U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-C- LLC

DATE: OCT. 22, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a management consulting and training services company, seeks to continue[1] the Beneficiary's employment as its chief executive officer (CEO) 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 California Service Center denied the petition concluding that the Petitioner did not establish that the Beneficiary was employed abroad in a managerial or executive capacity. In addition, the Director determined that the Petitioner did not demonstrate that the Beneficiary would be employed in a managerial or executive capacity in the United States under an extended petition.

On appeal, the Petitioner asserts that the Director did not consider the totality of the evidence and relied solely on its size, and the size of the foreign employer, in denying the petition. The Petitioner contends that it submitted sufficient evidence to establish that the Beneficiary acted in a managerial capacity abroad. With respect to the Beneficiary's proposed employment in the United States, the Petitioner states that the Director did not properly consider that it is a start-up company and its stage of development as required by the regulations.

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 managerial or executive capacity for one continuous year within

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period from November 6, 2017, to November 5, 2018. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation one year within the date of approval of the petition to support an executive or managerial position.

three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). 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.*

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The first issue we will address is whether the Petitioner established that the Beneficiary would act in a managerial or executive capacity under an extended petition.

"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.

"Executive capacity" means an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

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).[2] Beyond the required description of the job duties, we examine the company's organizational structure, the duties of a beneficiary's

[2] In support of the petition, the Petitioner emphasized that the Beneficiary would act in a managerial capacity in the United States. Later in response to the Director's request for evidence (RFE), the Petitioner stated that the Beneficiary would act in an executive capacity; now again on appeal, it contends that he would act in a managerial capacity. The Petitioner's shifting assertions as to the Beneficiary's qualification as a manager or executive leaves initial question regarding the petition. The Petitioner must resolve inconsistencies 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).

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, its staffing levels, and its organizational structure.

A. Duties

Based on the definition of managerial or executive 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 or executive 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 1533.

The Petitioner stated that it "provides consistent and viable solutions to companies by providing project management best practices and project management training." The Petitioner indicated that it offers "applied project management courses, corporate project management training, consulting services, and project management office development consulting."

In a support letter provided along with the petition, the Petitioner submitted the following duties for the Beneficiary in the United States:

- Leading the United States market expansion by overseeing and directing all levels of the day-to-day operations of the company,
- Setting the direction and growth of the company,
- Recruiting, interviewing, hiring, training, and when necessary, terminating employees, utilizing established policies and procedures,
- Developing the management team,
- Supervising, motivating and evaluating employee performance and training,
- Establishing work priorities, and delegating work to appropriate employees,
- Meeting with the financial team and accountants to review annual reports and profit and loss statements,
- Monitoring compliance with all federal, state, and local regulations,
- Identifying problem areas and working with the management team to develop solutions,
- Ensuring the consistent high quality of training programs and services, and
- Approving all capital investments.

In the later RFE, the Director stated that the Beneficiary's duties were generic responsibilities and requested that the Petitioner submit an explanation of his typical duties, including a statement setting forth the tasks he performed in during the previous year. In a response letter, the Petitioner listed some of the following duties for the Beneficiary:

- Overall responsibility for creating, planning, implementing, and integrating the strategic direction of the Petitioner,
- Responsibility for all components and departments of the business including Business Development, Finances and Administration,
- Planning the staffing levels, looking after recruiting, interviewing and selecting an employees as the need arises,
- Responsible for business development by making contacts in the marketplace,
- Maintaining a web presence and working to establish business relationships that result in instructional and business support contracts,
- Management of the overall operational, budgetary and financial activities of the company, and
- Working to improve the efficiency of business processes and procedures to enhance the quality, efficiency and output of the company.

The Petitioner submitted duty descriptions for the Beneficiary including several inconsistencies that leave question as to whether we would primarily devote his time to managerial or executive duties under an extended petition. The Petitioner stated in response to the Director's RFE that "at present, [the Petitioner] has one contract instructor retained." As such, this low level of staffing leaves doubt as to several of the Beneficiary's claimed duties. For instance, with only one contract employee beyond the Beneficiary, it is not clear how he would devote time to "directing *all levels* of the day-to-day operations of the company," spend meaningful time "supervising, motivating and evaluating employee performance and training," or engage in "meeting with the financial team and accountants to review annual reports and profit and loss statements." Indeed, there appear to be no levels of operation, few employees to supervise and motivate, and there is no apparent financial team.

