U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-C- INC.

DATE: OCT. 31, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

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

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner did not establish, as required, that: (1) a qualifying relationship exists between the Petitioner and the Beneficiary's employer abroad; (2) the Beneficiary would be employed in the United States in a managerial or executive capacity under the extended petition; and (3) the Beneficiary was employed abroad in a managerial or executive capacity.

On appeal, the Petitioner submits a brief and additional evidence addressing the three grounds cited as reasons for the denial. The Petitioner states that it is the wholly-owned subsidiary of the Beneficiary's foreign employer and claims that the Beneficiary will be employed in a managerial capacity and that he continues to assume the position of managing director with the foreign entity.

Upon *de novo* review, we find that the Petitioner did not meet the eligibility requirements cited above. Therefore, 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 qualifies him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. QUALIFYING RELATIONSHIP

The first issue to be addressed in this decision is whether the Petitioner established that it has a qualifying relationship with the Beneficiary's employer abroad. To establish a "qualifying relationship" under the Act and the regulations, a petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

In Section 1, Item 8 of the L Classification Supplement portion of the petition, the Petitioner stated that the Beneficiary is "the owner of the Indian company." At Item 9 of the same document the Petitioner checked the box marked "Branch" when asked to specify its relationship to the company abroad. The record does not show that the Petitioner provided evidence to support either claim.

The Director therefore issued a request for evidence (RFE) instructing the Petitioner to provide evidence establishing its ownership and control.[1] The RFE included a comprehensive list of documents that would be acceptable for the purpose of demonstrating the existence of a qualifying relationship, including the Petitioner's articles of incorporation, stock certificates, a stock ledger, recent federal tax returns, or evidence that the foreign entity is authorized to do business as a branch office in the State of New York.

In response, the Petitioner provided a statement referring to the Beneficiary's employer abroad as its "Indian [p]arent entity," thus indicating that it is not a branch office of the foreign entity, but rather that the nature of its claimed qualifying relationship is that of parent-subsidiary. The Petitioner also provided a copy of its 2014 corporate tax return and stated that it was including "the updated Schedule G/Form 1120 to document and establish correct ownership" of the Petitioner. However, the submitted tax return did not include a Schedule G and instead included Schedule K, which addresses the issue of foreign ownership. When asked to disclose its foreign ownership in No. 7 at Schedule K, the Petitioner responded that it is not foreign-owned and provided no further information.

The Beneficiary's 2014 tax return, which the Petitioner also provided in the RFE response, names the Beneficiary as the Petitioner's proprietor and is therefore inconsistent with information provided in the Petitioner's own tax return. The Petitioner must resolve this discrepancy 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). Although the RFE response also included the foreign entity's "Director's

[1] Although the Director stated that the Petitioner provided a support letter from its previous L-1A filing, the record indicates that this observation was incorrect. The Petitioner provided a brief supporting letter in support of the instant petition referring to its enclosure of the petition and a corresponding filing fee. The letter made no reference to any other supporting evidence and therefore we have no reason to believe that supporting evidence was submitted. Moreover, even if the referenced support letter from a previously filed petition had been submitted in support of this petition, it would not have altered the outcome in this matter, as the letter would not be deemed as sufficient evidence to demonstrate the existence of a qualifying relationship between the Petitioner and the foreign entity.

Report," which referred to the Beneficiary as "promoter" of the Petitioner and the foreign entity, the document did not address the Petitioner's ownership, nor did it resolve the incongruity between the Petitioner's and the Beneficiary's 2014 tax returns, which make inconsistent claims regarding the Petitioner's ownership.

In the denial decision, the Director observed that the Petitioner's tax return did not establish its ownership and further noted that the Petitioner did not provide stock certificates to establish that it is owned by the foreign entity, as claimed. The Director concluded that the Petitioner did not establish that it has a qualifying relationship with the foreign entity.

