U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-B-, INC.

DATE: OCT. 31, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, intending to operate as a beauty supply distributor, seeks to temporarily employ the Beneficiary as the business development manager of its new office[1] 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, as required, that: (1) the Beneficiary was employed abroad in a managerial or executive capacity; and (2) the new office would support the Beneficiary in a managerial or executive position within one year of approval of the instant petition.

On appeal, the Petitioner disputes the denial asserting that it has submitted sufficient evidence to show that the Beneficiary was employed abroad and would be employed in the United States in the position of "Executive Manager."

Upon *de novo* review, we find that the Petitioner has not established that the Beneficiary was employed abroad in a managerial or executive capacity. Therefore, we will dismiss the appeal. Because of the dispositive effect of this finding, we will reserve the remaining issue.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within 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.*

[1] The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

The petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

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

The Petitioner states that the foreign entity offers transportation services for various goods and that the Beneficiary has been employed abroad in a managerial capacity as the foreign entity's general manager. As the Petitioner does not claim that the Beneficiary was employed abroad in an executive capacity, we will not address that issue and will focus on determining whether the record demonstrates that the Beneficiary was employed abroad 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.

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). The Petitioner must also 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.

Further, the job description must clearly state 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). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of the 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 the Beneficiary's actual duties and role in a business. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Duties

First, we will discuss the duties performed by the Beneficiary during her period of employment with the foreign entity. 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).

In a supporting cover letter, the Petitioner stated that the Beneficiary's position as the foreign entity's general manager involves managing staff and overseeing the warehousing and moving of goods. The Petitioner also provided a separate job duty breakdown listing the following as part of the Beneficiary's required activities:

- Ensure "high level of customer service" and adherence to safety procedures for transporting hazardous and non-hazardous material;
- Develop policies and procedures and adhere to such in the course of executing supervisory responsibilities;
- Review staff requirements and assist with personnel recruitment, training, and scheduling;
- Conduct performance reviews, "resolve employee problems," and mentor and assist staff;
- Assess business opportunities and customer and market needs after conducting analysis;
- Communicate frequently with staff and management;
- Help develop and implement market strategies and budget and inventory controls and "[p]rovide checks and balances"; and
- Ensure that administrative requirements are satisfied.

In a request for evidence (RFE) the Director asked the Petitioner to provide a job duty breakdown identifying and showing the percentage of time the Beneficiary spends on typical managerial duties along with a description of how the Beneficiary's position and job duties fit the statutory definition of managerial capacity. The Director stated that if claiming that the Beneficiary was employed abroad in the role of a function manager, the Petitioner would need to provide evidence demonstrating that the function managed was essential to the foreign entity and that the Beneficiary occupied a top-level position with respect to that function.

In response, the Petitioner stated that the Beneficiary has discretion to make decisions on debt reduction, offer financial rewards and other incentives to help achieve sales goals, help with decisions to add or eliminate product lines, and revise training programs. The Petitioner resubmitted the job duty list that was included in the initial support letter and did not comply with the Director's request for a percentage breakdown.

In denying the petition, the Director found that the Beneficiary appears to assume the role of a "team lead" who assists subordinates with their daily tasks rather than primarily performing managerial or executive job duties. The Director also found that the Petitioner did not provide evidence of the Beneficiary's claimed discretionary authority over hiring and firing of the foreign entity's employees and did not establish that the Beneficiary assumes the role of a function manager that involves primarily managing, rather than primarily performing duties that are related to an essential function of the foreign entity.

On appeal, the Petitioner highlights the duration of the Beneficiary's foreign employment, stating that the Beneficiary has more than 15 years of "specialized knowledge, training, education, and skills" that have contributed to the company's growth and success. The Petitioner asserts that it offered sufficient evidence "to clearly define the [B]eneficiary's position as an Executive Manager."

The Petitioner does not, however, acknowledge or explain its reference to the Beneficiary's foreign position as that of general manager, as opposed to "executive" manager, nor does it state or provided evidence demonstrating that the Beneficiary performed primarily managerial or executive job duties. Rather, the Petitioner focuses on the term "function manager," asserting that a beneficiary need not necessarily manage people in order to qualify for the L1A classification.

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. The term "function manager" applies generally when a beneficiary is primarily responsible for managing an "essential function" within the organization. *See id.* The term "essential function" is not defined by statute or regulation. However, a petitioner claiming that a beneficiary will manage an essential function must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, or more specifically, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform duties related to the function. See *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016).

