U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-USA, INC.

DATE: NOV. 20, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a photography company specializing in equestrian events, seeks to continue the Beneficiary's temporary employment as its communications manager under the L-1A nonimmigrant classification for intracompany transferees.[1] *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the Vermont Service Center denied the 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 objects to the Director's finding that it did not provide a sufficiently detailed description of the Beneficiary's duties. The Petitioner asserts that the record demonstrates that the Beneficiary will continue to manage an "essential department" of the company and perform primarily managerial duties that are consistent with the size and scope of the organization.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.*

[1] The Petitioner previously filed an L-1A classification petition on the Beneficiary's behalf which was approved for the period from January 8, 2014, until January 1, 2017.

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

"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 Petitioner did not provide a sufficiently detailed description of the Beneficiary's job duties to support its claim that she would be employed in a managerial capacity. Further, the Director observed that the Petitioner submitted two significantly different organizational charts and found that the Petitioner had made material changes in order to make a deficient petition conform to the requirements for this classification. Finally, the Director concluded that the Petitioner had not shown that it has employees to relieve the Beneficiary from performing non-managerial job duties associated with the company's marketing and communications function.

On appeal, the Petitioner contends that the Director appears to have overlooked the Beneficiary's detailed job description and asserts that the Beneficiary "manages [the Petitioner's] communications and marketing department; she manages an essential department . . . ; she functions at a senior level within the [Petitioner's] hierarchy as well as with respect to the communications and marketing department; and she exercises discretion over the day-to-day operations" of that department. The Petitioner reiterates the Beneficiary's job duties and asserts that they clearly mirror the definition of managerial capacity.

Further, the Petitioner asserts that it did not intend to materially alter the petition by submitting a revised organizational chart and was simply attempting to provide the more detailed information requested in the Director's request for evidence (RFE). The Petitioner maintains that the Beneficiary's job duties alone are sufficient to establish that she is employed as a manager, given the size and scope of the company.

When examining the managerial or executive 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 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 creates, distributes, markets, and sells photographs, seeks to continue the Beneficiary's employment as its communications manager. The Petitioner provided a narrative description of the Beneficiary's duties in its initial supporting letter, noting that she will continue to direct and coordinate its marketing and communications department. In the RFE, the Director advised the Petitioner that the initial description lacked sufficient detail to establish that the Beneficiary's duties would be primarily managerial. The Director suggested that the Petitioner provide a letter from a company representative clearly describing the Beneficiary's typical managerial duties, and the percentage of time spent on each specific task.

In response, the Petitioner listed essentially the same duties in bulleted format, noting that the Beneficiary will:

- devise and coordinate our marketing and communications effort;
- oversee marketing efforts concerned with the pricing, sales and distribution of our photographs and services;
- establish and implement departmental policies, goals, objectives and procedures;
- develop branding strategies;
- engaging our future marketing professionals[3];
- coordinate and oversee marketing activities and policies to promote our products and services;
- serve as our spokesperson to the media and the general public;
- develop and distribute materials to explain our internal policies;
- issue press releases, arrange interviews, and compile press kits to further develop our business;
- our [*sic*] pricing strategies to maximize our profits and to increase our share of the United States market. . . ; [and]

[3] The Petitioner states that it intends to employ a marketing manager in the future.

- monitor trends in the equestrian photography industry indicating the need to develop new products and services.

The Petitioner also stated that the Beneficiary is in charge of its franchise development efforts. The Petitioner provided a copy of its franchise agreement with a Canadian company and noted the Beneficiary's responsibility to ensure the franchise owner's adherence to the terms of the agreement and to coordinate marketing efforts between the United States and Canada. The Petitioner stated these activities require 20 percent of the Beneficiary's time. Finally, the Petitioner added that the Beneficiary will conduct market research and "work with developers, advertisers, and production managers to market our services."

However, the Petitioner's response to the RFE did not include additional details regarding the nature of the Beneficiary's day-to-day duties. Nor did it indicate the amount of time the Beneficiary would allocate to most of the listed duties, although the Director specifically noted this information is needed to assist in establishing that the position involves primarily managerial duties. We agree with the Director's conclusion that the description is insufficient to demonstrate that the duties are primarily managerial in nature.

