U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-A-, INC.

DATE: OCT. 11, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a wholesaler of yarn-dyed fabric and shirts, seeks to temporarily employ the Beneficiary as its market 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 the Beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner asserts that the Beneficiary will manage an essential function of the Petitioner's international organization and contends that the Director failed to consider that the Beneficiary would rely on its foreign parent company's staff to support her managerial position.

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.*

"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.

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The sole issue addressed by the Director is whether the Petitioner established that it would employ the Beneficiary in a managerial capacity in the United States.[1] Specifically, the Petitioner claims that it will employ the Beneficiary as a function manager.

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).

When examining the managerial capacity of a given beneficiary, we will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business. In the case of a function manager with no direct subordinates, other factors considered may include a beneficiary's position within the organizational hierarchy, the depth of a petitioner's organizational structure, the scope of a beneficiary's authority and its impact on a petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that a beneficiary manages. *See Matter of Z-A-*, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016).

A. Duties

Based on the definition of managerial capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the company's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

[1] The Petitioner did not claim that the Beneficiary would be employed in the United States in an executive capacity.

Initially, the Petitioner stated that the Beneficiary would spend at least 80% of her time managing the product and business development function for the U.S. shirt market, while "non-managerial duties will be performed by others who are current employees or employees [the company] expects to hire in 2017-2018." The Petitioner noted that she would be "working with customers and developing and selling our product," identifying new markets for growth, engaging new clients, and designing and assisting in the development of new products for the U.S. market. A description of the proposed position in the Petitioner's business plan stated that the Beneficiary would be responsible for "developing new models of clothing," and providing "logistical and technical support" to customers.

Based on these descriptions, the initial evidence did not support the Petitioner's claim that the Beneficiary primarily performs managerial duties. Rather, the Petitioner indicated that the Beneficiary would likely spend a significant portion of her time directly selling the company's products, assisting customers with designs, supporting customers during the manufacturing process, and studying the market to develop new products. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In a request for evidence (RFE), the Director advised the Petitioner that the initial description did not provide sufficient detail to explain the intended managerial duties and requested additional information regarding the specific duties the Beneficiary will perform and the amount of time she would spend on each task. In response, the Petitioner stated that the Beneficiary will allocate her time as follows:

> 25% Working directly with customers and their design teams. As part of managing those relationships and orders, she will continue to supervise the Operations Manager and Designer in Portugal. She will also continue to have authority over the manufacturing process in Portugal as it relates to sales made to customers in North America.
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> 50% Developing a marketing strategy to both grow the number of customers and also grow the work with existing customers. She will implement that marketing plan with the assistance of newly hired sales associates in the U.S. and the administrative team in Portugal. . . . Creating a marketing plan . . . will include working with external vendors who can assist with graphic design and publications. She will make regular visits to current customers and also make sales pitches and presentations to potential customers.
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> 10-20% Attending fashion fairs/shows and textile seminars/conferences. . . . [The Beneficiary] attends the most prestigious fairs in the world . . . to both make sales and also to cultivate customer relationships. She also regularly attends fashion shows in the U.S. where customers are showing their products.

5-10% Administrative or office functions that are necessary.

The Petitioner's RFE response also included supporting letters from North American clients who have been working with the Beneficiary in the company's New York office and would continue these relationships upon her formal transfer to the U.S. operations. The CEO of [redacted] noted that his company's design team "is in constant communication" with the Beneficiary and works with her to develop custom fabrics for manufacture by the Petitioner's parent. The creative director for another client, [redacted] mentioned the Beneficiary's efforts to support the development of his company's imported shirt business and "hands-on attention" to the project. The vice president of [redacted] mentioned that the Beneficiary's presence in the U.S. "allows us to work on specific fabric designs, colors, and construction in addition to garment model detail and fit specifics." The Petitioner emphasized that the Beneficiary's meetings with these customers "resulted in product sales and product development at the factory in Portugal," and stated that she "managed and oversaw" these activities.