Here, not only did the Petitioner provide a deficient job description lacking in a detailed list of duties and their respective time allocations, but it also did not identify the essential function the Beneficiary purportedly managed or articulate the nature of that function. Further, although the Petitioner is correct in stating that a beneficiary is not precluded from qualifying under the L1A nonimmigrant visa classification by virtue of managing a function as opposed to managing personnel, it misinterprets the crux of this classification when it states that a beneficiary is "deserving of L1A classification" even if their role as a function manager requires them to "'primarily perform[] the tasks necessary to produce the product and/or providing [*sic*] the service(s) of the organization.'" In fact, as indicated above, the opposite is true. An employee who "primarily" performs the tasks necessary to produce a product or to provide services would *not* be considered to be "primarily" employed in a managerial capacity. *See, e.g*, section 101(a)(44)(A) of the Act (requiring that one "primarily" perform the enumerated managerial duties); *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Although the Petitioner focuses on the Beneficiary's discretionary authority over personnel matters and her "signatory authority" regarding contracts and corporate bank accounts, these elements are not, in and of themselves, sufficient to establish that the Beneficiary was employed in a managerial capacity because they do not establish that the Beneficiary allocated her time to performing primarily managerial job duties. Merely claiming that the Beneficiary assumed the role of a function manager because she did not manage personnel is not sufficient to show that the Beneficiary performed job duties that were consistent with managing an essential function.

Moreover, by virtue of listing job duties that are indicative of managing personnel and claiming that the Beneficiary exercises discretion over personnel matters the Petitioner further undermines the claim that the Beneficiary assumed the role of a function manager during her employment with the foreign entity. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See*

Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010). Although the Petitioner cites to unpublished AAO decisions to support its claims, it has not established that the facts of this petition are analogous to those in the cited decisions. Moreover, while 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on USCIS, unpublished decisions are not similarly binding. In sum, the Petitioner has not provided sufficient evidence demonstrating that the Beneficiary performed primarily managerial job duties during her employment abroad.

B. Staffing

As noted earlier, the foreign entity's staffing and organizational structure are also critical elements in this analysis. 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.

The Petitioner's supporting evidence includes a letter from the foreign entity's president/owner, who stated that he had four full-time employees and used contract labor "as needed." The letter further states, "Our team serves our customers by providing the services they want." The letter does not specify the types of contract workers the foreign entity hired, the duties they performed, or the frequency of such hiring, nor does it contain further information about the Beneficiary's placement and role within the foreign organization.

In the RFE response, the Petitioner provided the foreign entity's organizational chart showing a three-tiered staffing structure. The owner is depicted at the top of that structure president of the foreign entity, followed by the Beneficiary as general manager, followed by two drivers and an office manager at the bottom tier of the hierarchy. According to the Beneficiary's job duty breakdown, she was responsible for "all" supervisory duties, employee performance reviews, and mentoring and assisting employees. The Petitioner did not indicate how much time the Beneficiary allocated to these job duties, nor did it establish that the Beneficiary's subordinates were supervisory, professional, or managerial personnel.[2] Section 101(a)(44)(A)(ii) of the Act. The Petitioner also made no further mention of the contract labor that was referenced in the original letter from the foreign entity's owner. Further, as previously noted, the Petitioner's recent claim that the Beneficiary was employed abroad as a function manager is inconsistent with several of the Beneficiary's listed duties, which indicate that she was responsible for overseeing the foreign entity's non-supervisory and non-professional staff.

In sum, the Petitioner has not provided sufficient evidence to establish that the Beneficiary's foreign employment involved performing primarily managerial job duties within an organization that was adequately staffed and had the ability to relieve the Beneficiary from having to allocate her time primarily to operational job duties.

[2] In evaluating 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.

In light of the above, we find that the Petitioner has not provided sufficient evidence to demonstrate that the Beneficiary was employed abroad in a managerial capacity.

III. ADMINISTRATIVE DISSOLUTION

Finally, while not addressed in the Director's decision, we note that according to the records at the [redacted] Secretary of State website, the Petitioner's corporate status is currently inactive due to administrative dissolution. The Petitioner's dissolution raises serious questions about whether it continues to exist as an importing employer, whether the Petitioner maintains a qualifying relationship, and whether it is authorized to conduct business in a regular and systematic manner. *See* section 214(c)(1) of the Act; *see also* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (l)(3).

While we are not making an adverse finding based on the information obtained from the [redacted] Secretary of State website, the Petitioner may need to address and resolve this deficiency in any future filing where the Petitioner's status as an active business entity is material to eligibility.

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 C-B-, Inc.*, ID# 2271591 (AAO Oct. 31, 2019)