Some of the stated duties, such as performing market research, serving as a spokesperson, issuing press releases, compiling press kits, monitoring industry trends, and marketing the company's services by working with advertisers, are not managerial functions and indicate the Beneficiary directly performs all market research, public relations, and communications activities.[4] Other duties, such as "oversee marketing efforts," "coordinate our marketing and communications effort," and "coordinate and oversee marketing activities," are listed as separate responsibilities, but the Petitioner did not provide sufficient detail to explain what these responsibilities entail, how they differ from each other, or what specific tasks are associated with any of them. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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).

Based on the description provided, it appears that the Beneficiary does have authority over day-to-day decisions regarding marketing and communications, including responsibility for coordinating with the Petitioner's Canadian franchise. However, she is also required to carry out the non-managerial activities associated with her department's daily operation because, as discussed further below, the record does not establish that anyone else works, directly or indirectly, for the department. We are unable to determine whether the claimed managerial duties constitute the majority of the Beneficiary's duties, or whether the Beneficiary primarily performs non-qualifying administrative or operational duties. Although the Director advised the Petitioner of the need for this information, the Petitioner's description of the Beneficiary's job duties does not establish what

[4] In addition, as discussed further below, one of the submitted organizational charts indicates that the Beneficiary is responsible for the Petitioner's website and social media accounts, and also depicts her as one of the company's photographers. None of these job duties were included in job descriptions the Petitioner provided in its letters.

proportion of the duties is managerial in nature, and what proportion is non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Even though the Beneficiary technically holds the senior position within the marketing and communications department as the department's sole employee, the fact that the Beneficiary will manage a department 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 has seven employees. Its organizational chart submitted at the time of filing shows that the Beneficiary reports to the company's operations manager (later identified as the company president), and supervises a business development manager, a graphic designer, and a "webmaster apps developer" identified as The chart also includes seven photographers, Petitioner's counsel, and an accounting employee. The individuals holding the positions of business development manager and graphic designer were also listed as photographers.

In the RFE, the Director acknowledged the organizational chart, but advised the Petitioner that it did not provide sufficient information regarding the personnel the Beneficiary would oversee, such as their duties and educational background. The Director requested a more detailed organizational chart along with evidence of wages paid to employees and contractors.

In response, the Petitioner's operations manager explained that he and the Beneficiary are the company's only payroll employees, while everyone else on the organizational chart, including the photographers are "independent contractors compensated by check." The Petitioner provided a new organizational chart listing employees and contractors of both the Petitioner and its French parent company. This chart does not include a business development manager or a graphic designer. It also does not identify the Beneficiary by job title or indicate that she supervises anyone. Rather, the chart appears to depict her as sharing responsibility for the Petitioner's and foreign entity's websites with the "webmaster apps developer." Specifically, the chart identifies the Beneficiary as "respons[i]ble [for] Website Communication on Facebook." It also identifies the Beneficiary as one of the photographers working for the foreign entity.

The Petitioner did not explain these changes at the time of the RFE response. It now re-submits both organizational charts and states that the second chart was intended to be responsive to the Director's request for more detailed information. The Petitioner maintains that "managing a graphic designer and a webmaster is a normal occurrence for a communications manager," and emphasizes that "even if the employees listed on the organizational chart had not been engaged by [the Petitioner], [the Beneficiary's] job duties would be more than enough to support the requirements of a managerial position."

However, the Petitioner's statement disregards the obvious differences between the two charts; we cannot conclude that one is simply a more detailed version of the other. It may be "normal" for a communications manager to manage a graphic designer and a webmaster, but the Petitioner has not shown that it engaged either of these employees.[5] The latter chart does not show that the Beneficiary supervises these positions or that these positions even exist within the company.