On appeal, the Petitioner maintains that "the vast majority" of the Beneficiary's duties are "inherently managerial" and refers to her responsibilities for developing a marketing plan, training associates, and "overseeing design and manufacturing" as indicators of her managerial position. However, this claim is not supported by the submitted position descriptions and supporting evidence.

While the Petitioner has established that product and business development for its multimillion dollar shirt product line is an essential function, its descriptions of the Beneficiary's duties do not establish that she will primarily manage that function, as opposed to performing sales, design, marketing, customer service and other non-managerial services related to that function. The actual duties themselves 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 has not established that the Beneficiary's responsibility for working directly with customers and their design teams, which will require 25% of her time, is a managerial task. Although the Petitioner indicates that she will be supported by a designer in Portugal and have some authority over the actual manufacture of the products, the record reflects that face-to-face design sessions and other customer interactions will require a significant portion of her time within this area of responsibility, especially given the Petitioner's initial indication that she would be available to provide "logistical and technical support" to U.S. customers. We acknowledge that this is an important responsibility that likely requires the Beneficiary's deep knowledge of the foreign entity's manufacturing capabilities and operations. However, the Petitioner did not establish how this area of responsibility requires the Beneficiary to perform managerial duties.

According to the Petitioner's job description in response to the RFE, the Beneficiary's responsibility for developing marketing plans and strategies will require 50% of her time. However, this area of responsibility also included non-managerial duties and the Petitioner did not provide the requested level of detail by indicating how much time she would spend on specific tasks. For example, the Petitioner indicated that this responsibility would include making "regular visits to current

customers," and making "sales pitches and presentations to potential customers." Therefore, even after the Petitioner hires sales associates, it appears that the Beneficiary herself would also be responsible for non-managerial sales and marketing duties required to implement the marketing plan. The Petitioner also did not indicate how the foreign entity's administrative team would assist her with this responsibility, or describe the nature of her work with vendors in support of its claim that this area of responsibility would be wholly managerial in nature.

Finally, the remaining 25% of the Beneficiary's time would be divided among duties that the Petitioner did not characterize as managerial in nature, such as attending seminars, attending fashion shows to make sales and build client relationships, and performing necessary administrative and office functions.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a beneficiary as long as those tasks are not the majority of a beneficiary's duties, a petitioner still has the burden of establishing that a beneficiary will "primarily" perform managerial duties. *See* section 101(a)(44)(A) of the Act. Whether a beneficiary is a "function" manager turns in part on whether the petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See Matter of Z-A-*, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016).

Here, the Petitioner did not adequately document what proportion of the Beneficiary's duties would be managerial functions and what proportion would be non-managerial. The Petitioner broadly characterizes her duties as managerial, but the lack of specificity is important because many of the Beneficiary's duties, as discussed above, do not fall directly under managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the Beneficiary performing her duties, we cannot determine what proportion of the duties would be managerial, nor whether the Beneficiary would be primarily performing the duties of a function manager. *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). While the Beneficiary would exercise discretion over the sales operations for her assigned product line and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions do not establish that her actual duties would be primarily managerial in nature.

B. Staffing and Organizational Structure

At the time of filing in September 2017, the Petitioner stated that it had one current employee in the United States, who was identified as a "back office" employee or office administrator. The Petitioner indicated that it had already selected a market manager for the fabric market who would join the company in "early 2018" and had already filed an L-1A petition for a general manager who would supervise the market managers. A proposed organizational chart included in the Petitioner's business plan indicated that it would hire three "sales managers"[2] in 2018, who would report to the market managers. In addition, the organizational chart showed three sales support employees based

[2] The Petitioner identified these proposed employees as "sales assistants" elsewhere in the business plan. Later, in response to the RFE, the Petitioner stated that additional staff hired in 2018 would be limited to "two sales associates."

in Portugal [redacted] and stated that two would support fabric sales and one would support shirt sales.