Likewise, despite having only one contract employee, the Petitioner indicated that the Beneficiary would be tasked with "identifying problem areas and working with [the] management team to develop solutions" and that he would have "responsibility for all components and departments of the business including Business Development, Finances and Administration." However, again, the Petitioner does not have an apparent management team or separate components devoted to business development, finance, or administration. These material discrepancies leave substantial uncertainty as to whether the Beneficiary would devote a majority of his time to qualifying managerial or executive duties under and extended petition and whether it has developed sufficiently during the first year to support him in a qualifying capacity. Again, the Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 582, 591-92.

Further, to the extent the Petitioner articulates apparent qualifying duties for the Beneficiary they are generic and could apply to any manager or executive working in any industry and they provide little insight into his actual day-to-day tasks. These vague duties include the Beneficiary "leading the United States market expansion," "setting the direction and growth of the company," and "creating, planning, implementing, and integrating the strategic direction of [the Petitioner]." However, in each case, there is no explanation or documentation to substantiate how the Beneficiary led market expansion, the direction and growth he set, or the strategic direction he created and implemented. The Petitioner did not clearly articulate the duties the Beneficiary performed, or would perform, daily. In addition, the Petitioner did not detail or document the policies and procedures the Beneficiary

established related to recruiting, interviewing, hiring, training, and terminating employees, regulations he ensured compliance with, contacts he developed in the marketplace, capital investments he approved, business relationships he established, budgetary and financial activities he managed, or business processes and procedures he improved. In fact, the Petitioner asserted that the Beneficiary was tasked with "establishing work priorities, and delegating work to appropriate employees," but it only had one claimed contactor employee as of the date of the petition and there is no documentation on the record to substantiate his delegation of duties to subordinates.

Further, given the Petitioner's lack of staff, it is not clear how the Beneficiary would be relieved from some of the non-qualifying operational aspects set forth in his duties. For example, the Petitioner stated that the Beneficiary would be responsible for "maintaining a web presence;" however, with only one claimed instructor on staff it is not clear how he would be relieved from performing the non-qualifying duties inherent in maintaining the company's web presence.

Whether the Beneficiary is a managerial employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the Petitioner does not sufficiently document what proportion of the Beneficiary's duties would be managerial or executive functions and what proportion would be non-qualifying. The Petitioner lists the Beneficiary's duties which would inherently include administrative or operational tasks, but does not adequately quantify the time he spends on these different duties. For this reason, we cannot determine whether the Beneficiary was primarily performing managerial or executive capacity duties as of the date the petition was filed. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Even though the Beneficiary holds a senior position within the organization, the fact that he will manage or direct a 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)(A) and (B) 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 or executive 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.

In support of the petition, the Petitioner submitted an organizational chart reflecting that the Beneficiary supervised an executive assistant, a business development manager, two sales representatives listed as "to be hired," and an instructor. The chart further indicated that the instructor would oversee two other instructors also shown as "to be hired." Later, in response to the RFE, the Petitioner provided an organizational chart showing that the Beneficiary supervised two sales representatives listed as "to be hired" and one instructor identified by name overseeing two other

instructors again shown as "to be hired." Again, the Petitioner also stated in a support letter in response to the RFE that "at present, [the Petitioner] has one contract instructor retained."

On appeal, the Petitioner emphasizes that the Director did not sufficiently consider that it was a start-up company, its stage of development, and asserts that its small size was overemphasized in dismissing the petition. However, we note that the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the intended U.S. operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations allowing for an extension of this one-year period. If the Petitioner does not have the necessary staffing after one year to sufficiently relieve the Beneficiary from performing operational and administrative tasks, they are ineligible for an extension. The Petitioner indicates that it only employed one contracted instructor and provides an employment agreement dated in March 2018 specific to this employee indicating that he would earn $60 per hour.[3] However, despite the requests of the Director, it submits no supporting state or federal state wage tax, or other, documentation to substantiate this contractor's employment with the Petitioner. Therefore, in short, the Petitioner has not provided evidence to establish that it has even one employee beyond the Beneficiary after one year. As such, it appears clear that it does not have the necessary staffing after one year to sufficiently relieve the Beneficiary from performing operational and administrative tasks and to support him in a managerial or executive capacity.

Further, the Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in a managerial or executive capacity. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for us 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 or a company that does not conduct business in a regular and continuous manner. *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). Here, we and the Director emphasize that the Petitioner only had one contractor, whose level of engagement was not substantiated. As such, the focus of our analysis was not exclusively on the size of the company; but rather, whether it had sufficient staffing to primarily relieve the Beneficiary from performing non-qualifying operational duties as of the date the extension petition was filed.