The Director observed that the Petitioner made material changes to make its petition conform with the requirements for this visa classification. However, it appears that the initial evidence, which identified the Petitioner as having seven employees, including graphic design and business development positions which do not appear to exist, actually exaggerated the size and structure of the company. The initial evidence also did not identify the Beneficiary's responsibilities with respect to the Petitioner's website and social media accounts, or her role as a photographer, which were all revealed on the later organizational chart.

Reviewing the evidence as a whole, the Petitioner has not established that the Beneficiary supervises subordinate staff or contractors as part of her daily routine and therefore did not demonstrate that she qualifies as a managerial employee based on her supervision of subordinate personnel. Although the Petitioner asserts that she will be recruiting a marketing manager in the future, 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 claims that the Beneficiary nevertheless manages an "essential department" within the company as the head of marketing and communications. 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. The Beneficiary, as communications manager, is solely responsible for the company's marketing and communications activities. While such activities are essential to the company and she has discretion over these activities, for all of the reasons discussed, the record does not show that the Beneficiary is primarily managing this function, rather than performing its day-to-

[5] The Petitioner submitted copies of "Work for Hire" agreements for three photographers (only one of which appeared on either organizational chart). It did not provide any evidence related to the persons identified as graphic designer or business development manager, nor evidence showing that it engages Solicis or describing the nature and scope of the services this company provides.

day operational tasks. The record indicates that the Beneficiary is likely performing a number of non-managerial duties, including website maintenance, social media communications, and even providing photographic services, along with the non-managerial duties that are listed in her stated position description. Accordingly, the Petitioner has not established that her actual duties are primarily managerial in nature.

In addition, the Petitioner emphasizes that we should take into account the size and scope of the company, asserting that the Beneficiary's duties are typical of a marketing and communications manager in this type of business. 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 has submitted conflicting information about the size of its organization, but ultimately did not establish that it has staff or contractors who actually perform the day-to-day, non-managerial duties of its communications and marketing department, thereby relieving the Beneficiary from having to perform these duties herself. We interpret the statute to prohibit discrimination against small or medium-size businesses. However, we also interpret that Act to require all petitioners to establish that the beneficiary's position "primarily" consists of managerial duties, and that it has sufficient personnel to relieve a beneficiary from performing operational and administrative tasks.

The reasonable needs of a petitioner will not supersede the requirement that a beneficiary be "primarily" employed in a managerial capacity as required by the statute. *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008). Here, the evidence does not establish that the Beneficiary's position meets this requirement and the Petitioner has not met its burden to establish that she will be employed in a managerial capacity.

III. PRIOR APPROVAL

We acknowledge that USCIS previously approved an L-1A petition filed on the Beneficiary's behalf for the same position. Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. 8 C.F.R. § 103.2(b)(16)(ii). The burden of proof remains on the petitioner, even where an extension of nonimmigrant status is sought. Here, the Director reviewed the record of proceeding and concluded that the Petitioner did not establish eligibility for an extension of the nonimmigrant visa petition's validity.

We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d

1084, 1090 (6th Cir. 1987). Furthermore, we are not be bound to follow a contradictory decision of a service center. *La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).

IV. DOING BUSINESS

Finally, we are unable, through reference to a website maintained by the Florida Secretary of State's Division of Corporations (www.sunbiz.org), to determine that the Petitioner continues to be in good standing and authorized to do business in Florida.

Specifically, we found that the company's status has been "inactive" and "revoked for annual report" since September 22, 2017. If the Petitioner is no longer active, this would raise questions about whether it continues to exist as an importing employer, whether it maintains a qualifying relationship with the Beneficiary's foreign employer, and whether it is authorized to conduct business in a regular and systematic manner. *See* section 214(c)(1) of the Act; *see also* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (l)(3).

While we are not denying the petition on this basis, if the Petitioner seeks to pursue this matter further, it should submit evidence, such as a certificate of good standing, or any other evidence, to demonstrate its good standing in Florida as well as evidence to show that it is actively doing business as defined at 8 C.F.R.§ 214.2(l)(i)(2)(H).

V. 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 S-USA, Inc.*, ID# 817523 (AAO Nov. 20, 2017)