U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12316026

Date: NOV. 24, 2020

Appeal of California Service Center Decision

Form I-129, Petition for L-1A Manager or Executive

The Petitioner, describing itself as an importer, exporter, and distributor of professional audio equipment, seeks to temporarily employ the Beneficiary in the United States as a 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 Director of the California Service Center denied the petition, concluding the record did not establish that the Beneficiary would be employed in a managerial or executive capacity in the United States. On appeal, the Petitioner points to a prior approval of an L-1A nonimmigrant visa on behalf of the Beneficiary and indicates the circumstances of her employment have not changed since this approval. The Petitioner contends that the Beneficiary would only devote a small portion of her time to non-qualifying operational duties and it states that the Director did not properly consider independent contractors as a part of its organizational structure.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. 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. 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. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The sole issue to be addressed is whether the Petitioner established that the Beneficiary would be employed in a managerial capacity. The Petitioner does not claim on appeal that the Beneficiary

would be employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary would be employed 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 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).

A. Duties

To be eligible for L-1A nonimmigrant visa classification as a manager, the Petitioner must show that the Beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(A)(i)-(iv) of the Act. If the record does not establish that the offered position meets all four of these elements, we cannot conclude that it is a qualifying managerial position.

If the Petitioner establishes that the offered position meets all elements set forth in the statutory definition, 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). In determining whether a given beneficiary's duties will be primarily managerial, we consider the Petitioner's description of the job duties, the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve the 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 stated that it "deals in the importation, exportation, and distribution of audio parts," noting that its foreign parent company has been in this business "for decades." The Petitioner listed the following duties for the Beneficiary as its asserted general manager:

> Managing the Company
> - ∑ Directing and evaluating the sales, administrative and financial management, logistics, and operations management departments of [the Petitioner]; through daily and monthly reports.
> - ∑ Reviewing and assuming the responsibility for the financial accountability of the aforementioned departments, including managing adherence to each departmental budget;

- ∑ Executing management policies to achieve and exceed the financial goals of [the Petitioner];
- ∑ Optimizing efficient and effective use of [the Petitioner's] facilities, equipment and labor through the supervision of effective management planning, scheduling, ordering and inventory control;
- ∑ Planning, scheduling, assigning and directing work of [Petitioner] managerial employees;

Supervising and controlling the work of others

- ∑ Leading bi-weekly management meetings, reviewing the planned tasks and goals through reports and fulfillment results in order to report quarterly to the [foreign parent] Board of Directors in [redacted] in respective areas of accountability;
- ∑ Appraising performance through the annual management results, rewarding and disciplining supervisory and managerial employees, when applicable;

Beneficiary Authority

- ∑ Perform[ing] annual evaluation of employees
- ∑ Recommending promotions for employees and reviewing the tasks for each department when applicable and necessary
- ∑ Hiring and terminating employees, when applicable and necessary.

Making decisions on daily operations

Analyzing costs on different proposals for:

- o Major purchases
- o Regarding providers contract for import services like flat rates on transportation, freight rate, and customs brokerages.
- o Improvement projects
- o Special discounts authorization, credit extension, payment terms, etc for customers
- o License and Permit for the functioning of the company
- o Employee licenses and permitions [sic]

In addition, the Petitioner also provided a daily schedule for the Beneficiary listing some of the following duties:

- ∑ Reviewing of financial management and sales and marketing reports,
- ∑ Leading and directing the work of managerial personnel to meet/exceed sales and administration goals,
- ∑ Conducting review and supervision of sales, product purchasing processes, warehouse and import matters,
- ∑ Overseeing special projects development, eg., improvements in warehouse system and procedures and new technology, and
- ∑ Performing large customer credit application analysis.

The Petitioner submitted generic duties that could apply to any manager acting in any business and industry they add little insight into the actual nature of the Beneficiary's asserted role. For instance,

the Petitioner vaguely stated that the Beneficiary would be responsible for the "directing and evaluating the sales, administrative and financial management," "reviewing and assuming the responsibility for financial accountability," "planning, scheduling, assigning, and directing [the] work of [Petitioner] managerial employees" and "leading bi-weekly management meetings." However, the Petitioner submitted few credible details and no supporting documentation to substantiate the Beneficiary's performance of qualifying managerial duties, such as the financial management the Beneficiary directed, the departmental budgets she set, management policies she "executed," or facilities or equipment she "optimized." Likewise, it did not specify or document the sale or administration goals the Beneficiary planned, promotions she recommended, hiring or firing decisions she made, major purchases she oversaw, providers she negotiated contracts with, "improvement projects" she made decisions on, or new technology she implemented.