As discussed, the Petitioner has presented shifting assertions as to whether the Beneficiary qualifies as a manager or an executive. For instance, it asserted in support of the petition that the Beneficiary qualifies as a manager, indicated in response to the RFE that he would act in an executive capacity, and now on appeal again emphasizes he would qualify as a manager. We will briefly discuss each.

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

[3] The petition was filed on November 2, 2018.

employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

The Petitioner has not established that the Beneficiary qualifies as a personnel manager. First, it asserts that it has, at most, one other employee in the United States beyond the Beneficiary. Therefore, it is not possible for the Beneficiary to qualify as a personnel manager based on his supervision of subordinate managers. Further, the Petitioner has not demonstrated that the Beneficiary would oversee subordinate professionals.[4] The Petitioner does not claim that the Beneficiary sole subordinate qualifies as a professional; further, it does not provide detailed job duties for the claimed instructor to substantiate that this positions requires a bachelor's degree. In addition, the Petitioner did not provide, at minimum, evidence that the Beneficiary's sole subordinate holds a bachelor's degree. For these reasons, the Petitioner has not established that the Beneficiary qualifies as a personnel manager.

The Petitioner also did not demonstrate that the Beneficiary would qualify as a function manager.[5] Again, it does not expressly articulate this ground for qualification, nor does it clearly describe the Beneficiary's qualifying managerial duties, define his function (if any), or demonstrate that he would primarily manage a function rather than perform it. In fact, the Petitioner's lack of staffing indicates that the Beneficiary would likely primarily perform the services of the company, rather than manage and direct them.

Furthermore, the Petitioner did not demonstrate that the Beneficiary would act in an executive capacity under an extended petition. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of

[4] 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.

[5] 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).

directors, or stockholders of the organization." *Id.* In short, the Petitioner has not corroborated that it has any fulltime employees; therefore, it is not clear how the Beneficiary could qualify as acting within a complex organizational hierarchy. Likewise, the Beneficiary's duty description includes various discrepancies and it does not sufficiently articulate or document his executive-level tasks. As such, it has not established that the Beneficiary would primarily direct the management and establish the goals and policies of the organization.

Lastly, the regulations further require that a petitioner requesting the extension of a new office petition on behalf of a beneficiary submit evidence of the financial status of the United States operation. 214.2(l)(1)(14)(ii)(E). The Petitioner only vaguely references that it earned $19,000 in revenue during the first year. This level of revenue during the first year does not indicate that the Petitioner's operations have developed sufficiently to support the Beneficiary in a managerial or executive capacity; in fact, it is not clear how it would maintain its operations under an extended petition given this low level of revenue. Otherwise, the Petitioner provides no evidence to substantiate its financial position as of the date the petition was filed and whether it is operating sufficiently to support the Beneficiary in a managerial or executive capacity.

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

III. FOREIGN EMPLOYMENT IN AN MANAGERIAL OR EXECUTIVE CAPACITY

As we have discussed, the Director also denied the petition concluding that the Petitioner did not establish that the Beneficiary was be employed in a managerial or executive capacity abroad. Because of the dispositive effect of the above finding of ineligibility; namely, our affirmation of the Director's conclusion that the Petitioner did not establish that the Beneficiary would act in a managerial or executive capacity in the United States, we will only briefly address the remaining issue addressed by the Director.

In denying the petition on these grounds, the Director determined that the Beneficiary's foreign duties were generic and noted that the Petitioner did not submit duties for the Beneficiary's subordinates abroad. Upon review, we concur with the Director that the provided evidence does not sufficiently demonstrate that the Beneficiary acted in a managerial or executive capacity abroad. In fact, the Petitioner indicates that the Beneficiary's duties are identical to his U.S. duties, and as we discussed at length, these duties include several discrepancies and set forth few credible details as to his actual qualifying tasks. This lack of detail and documentation to substantiate the Beneficiary's daily duties abroad is particularly noteworthy since it claims he acted in this capacity dating back to 2010. In fact, the Petitioner submits 2017 foreign employer financial information corresponding with the Beneficiary's employment abroad reflecting that it only had $105,064.10 in payroll expenses during that year. Questionably, this total amount of payroll abroad is comparable to the Beneficiary's salary abroad as reflected in support letters and Canadian income tax documentation. This discrepancy leaves substantial doubt as to whether the foreign employer employed the six subordinates reflected in its submitted organizational chart during the Beneficiary's asserted employment abroad.

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

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of T-C- LLC*, ID# 6442301 (AAO Oct. 22, 2019)