's employees when the petition was filed precludes a determination that the Petitioner had sufficient staff to perform the duties of the business and relieve the Beneficiary from performing operational and administrative duties when the petition was filed and continuing through adjudication.

Even if considering that the Petitioner continued to employ these same individuals in the positions identified on the organizational charts in the record, the record still does not contain sufficient evidence to establish that the Beneficiary's duties include primarily supervising these individuals. As noted above, the description of duties and the allocation of the Beneficiary's time are ambiguous. At most the Petitioner appears to allocate only 35 percent of the Beneficiary's time to supervisory duties. Moreover, the Petitioner does not provide evidence establishing that the subordinate positions are supervisory, managerial, or professional positions.

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*).

When evaluating whether a beneficiary manages professional employees, we 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

[2] The Petitioner submitted this same report initially and in response to the Director's RFE.

be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Therefore, 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. The record here does not include sufficient evidence to establish that any of the positions subordinate to the Beneficiary's require a bachelor's degree to perform them.

The organizational chart identifies one of the positions in the purchasing department as the "senior purchase manager" and identifies a second position on the same tier as a purchase manager. The duties of the senior purchase manager position are "[d]irect the actual distribution of product to the [foreign entity]," establish sales territories, quotas, goals, training programs, and analyze sales and purchasing statistics to determine sales potential and inventory requirements, monitor customer preference, and forecast and track sales and purchase records. Based on the brief descriptions of the other positions in the purchasing department, it is not clear who the senior purchase manager directs. It appears that she will perform supply chain management and sales duties. The duties as described do not demonstrate that this position is primarily a supervisory position. Similarly, the description does not establish that this is a professional position. The record confirms this conclusion as the individual in the position has only a high school education.

The purchase manager position description includes some of the same duties as the senior purchase manager and does not include any supervisory duties. The record does not include evidence that this position is a professional position. The four positions subordinate to the Beneficiary in the purchasing department, including the two purchase staff, perform operational tasks of the purchase department, but are not primarily supervisory, managerial, or professional positions. Similarly, the quality assurance position is described as inspecting, testing, or measuring materials or products and accepting or rejecting the products that do not meet specifications. The record does not include evidence that this position is a supervisory, managerial, or professional position.

The duties for the position in the accounting department include preparing financial and cash flow reports for the "President,"[3] preparing the payroll, and preparing documents for employment, medical insurance, and worker's compensation. The Petitioner does not identify the amount of time this employee spends on preparing reports and the position description does not include sufficient detail to support a claim that the position is a professional position. Rather it appears that the duties of this position are primarily administrative duties. Neither the organizational chart nor the description establishes that this position is a supervisory, managerial, or professional position. The Petitioner also indicated that the Beneficiary maintains relations with external auditors, but the record does not include evidence of payments made to outside accountants or auditors and the

[3] The description of the accounting employee's duties indicates that she will provide reports to the "President," and not to the Beneficiary's position of chief financial and operations officer. This chain of command appears different than that recorded in the description of the Beneficiary's duties.

Petitioner does not further explain the actual duties of the outside auditors or the Beneficiary's duties related to them.

The record does not establish that the Beneficiary will primarily supervise other supervisory, managerial, or professional employees, or will be relieved from performing tasks related to financial planning, creating and distributing budgets, ensuring compliance with regulatory requirements, and other operational tasks.

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

We have considered the reasonable needs of the organization in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify a beneficiary's job duties, a petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. The Petitioner is a four-year-old company with seven to nine employees who perform some of the operational and administrative tasks of the company. The Petitioner has not adequately explained how its reasonable needs justify the Beneficiary's performance of non-qualifying duties, including the first-line supervisory duties of non-professional employees.

III. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of P-, Inc.*, ID# 747643 (AAO Nov. 16, 2017)