In response to the RFE, the Petitioner added that the Beneficiary would supervise an operations manager and a pattern maker/garment design developer at the parent company's shirt factory in Portugal as part of her responsibility for "managing [customer] relationships and orders."

In the denial decision, the Director emphasized that the Petitioner had only one employee at the time of filing, a "back office" employee who performs mainly administrative work. The Director found that the Petitioner did not explain how this one employee would be able to relieve the Beneficiary from performing non-managerial duties. The Director acknowledged that the Petitioner also intended to employ a general manager, a second market manager, and at least six employees by mid-2018, but emphasized that the Petitioner must establish eligibility at the time of filing.

On appeal, the Petitioner asserts that the Director "failed to consider all the evidence, particularly the foreign staff and how the Beneficiary would interact with and rely on that staff to perform her duties in the U.S." and did not consider that she will act a senior level with respect to the essential function of business development for the U.S. shirt market. Specifically, the Petitioner states that "[t]he Business Plan plainly states that support staff and the Designer Team in Portugal support the U.S. operation and even states some of those employees by name." We agree with the Petitioner that it is appropriate to consider staff employed within the broader international organization when analyzing whether a Beneficiary will be relieved from performing non-managerial duties.

As noted, the business plan and the Petitioner's organizational chart name three Portugal-based employees in sales support who will support the U.S. operation, including one specifically assigned to the shirt market. The Petitioner did not mention the operations manager at the Portuguese shirt factory or the Portugal-based designer or design team in its business plan or include them in its organizational chart, although it referred to the Beneficiary's authority over them in one of her position descriptions. The Petitioner has provided the names of these employees, but has not provided descriptions of their duties or explained how they would relieve the Beneficiary from spending a significant amount of time meeting with U.S. customers to promote, sell, and design the company's products. The Petitioner emphasizes the steady growth in U.S. sales that has occurred since the foreign entity assigned the Beneficiary to the U.S. market, but it does not claim to have anyone else actually performing the U.S. sales work. Therefore, while we do not doubt that the Petitioner and its parent company must work together to ensure that U.S. clients receive the products and customer service they expect, the record reflects that the Beneficiary is the only employee who directly handles sales.

The Petitioner also argues that "managing an essential function that requires constant communication and oversight of the design and manufacturing process necessarily requires the Beneficiary to rely on the foreign entity's staff members." The Petitioner has stated that the Beneficiary "sets the production work for orders from customers she serves," and that after working directly with customers "relays those customers' needs to the other design team members and the manufacturing team." However its descriptions of her duties do not support its claims that this is a

duty she performs on a constant basis or that monitoring the manufacturing process requires a significant portion of her time. The Petitioner noted her oversight of manufacturing as one component of her responsibility for working directly with customers and their teams, but not as one of her primary responsibilities.

With respect to the Petitioner's claim that the Beneficiary acts at a senior level with respect to her assigned essential function, we acknowledge that she would report to the senior employee in the U.S. market, who reports directly to the CEO and board of directors for the parent company. As noted, the record establishes that the Beneficiary has the authority to set strategies and goals for her assigned product line and the ability to make other discretionary decisions, and such authority is consistent with the definition of managerial capacity. However, the Petitioner did not meet its burden to establish that she would primarily perform these higher-level duties, rather than primarily carrying out sales, design, and customer service functions, as of the date of filing.

On appeal, the Petitioner emphasizes that it plainly stated that the Beneficiary spends half of her time on developing a marketing strategy and emphasizes that the amount of time she spends on this responsibility demonstrates that she would be primarily managing the U.S. shirt market. However, the Petitioner does not acknowledge that this area of responsibility would require her to make regular visits to customers and make sales pitches and presentations. It is unclear whether these non-qualifying duties would be assigned to U.S.-based sales employees in the future, as the Petitioner did not provide a position description for the proposed role described variously as sales manager/sales assistant/sales associate. In fact, in response to the RFE, the Petitioner referenced these future hires and stated that the "additional employees will carry out some of the non-managerial tasks, leaving [the Beneficiary] to focus the majority of her time managing the [redacted] This statement seemed to acknowledge that the Beneficiary would not be able to perform primarily managerial duties until the Petitioner hires additional sales staff.