On appeal, the Petitioner reiterates claims it made in the RFE response statement, contending that it is wholly owned by the foreign entity and again stating that it is submitting its "updated Schedule G/Form 1120 to document and establish correct ownership." Although the Petitioner has submitted the more recent 2015 tax return, it contains the same schedules, including Schedule K, which contains the same information about the Petitioner's foreign ownership. Nowhere in the 2015 tax return is there any indication that the Petitioner is the wholly owned subsidiary of a foreign entity or that it has any foreign ownership at all.

The Petitioner also provided stock certificate No. 2, which shows that it issued 200 shares of its stock to the foreign entity in 2008, when the U.S. entity was established. However, the Petitioner did not provide its corresponding articles of incorporation, as requested in the RFE, and thus it is unclear how many shares it was authorized to issue. Given that the Petitioner did not provide a stock ledger, which was also listed in the RFE as one of the numerous documents the Petitioner could have submitted to establish proof of ownership, we are unable to verify the Petitioner's claim that the foreign entity is its only stockholder. The submitted documentation does not resolve the inconsistency between the Petitioner's claim regarding its ownership and the Beneficiary's tax return, which names him as the Petitioner's proprietor, i.e., its owner. *See id.*

Regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities. *See, e.g.*, *Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (Comm'r 1988); *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). As the Petitioner in this matter has not provided sufficient credible supporting evidence establishing its ownership, we cannot conclude that it has a qualifying relationship with the Beneficiary's employer abroad and on the basis of this finding the instant petition cannot be approved.

III. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director also found that the Petitioner did not establish that the Beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity.

The Act defines "managerial capacity" 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.

The Act defines the term "executive capacity" as 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.

A. U.S. Employment in a Managerial Capacity

First, we will determine whether the Petitioner provided sufficient evidence to establish that the Beneficiary would be employed in the United States in a managerial capacity.[2]

1. Duties

When examining the managerial capacity of the Beneficiary, we will look first to 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).

Based on the statutory 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 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 1533.

In the petition, the Petitioner claimed three employees and a gross income of $285,620. In the L Classification Supplement portion of the petition, Section 1, Item 7, the Petitioner stated that the Beneficiary's U.S. employment includes overseeing the company's operations, hiring and firing managerial and supervisory staff, making policy decisions, and marketing the company's products to

[2] The Petitioner has made inconsistent claims as to whether the Beneficiary would be employed in a managerial or executive capacity; however, on appeal, the Petitioner claims that the Beneficiary would be working in a managerial capacity. Therefore, we will only address that claim in our decision.

retail merchandisers. The Petitioner also stated that the Beneficiary has 35 years of experience in marketing and administration.

In the RFE, the Petitioner was advised that the initial supporting evidence was not sufficient to establish eligibility.[3] Accordingly, the Petitioner was given the opportunity to supplement the record with evidence that sufficiently articulates the actual job duties to be performed by the Beneficiary in the proposed position and the amount of time he would allocate to each of his assigned duties.

In response, the Petitioner provided its own letter as well as a letter from its attorney, both listing the same 23 job duties as part of the Beneficiary's current and proposed employment. Neither letter included the requested time allocations and they were inconsistent with one another as to whether those 23 job duties qualify the Beneficiary for classification in a managerial or executive capacity.

Further, much of the job description highlighted the Beneficiary's discretionary authority over matters concerning the Petitioner's finances, its goals and business strategies, as well as its personnel, but does not state what specific daily tasks the Beneficiary would perform. For instance, the Petitioner stated that the Beneficiary would develop long- and short-term business strategy "to maximize returns on investments and to increase productivity." However, it did not clarify the relevance of making investments within the scope of a clothing wholesale business, nor did the Petitioner specify what daily tasks the Beneficiary would execute to increase productivity. The Petitioner also claimed that the Beneficiary would monitor operations and direct preparation of annual reports for review by the foreign entity's shareholders. However, the Petitioner did not explain what underlying tasks are involved in monitoring operations. Further, given that ownership of the foreign entity is equally divided between the Beneficiary and one other individual, the claim that the annual reports would be prepared for review by the foreign entity's "shareholders" is misleading in that it gives the impression that the Beneficiary would be required to answer to multiple shareholders when, in fact, he himself is one of the two shareholders. Likewise, the Petitioner's claim that the Beneficiary would establish a sales training program, supervise "department managers of various departments," "maximize the use of direct hires and other workers," and "[c]oordinate with other team members," belies the Petitioner's claimed three-person staff consisting of a sales and marketing manager, a production manager, and a secretary. This staffing composition does not constitute "various departments" or a "team" of workers.