Although we do not expect the Petitioner to detail and document every managerial task performed by the Beneficiary, the near complete lack of detail and documentation related to her asserted managerial duties is noteworthy since it claims she has been acting in this role in the United States for more than three years prior to the date the petition was filed. Specifics are clearly an important indication of whether a beneficiary's duties are primarily 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).

Even though the Beneficiary holds a senior position within the organization, the fact that she will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section 101(a)(44)(A) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. Id. 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; however, the position descriptions alone are insufficient to establish that her actual duties would be primarily managerial in nature.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we 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.

On appeal, the Petitioner emphasizes that the Beneficiary acts in a managerial capacity based on her oversight of subordinate supervisory and managerial 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). Since

the Petitioner only contends that the Beneficiary qualifies as a personnel manager on appeal, we will not analyze whether she qualifies as a function manager.

The Petitioner submitted conflicting organizational charts leaving substantial uncertainty as to whether the Beneficiary acted as a personnel manager overseeing subordinate supervisors or managers as of the date the petition was filed. For instance, in support of the petition in January 2020 the Petitioner provided an organizational chart reflecting that the Beneficiary supervised an operations manager overseeing an import and export employee, an administrative assistant, and a warehouse manager supervising a warehouse assistant. Further the chart indicated that the Beneficiary oversaw a commercial manager overseeing two independent sales representatives in Colombia as well as another such sales representative based in Puerto Rico.

Meanwhile, only a few months later in response to the Director's request for evidence (RFE) in April 2020, the Petitioner submitted a completely different organizational chart showing that the Beneficiary oversaw a sales coordinator, an administrative assistant/import and export employee, an online sales and administrative employee, a sales manager, and a warehouse manager. The chart also reflected that the administrative assistant/import and export employee supervised "janitorial cleaning services," while the online sales and administrative assistance employee oversaw a design and social media employee. In addition, the chart indicated that the sales manager supervised four independent sales representatives, one each in Puerto Rico, Colombia, Peru, and the Caribbean; and that the warehouse manager oversaw a warehouse assistant and an "occasional subcontractor."

However, it is noteworthy that only one asserted employee was included in both organizational charts, one of the claimed independent sales representatives based in Colombia, despite them only being submitted approximately three months apart. In addition, the Petitioner's most recent state employer's quarterly tax return from the third quarter of 2019 listed only two employees, beyond the Beneficiary, from in its initial organizational chart coinciding with the date of the petition; specifically, the claimed administrative assistant and import and export employee. Further, this same state wage documentation from the third quarter of 2019 includes none of the employees listed in it's the Petitioner's later submitted April 2020 organizational chart, aside from the Beneficiary. The Director noted discrepancies between the Petitioner's asserted organizational charts and provided state quarterly wage tax documentation but does not properly address these inconsistencies with additional explanations or evidence on appeal.

For instance, in the Petitioner's initial organizational chart, the Petitioner asserted that the Beneficiary oversaw three supervisory employees; namely, operations, commercial and warehouse managers. However, none of these claimed supervisory subordinates are reflected in its provided state quarterly wage tax documentation nor has it provided other supporting evidence to substantiate their employment or the Beneficiary's supervision of them. In fact, on appeal, the Petitioner points to four claimed supervisory subordinates listed in its later organizational chart submitted after the date the petition was filed, none of whom are included in the initially submitted organizational chart. We note that 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).

In sum, the provided evidence relevant to its asserted organizational structure includes numerous discrepancies and inconsistencies and does not credibly establish its organizational structure as of the

date the petition was filed. The Petitioner submits no explanation for the two completely different organizational charts submitted on the record or the material discrepancies between them and provided state employer's quarterly wage tax documentation. In addition, as noted, the Petitioner submitted no supporting evidence to substantiate that the Beneficiary oversaw subordinate supervisors or managers when the petition was filed, including her conducting bi-weekly meetings with them and appraising their performance, as discussed in her duty description. There is also no supporting evidence on the record reflecting the Beneficiary's delegation of non-qualifying duties to subordinates of any kind, let alone supervisory employees with subordinates of their own. The Petitioner must resolve inconsistencies and discrepancies in the record with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, the Petitioner also asserts that the Director did not properly consider its asserted independent contractor sales representatives, stating that "there is no logical reason to exclude the full-time independent contractors from the size of the supervisory load on [the Beneficiary]." First, the Director did not "exclude" these independent contractors from consideration within its organization but merely indicated that the Petitioner had "provided no corroborating documentation which establishes that [they] provide services to [the Petitioner]."

