U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-USA, INC.

DATE: SEPT. 3, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an engineering services company, seeks to temporarily employ the Beneficiary as its "Manager of North America" 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 record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity in the United States.

On appeal, the Petitioner asserts that the Beneficiary would qualify as a personnel manager based on his supervision of subordinate managers and professionals. The Petitioner also contends that the Beneficiary would act as a function manager overseeing an essential function of its foreign parent company; namely, its relationship with a contracted sales organization. The Petitioner further asserts that the Beneficiary would qualify as an executive based on his full authority over the U.S. company.

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 their services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify them to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. DEFINITIONS

"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.

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

The sole issue we will address is whether the Petitioner established that the Beneficiary would be employed in a managerial or executive capacity in the United States.

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). 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. 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 its foreign parent company "is a leader in the design, manufacture, and sales of jig tool, prototype parts, ceramic products and set of machinery; [and] production and regrinding of quartz glass." The Petitioner emphasized that it has worked for over a decade with a U.S. company

that is a "top rated supplier of customized precision metric tools" who "interacts with [the parent company's] customers in the North American market, place[s] orders on their behalf, receives shipments from Japan and forwards them to their final destination." The Petitioner further indicated that it was established in 2013 to "better serve customers in the North American market" and that it is dedicated to "support[ing]…customers across North America, improving delivery schedules, facilitating a quicker response to design challenges and enhancing customer service."

The Petitioner stated that the Beneficiary has been, and would be, tasked with some of the following duties:

- Direct and manage the Petitioner financial and budget activities, maximize investments, increase efficiency, coordinate activities and resolve problems;
- Analyze operations to evaluate performance of the company and staff, determine areas of cost reduction, program improvement, and policy change;
- Manage, plan, and implement policies, objectives, and activities, maximize return on investments, and increase productivity;
- Negotiate and approve contracts and agreements with suppliers, distributors, federal and state agencies, recommend approval and suggest changes;
- Manage staff and professional contractors, including sales engineers in Japan, make or recommend personnel decisions;
- Supervise contracted Sales Engineers and other professionals to ensure the smooth and on-time supply of customized foreign parent products;
- Prepare and present reports concerning activities, expenses, budgets, government statues and rulings, establish departmental responsibilities and coordinate functions sales, administration, client services departments and sites;
- Implement corrective action plans to solve organizational and departmental problems, coordinate the development and implementation of budgetary control systems, recordkeeping systems, and other administrative control systems;
- Review and analyze legislation, laws, and public policy, and recommend changes to promote and support interests of both the general population and special groups, refer major policy matters to lower management for final decisions;
- Administer programs for selection of sites, construction of future office location and provision of equipment and supplies; and
- Organize and approve promotional strategies.

In addition, in response to the Director's request for evidence (RFE), the Petitioner provided additional explanation of the Beneficiary's role, noting that he was tasked with "overseeing the Business Development and Marketing division." The Petitioner further indicated that the Beneficiary used "specialized knowledge of the manufacturing industry to determine goods and services to be sold" and that he "set process and credit terms based on forecasts of customer demand." It also stated that the Beneficiary was "responsible for planning and directing activities such as sales promotions" and coordinating "a wide range of business activities and entire departments, as well as negotiating and approving contracts on behalf of the company with no oversight." In addition, it indicated that the Beneficiary was tasked with "leading and controlling at a broad level the direction of the entire U.S. company by establishing company norms for all subordinates to follow."

The Petitioner has submitted a vague U.S. duty description and little documentation to substantiate the Beneficiary's daily qualifying managerial and executive level tasks. The Beneficiary's duty description includes several generic duties that could apply to any manager or executive acting in any industry and they provide little insight into his actual day-to-day managerial or executive tasks. For instance, the Petitioner did not sufficiently detail or document financial or budget activities that the Beneficiary directed, investments he maximized, problems he resolved, or areas of cost reduction, program improvement, or policy change he determined. Likewise, it did not articulate or document policies or objectives he managed, productivity he increased, contracts with suppliers, distributors, or governments he negotiated and approved, reports he prepared, or departmental responsibilities he established.

In addition, the Petitioner did not detail or substantiate with supporting evidence the corrective actions he implemented to solve organizational and departmental problems, budgetary control systems he developed and coordinated, administrative control procedures he put in place, law and public policy he reviewed and recommended changes based upon, or promotional strategies he organized and approved. In fact, despite asserting that the Beneficiary oversees a business development and marketing division the record includes almost no supporting documentation to corroborate this, such as him delegating duties to subordinates in these departments or evidence of him "leading and controlling at a broad level the direction of the entire U.S. company by establishing company norms for all subordinates to follow." This lack of detail and documentation is particularly notable since the Petitioner asserts that the Beneficiary has been acting in his asserted capacity in the United States since December 2013.[1] Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

We acknowledge that the Petitioner submitted an expert opinion letter from a finance professor at the [redacted] however, this letter also included few credible details as to the Beneficiary's duties in the United States over the last several years. For example, the professor vaguely noted that the Beneficiary was responsible for "managing various crucial and firm-wide sales and business development initiatives for major business clients, strategies, and internal business operations." The letter also indicated that the Beneficiary acted as a "key liaison between the parent company and its U.S. client base and supplier network," conducted "market strategy development initiatives," and "assign[ed] tasks and overs[aw] projects to professionals." The professor also ambiguously stated that the Beneficiary oversees "organizational and analytical process resources, and initiatives which are characterized by significant complexity" and that he broadly orchestrates "diverse geographic elements" and manages "advanced technical, human, financial, and logistical elements."