The job description also points to the Beneficiary's role in directing import transactions and financial programs as well as establishing the company's budget and allocating its funds. However, these broad duties are not representative of functions that the Beneficiary would carry out on a daily basis. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. Here,

[3] The RFE once again made reference to a support letter associated with a previously filed petition. As noted above, the record does not indicate that a supporting statement was provided at the time the instant petition was filed, nor did the Petitioner indicate either in its RFE response statement or on appeal that such a letter was submitted. The Director's inaccurate observation is noted for the record, but it will not alter our analysis or the outcome in this matter.

the Petitioner provided a job description that lacks detail and does not delineate the Beneficiary's activities in the course of their daily routine.

In denying the petition, the Director found that the Petitioner did not sufficiently articulate the Beneficiary's actual duties and therefore did not establish that the managerial or executive nature of the proposed employment.

On appeal, the Petitioner resubmits the same deficient job description, despite the Director's denial, which was based, in part, on the lack of a sufficient description of the Beneficiary's job duties. The Petitioner claims that the duties listed fit the definition of managerial capacity.

We disagree and find that the Director was correct in pointing to the inadequacy of the submitted list of duties. As discussed in the above analysis, the Petitioner offered a job description that lacks a detailed explanation of the actual daily tasks the Beneficiary would carry out within the scope of its clothing wholesale operation and it does not state how much time the Beneficiary would allocate to specific tasks. 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). Despite being advised that the prior job description lacked necessary information that would lead to a conclusion that the Beneficiary would be employed in a managerial or executive capacity, the Petitioner resubmitted the same deficient job description and added no further information to clarify precisely what tasks the Beneficiary would perform on a daily basis or the amount of time he would allocate to those tasks. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In light of the above, we find that the Petitioner did not provide an adequate job description and therefore we cannot conclude that the Beneficiary would be employed in a managerial capacity as claimed.

2. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining a beneficiary's claimed managerial capacity, including the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The Petitioner claimed a total of three employees at the time of filing, but did not provide a corresponding organizational chart or list of employees and job titles to establish whom it employed at that time.

In the RFE, the Petitioner was asked to provide an organizational chart depicting its staffing levels and listing its employees by name and job title. The Petitioner was also instructed to submit its

payroll documents and state quarterly wage reports that preceded, included, and followed the time period during which the petition was filed.

Although the Petitioner provided job descriptions for a sales and marketing manager, a production manager, and an office secretary, it did not provide the names of employees who may have filled these positions at the time of filing, nor did it provide the payroll documents and state quarterly wage reports that were requested in the RFE. Furthermore, while the Petitioner provided its 2014 tax return, it does not indicate that the Petitioner paid any wages or salaries to such employees. The tax return indicates $90,000 paid in officer compensation, however, there is no evidence to show who received that compensation, nor can we determine the employment of any such officer(s).

In the denial decision, the Director noted that the Petitioner neglected to provide evidence to prove that it had employees to fill the above-listed positions at the time of filing. The Director indicated that this evidentiary deficiency contributed to the overall conclusion that the Beneficiary's proposed position would not be in a managerial or executive capacity.