Upon review, we concur with the Director's conclusion, as there was no evidence on the record to substantiate the Petitioner's regular engagement of its claimed contractors. Further, it is not clear which contractors it claims establish the Beneficiary as a personnel manager overseeing subordinate supervisors or managers, since it provided two materially different pictures of these claimed contractors between its two organizational charts. For example, the chart provided with the petition reflected that the Petitioner employed three contractors, two sales representatives in Columbia and one in Puerto Rico, while the latter RFE organizational chart submitted only approximately three months later showed sales representatives in Puerto Rico, Columbia, Peru, and the Caribbean. Further, as noted, only one of these claimed independent sales representatives was included in both organizational charts. As such, the Petitioner has not provided a credible picture of its claimed independent contractors as of the date the petition was filed nor how they supported the Beneficiary's supervision of subordinate supervisors and managers.

The Petitioner also provides additional evidence on appeal meant to substantiate its claimed sales representatives, submitting one "assistance agreement" and three "independent representation agreements" executed with these contractors on appeal. However, these agreements do not credibly establish the engagement of these contractors on a regular basis as such that they could be considered members of the Petitioner's organizational structure as of the date the petition was filed. For instance, the first agreement is with the Petitioner's asserted sales representative based in Peru, an employee only listed in the Petitioner's RFE organizational chart and not in the initially provided chart. Further, the agreement is dated in March 2008, more than a decade prior to the date the petition was filed, leaving question as to why this asserted employee was only included in the Petitioner's RFE organizational chart and not the former chart provided in support of the petition. Likewise, an agreement specific to the Petitioner's claimed sales representative in Puerto Rico is dated in 2013, approximately seven years prior to the date the petition was filed. Lastly, another of these contractor agreements lists an individual not included in either of the submitted organizational charts.

Therefore, the additional evidence provided on appeal only reveals additional material discrepancies that leave further uncertainty as to the Petitioner's asserted organizational structure. It should also be noted that this additional evidence does not substantiate the Petitioner's "fulltime" engagement and payment to sales representatives such that they could be considered a part of its organizational structure as of the date the petition was filed. For the foregoing reasons, the Petitioner has not established that the Beneficiary qualified as a personnel manager based on her authority over subordinate supervisors and managers as of the date the petition was filed.

In the alternative, the Petitioner did not demonstrate that the Beneficiary qualified as a personnel manager based on her supervision of professional subordinates. 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." Therefore, we must 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 Petitioner has not sufficiently demonstrated that the Beneficiary would qualify as a personnel manager based on her oversight of professional subordinates. The Petitioner does not clearly assert that the Beneficiary supervised professional subordinates as of the date the petition was filed, explain how her claimed subordinates qualify as professionals, nor submitted documentary evidence to substantiate that they hold bachelor's degrees. Further, as discussed, the Petitioner has not sufficiently established its organizational structure as of the date the petition was filed due to the numerous inconsistencies we have discussed at length in this decision.

Lastly, as noted, the Petitioner also points to the prior approval of an L-1A nonimmigrant visa and emphasizes that the facts and circumstances of the Beneficiary's employment have not changed. However, the Director's decision in this matter does not indicate whether they reviewed any prior approvals of other nonimmigrant petitions. If the previous L-1A nonimmigrant petition was approved based on the same evidence contained in the current record, the approval would constitute an error on the part of that Director. 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. Matter of Church Scientology Int'l, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be unreasonable for us or any agency to treat acknowledged errors as binding precedent. Sussex Eng'g, Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center Director approved a nonimmigrant petition on behalf of the Beneficiary, we would not be bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 44 F. Supp. 2d 800, 803 (E.D. La. 1999).

For the foregoing reasons, the Petitioner has not established that the Beneficiary would act in a managerial capacity under an approved petition.

ORDER: The appeal is dismissed.