The Petitioner indicates that it is seeking to staff its New York office which, although established in 2014, has had no long-term employees other than the back office employee.[3] However, it must still show that it can immediately employ the Beneficiary in a position in which she would primarily perform managerial duties. Again, whether a beneficiary is a "function" manager turns in part on whether the petitioner has sustained its burden of proving that his or her duties are "primarily" managerial. *See Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016). The Petitioner's claim that the facts of this case are very similar to those in *Matter of Z-A-* is not persuasive as the record here does not support its assertion that the Beneficiary's actual duties would be primarily managerial.

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 would be employed in a managerial capacity. *See* section 101(a)(44)(C) of the Act.

[3] The Petitioner indicates that the Beneficiary and the proposed general manager have made frequent visits to its New York office over a period of two years to meet with U.S. clients. U.S. Citizenship and Immigrant Services (USCIS) records show that the Beneficiary had spent more than half of her time in the United States since the beginning of 2015.

However, it is appropriate for 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). Our determination here is not based on the size of the petitioning company, but on the submitted position descriptions, which indicate that the Beneficiary would be primarily performing sales and design work rather than primarily managing the business and product development for the U.S. shirt market. 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).

For the reasons discussed, the Petitioner has not established that it will employ the Beneficiary as a function manager in the United States.

III. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

Although not addressed by the Director, we find that the Petitioner has not established that the Beneficiary has been employed abroad in a managerial capacity.

The Petitioner emphasizes that the proposed U.S. position and the Beneficiary's current position abroad as Product Market Manager for the North American market, are nearly identical, and asserts that the Director should not have made an adverse finding with respect to the U.S. position, after reaching the opposite conclusion with respect to the foreign employment. However, as with the U.S. position, the Petitioner's description of the Beneficiary's duties abroad indicates that she has been spending a significant portion of her time on non-qualifying duties, notwithstanding her overall discretion over one of the foreign entity's key products markets. Therefore, the deficiencies addressed above also apply to our analysis of her employment abroad.

The Petitioner stated that "working with customers takes up a majority of her time as Product Market Manager – well over 50%," and noted that she "is responsible for developing custom-made collections for customers in North America." Based on this description, the Petitioner did not establish why this duty should be characterized as managerial in nature, as the Beneficiary has been performing the services necessary for the foreign entity to sell its products. The Petitioner stated that once a customer's design is complete, the Beneficiary has been spending an additional 10-20% of her time overseeing the work performed at the Portuguese factory to ensure the product is what the customer ordered, noting that she has the authority to stop orders if she determines that something is not being manufactured correctly. The Petitioner did not assign percentages to any other duties, but noted that she sets sales goals and a sales plan, sets her meetings with customers, sets her travel to accomplish her goals, and sets the production work orders. This description shows that the Beneficiary exercises discretion in the sales and design areas, but does not explain how she performs primarily managerial duties or primarily manages an essential function.

The Petitioner also indicates that the Beneficiary oversees three sales support staff, a designer and an operations manager, but does not provide details regarding their duties or functions, or explain the

nature of the support they provide. As noted, the record indicates that the Beneficiary has been spending more than half of her time in the United States directly working with customers on non-managerial sales and design activities, and therefore the record does not establish that her duties have been primarily managerial. For these reasons, the Petitioner has not established that the Beneficiary has been employed abroad as a function manager.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial capacity, or that she has been employed abroad in a managerial capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of S-A- Inc.*, ID# 1664209 (AAO Oct. 11, 2018)