However, much like the Beneficiary's duties, this document includes a questionable lack of detail; for instance, the letter does not include credible explanations of the business development initiatives the Beneficiary worked on, major business clients he worked with, strategies he implemented, or projects he managed. Further, the professor does not credibly explain in his letter the specifics of "organizational and analytical processes," "diverse geographic elements," and "logistical elements."

[1] The petition was filed on October 22, 2018.

In sum, the record includes little substantiating documentation of the Beneficiary's actual duties on a day-to-day basis and the explanations of his tasks include few credible details.

Even though the Beneficiary holds a senior position within the organization, the fact that they 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 or executive 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 his actual duties would be primarily managerial or executive 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.

The Petitioner submitted an organizational chart indicating that the Beneficiary supervises a business development manager overseeing a "Manager." The chart further reflected that the manager supervises an administration department including an executive administrative coordinator, a business development and marketing department with a vacant market research analyst position, and an engineering and services division consisting of sales engineers working for another U.S. based company.

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

The Petitioner has not submitted sufficient evidence to establish that the Beneficiary oversees subordinate managers as necessary to qualify him as a personnel manager. First, the Petitioner has not submitted sufficient documentation to substantiate its asserted organizational chart. For instance, the Petitioner contends that the Beneficiary supervises a business development manager overseeing a manager. However, the Petitioner's payroll documentation and the most recent state quarterly wage report from the third quarter of 2018 only reflects wages paid to the claimed manager and executive administrative coordinator. The Petitioner questionably only provides one asserted pay stub for the asserted business development manager and this claimed employee does not appear in its payroll or tax documentation. Further, the Petitioner's organizational chart indicates that the manager oversees

the executive administrative coordinator, but the manager's duties include no apparent responsibility for overseeing this administrative employee. The Petitioner must resolve inconsistencies and ambiguities 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).

Further, the asserted manager's duties indicate that he is largely tasked with leading engineering teams; presumably, contractors the Petitioner claims are being provided by another U.S. company. We acknowledge that the Petitioner submits a letter from this company stating that the foreign parent and Petitioner "work closely" with "sixty sales engineers" from that company. However, there is insufficient evidence to demonstrate that these contractors are under the supervisory authority of the Beneficiary and his asserted subordinate managers.

For instance, the letter from this U.S. company makes no reference to the Beneficiary or his subordinates overseeing and directing the discussed sales engineers. In addition, a provided "Exclusive Distribution Agreement" reflects that the U.S. company coordinating with the Petitioner was granted an exclusive right to sell the foreign parent company's products, but there is no indication in this agreement that the Petitioner or the Beneficiary manage and direct the sales engineers as subordinates or make personnel decisions with respect to them, as asserted in the Beneficiary's duties. Indeed, despite claiming that a vast majority of its organizational chart consists of contracted sales engineers, the Petitioner provides almost no supporting documentation to substantiate the Beneficiary directing his subordinate managers or this claimed network of sales engineers. Further, the Petitioner's 2017 Form 1120, U.S. Corporation Income Tax Return does not reflect that it devoted substantial costs to employing a network of sales engineers; for instance, this document demonstrated that it spent only $12,948 on "professional fees" during that year. Otherwise, the Petitioner does not submit evidence to substantiate that the referenced sales engineers are under the direction of the Petitioner and Beneficiary or that it is paying these contractors.

Furthermore, the aforementioned expert opinion letter from a professor of finance at the [redacted] appears to make conflicting statements as to the Petitioner's asserted organizational chart and the Beneficiary's claimed managerial capacity. For example, the letter ambiguously states that the Beneficiary has direct reports "in the larger sense" and that he has "at least one professional sub[ordinate]." These statements appear questionable in light of the Petitioner's claimed organizational structure, including two subordinate managers and approximately 60 sales engineers. The opinion letter also appears to confirm that the Beneficiary does not have personnel or supervisory authority over the contracted sales engineers, stating that they "ultimately report to that firm." Otherwise, the Petitioner provides little documentation to substantiate that he manages a vast network of sales engineers or that he has personnel authority over them. Likewise, the record includes no evidence of the Beneficiary delegating to his claimed subordinate business development manager and manager despite claiming that he has acted in his role for several years. Therefore, in sum, the Petitioner has provided insufficient evidence to establish that the Beneficiary qualifies as a personnel manager based on his supervision of subordinate managers and supervisors.