Although the Petitioner supplements the record on appeal with an organizational chart listing the Beneficiary as the company's chief executive officer and naming two other employees as sales manager and sales person, respectively, the record continues to lack payroll documents and wage reports to show precisely whom, if anyone, the Petitioner employed at the time of filing. As stated above, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Furthermore, the organizational chart provided in support of the appeal lists a sales manager and a sales person. This information is inconsistent with the employee list that was provided in the RFE response, which indicates that the Petitioner employed a sales and marketing manager, a production manager, and a secretary at the time of filing. The Petitioner has not submitted independent, objective evidence to resolve this inconsistency and establish precisely who, if anyone, the Petitioner employed at the time of filing or the positions they filled. *See Ho*, 19 I&N Dec. at 591-92. Without this critical information resolving the inconsistency and establishing who the Petitioner employed at the time of filing, we cannot conclude that the Petitioner had the necessary staff to relieve the Beneficiary from having to carry out its operational and administrative tasks.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

As discussed above, the Petitioner provided inconsistent claims as to whom it employed at the time of filing and it has provided no wage evidence to corroborate either of its claims. Therefore, given the inadequate and inconsistent evidence submitted in support of this petition, we cannot conclude that the Beneficiary's primary concern would be to manage a staff of supervisory, professional, or managerial employees, as applicable to one employed in a managerial capacity. In fact, even if the Petitioner were to submit evidence corroborating that the employees listed in its organizational chart were actually employed at the time of filing, there is no evidence to suggest that either the sales person or the sales manager had subordinates of their own such that they would be deemed supervisory or managerial subordinates. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

In sum, the record is not persuasive in establishing that the Petitioner's organization at the time of filing was sufficient to support the Beneficiary in a primarily managerial position. Therefore, for the reasons discussed above, the evidence submitted does not establish that the Beneficiary would be employed in a managerial capacity under the extended petition.

B. Employment Abroad in a Managerial or Executive Capacity

Next, we will determine whether the Petitioner provided sufficient evidence to establish that the Beneficiary was employed abroad in a managerial or executive capacity.

As stated earlier, we look first to the description of the Beneficiary's job duties when examining the managerial or executive capacity of the position in question, as this evidence is critical in revealing the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108.

In the present matter, the only initial information about the Beneficiary's foreign employment was found in the L Classification Supplement, Section 1, Item 6, where the Petitioner stated that the Beneficiary was the CEO of the foreign entity, where he was responsible for "all operations," including hiring and firing managerial staff and making policy decisions.

In the RFE the Director restated the above job description and determined that it was not sufficient for the purpose of establishing that the Beneficiary was employed abroad in a managerial or executive capacity. The Petitioner was instructed to provide a letter from an authorized representative of the foreign entity describing the Beneficiary's duties in full and indicating the percentage of time he devoted to each duty.

In response, the Petitioner did not comply with the Director's request and instead only provided job descriptions for the Beneficiary's position with the U.S. employer. The Director's denial decision appropriately points to the lack of initial supporting evidence and the lack of additional evidence addressing the deficiencies cited in the RFE.

On appeal, the Petitioner provides an organizational chart of the foreign entity, but again neglects to supplement the record with any information about the job duties that the Beneficiary performed

during his employment abroad. Although the chart depicts the Beneficiary at the top of the foreign entity's organizational hierarchy as managing director overseeing three directors, a production manager, a sales manager, a quality manager, and a purchase manager, this evidence alone is not sufficient without a detailed job description and statement discussing how the foreign entity's support personnel relieved the Beneficiary from having to primarily carry out the organization's operational and administrative functions. As stated above, the Petitioner is expected to provide relevant, probative, and credible evidence to support its assertions. *See Chawathe*, 25 I&N Dec. at 376.

Given the lack of sufficient supporting evidence describing the Beneficiary's job duties during his employment abroad and discussing who carried out the foreign entity's operational and administrative job duties, we cannot conclude that the Beneficiary was employed abroad in a managerial or executive capacity. For this additional reason, the instant petition cannot be approved.

IV. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer or that the Beneficiary has been and would be employed in a managerial or executive capacity under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of S-C- Inc.*, ID# 681412 (AAO Oct. 31, 2017)