The Petitioner further asserts that the Beneficiary oversees professional subordinates thereby qualifying him as a personnel manager. 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."

The Petitioner does not specifically articulate why the Beneficiary's subordinates qualify as professionals. For instance, it only vaguely indicated that the claimed "manager" holds a "BA [in] Commerce." It also stated that the executive administrative coordinator holds only a secondary degree and it did not indicate the claimed business development manager's level of education, even if his employment with the Petitioner was properly substantiated. As such, the Petitioner only clearly articulates that one of the Beneficiary's subordinates has a bachelor's degree in commerce; but it does not explain how this demonstrates that this employee is a professional, nor does it submit evidence to substantiate that this subordinate holds this degree. Beyond this, the Petitioner vaguely indicates that its "partner" company in the U.S. employs approximately 60 sales engineers and asserts that they are professionals. However, the Petitioner does not sufficiently establish the degrees held by these sales engineers nor that they are under the supervisory control of the Beneficiary. The Petitioner also does not adequately articulate why the sales engineers should be considered professionals consistent with the regulations. Therefore, the Petitioner has not demonstrated that the Beneficiary qualifies as a personnel manager based on his supervision of professional subordinates.

On appeal, the Petitioner also contends that the Beneficiary qualifies 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).

The submitted evidence is not sufficient to establish that the Beneficiary would act as a function manager under an extended petition. When asserting that the Beneficiary qualifies as a function manager on appeal, the Petitioner emphasizes that the Beneficiary reports only to the president of the parent company in Japan, points to the "number of contracts signed by the beneficiary," and notes that he is one of two corporate officers of the company. However, these assertions and the referenced evidence are not sufficient to demonstrate that the Beneficiary would devote his time primarily to qualifying managerial tasks. As we discussed at length, the Petitioner has submitted little detail and documentation to substantiate the Beneficiary's qualifying managerial duties despite claiming that he has acted in this role since 2013.

For instance, the Petitioner points to the "number of contracts signed by the beneficiary," but it provided no specific examples of these contracts nor is there supporting documentation of them on the record, beyond a few employment contracts he signed in 2014 with the company's few employees.

Further, the Beneficiary's appointment as a corporate officer does not demonstrate that he devotes a majority of his time to qualifying managerial tasks. In fact, the Petitioner indicates that it was established to "serve customers, generate quicker response times, improve delivery, and enhance customer service." Given the lack of detail and supporting evidence and employees to relieve the Beneficiary from these apparent operational functions, it appears more likely that he is primarily devoted to these duties and providing these services to customers rather than managing a function. For example, as we noted, the Petitioner submits little evidence to demonstrate the Beneficiary primarily delegating non-qualifying operational tasks to his subordinates or reflecting his oversight and managerial authority over a network of sales engineers. Therefore, the Petitioner has not established that the Beneficiary would act as a function manager under the extended petition.

Lastly, the Petitioner also asserts that the Beneficiary's work is "executive in nature," stating that he is "the key point of escalation for all internal and operational issues, including logistics, manufacturing, product engineering, sales engineering, and business strategy development" with full authority over the work of "every internal team." 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 directors, or stockholders of the organization." *Id.*

The Petitioner has not provided sufficient evidence to establish that the Beneficiary would act in an executive capacity under the extended petition. Again, the Petitioner submitted little detail and documentation to substantiate that the Beneficiary primarily devotes his time to executive-level duties. For instance, the Petitioner states that the Beneficiary oversees "every internal team" and a wide range of executive-level strategy aspects related to these teams. First, the Petitioner submits no evidence to substantiate the Beneficiary setting strategy for the company's asserted organizational hierarchy. As discussed, the Petitioner has only established that it has two employees beyond the Beneficiary; as such, we presume that the "internal teams" it references are teams of sales engineers working for the U.S. company it has contracted with.

However, again, the Petitioner submits little evidence to establish that these claimed sales engineers can be considered part of its organizational hierarchy or that they are under the executive authority of the Beneficiary. There is no supporting documentation to demonstrate the Beneficiary's executive authority over these employees and the provided exclusive distribution agreement only reflects that this company has the right to sell the foreign parent's machined components, but provides no indication that the Petitioner has authority over this company's sales engineers. Although we acknowledge that it is possible that the Petitioner's employees and the U.S. company selling its products cooperate to meet customer's needs, this evidence is not sufficient to demonstrate that the Beneficiary acts at the top of a complex organizational hierarchy with executive authority over these contractors. Indeed, the expert opinion letter provided by the Petitioner acknowledges that the

referenced sales engineers "ultimately report to that firm." As such, the Petitioner has not established that the Beneficiary would act as an executive under the extended petition.

Therefore, for the foregoing reasons, the Petitioner has not established that the Beneficiary would act in a managerial or executive capacity under the extended petition.

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 K-USA, Inc.*, ID# 5134055 (AAO Sept. 3, 2019)