U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-H-S- INC

DATE: SEPT. 6, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a hospice care provider, seeks to temporarily employ the Beneficiary 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 record did not establish, as required, that: (1) the Petitioner has secured sufficient physical premises to house a new office; (2) the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity; and (3) the Beneficiary has been employed abroad in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that it previously met its burden of proof.

Upon *de novo* review, we will withdraw grounds (1) and (3), and dismiss the appeal based on ground (2) and an additional issue that surfaced in our review of the record.[1]

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

[1] Ground (1) applies only to new offices, which have been doing business in the United States for less than one year. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). The Petitioner, however, incorporated in 2007 and has been doing business for several years. Its 2016 acquisition by a newly created parent company did not cause the Petitioner to revert to a new office; the newly created parent company is not the employer named on the petition form. The Petitioner has submitted sufficient information and evidence to overcome ground (3).

petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Petitioner specifies that the Beneficiary will be employed in the United States in a managerial rather than executive capacity. The Director found that the Petitioner had not met its burden of proof regarding the Beneficiary's intended U.S. employment.

"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). 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.

When examining the managerial capacity of a given beneficiary, we will look 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). 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 and its staffing levels.

A. Duties

The list of initial exhibits indicated that exhibit 25 is the "[j]ob description for the position occupied by [the Beneficiary] – Chief Executive Officer." Exhibit 25 is a job description for an "Administrator." The description listed 19 responsibilities, including these examples:

- Supervises the entire organizational operation and directly supervises the Director of Nursing
- Assure that skilled nursing and other therapeutic services furnished are under the supervision and direction of a physician or a Registered Nurse
- Assure appropriate staff supervision during all operating hours [this item appears twice, numbered 12 and 16]
- Appoint a similarly qualified alternate to be available at all times during operating hours in the absence of the Administrator

Under "qualifications," the job description stated that the administrator must be a registered nurse or physician, or else "have training and experience in health service administration and at least one year of supervisory experience in home health care or related health programs."

The Beneficiary's résumé listed experience with:

- Building materials companies;
- An auto repair shop;
- Logistics/warehouse/transportation companies; and
- A real estate company.

The Beneficiary claimed the following educational background:

- Bachelor's degree in electrical engineering; and
- Master's degree in business administration.

According to his own résumé, the Beneficiary does not possess the minimum requirements listed on the job description initially furnished by the Petitioner. The résumé included a "Summary of Qualifications" indicating that the Beneficiary was "[t]rained to plan, organize, conduct and evaluate health research projects," but the Beneficiary did not elaborate or say where he received that training. Also, training for "health research projects" is not the same as "training and experience in health service administration and at least one year of supervisory experience in home health care or related health programs."

In a request for evidence (RFE), the Director stated that the Petitioner did not provide enough information about the Beneficiary's proposed duties to show that the position would be primarily managerial. In response, the Petitioner submitted another job description for the Beneficiary. The Director had specifically asked for information about how much time the Beneficiary would devote to individual tasks. The second job description did not remedy this deficiency. In the denial notice, the Director found that the revised job description lacked specificity.

The Director was correct to assert that the second job description lacked detail, but review of the document raises another significant concern. The new description is not simply a clarification or rephrasing of the earlier version; it is fundamentally different. The second version of the job

description did not include the health care experience requirement and the Petitioner did not explain this noteworthy change.

Most significantly, the second job description focused on the newly-formed U.S. company that purchased the petitioning entity in 2016. The second job description's only direct reference to the petitioning entity is a single line item stating that the Beneficiary would "[m]anage and operate the newly acquired US subsidiary." Other duties and responsibilities include the following examples:

- Identify investment opportunities [in] the US market for and submit proposals/offers to the
- Grow parent company's presence [in] the US market by acquiring new businesses or opening new subsidiaries;
- Overall administration of Agency[2] and its affiliated companies;
- Personnel management: 14+ people in the USA and other employees of the parent company . . . ; and
- Assist in the evaluation of community needs and plan appropriate programs/services.

If the second job description refers to the same position as the first, then it represents a very substantial revision of the Beneficiary's intended duties. If, on the other hand, it refers to a different position, as CEO of rather than administrator at the petitioning entity, then it does not relate to the job offer that formed the original basis of the petition. Either way, the Petitioner did not explain or even acknowledge the major differences between the two job descriptions.

On appeal, the Petitioner states: "We include a detailed job description" for the intended U.S. position, but the appeal does not include a new job description. Considering the major differences between the two prior versions, a third job description would require substantial evidentiary support in order to be credible. It is the Petitioner's responsibility to resolve discrepancies in the record with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner has not done so.

The Petitioner has not established that the duties of the proffered position are primarily managerial.

B. Staffing

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 101(a)(44)(A)(i) and (ii) of the Act. The Petitioner does not claim that the Beneficiary will be a function manager. Rather, the Petitioner asserted that the Beneficiary's managerial capacity derived from his supervision of subordinate personnel.

[2] The record does not identify the "Agency" in question.

Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*4*). If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(*2*)-(*3*).

As noted above, the Beneficiary's revised job description indicated that the Beneficiary would manage "14+ people in the USA and other employees of the parent company [abroad]." The foreign company and its affiliates, however, have no demonstrated connection to the Petitioner's activities as a hospice care provider. The foreign entities are primarily concerned with building materials, automobile repair, and shipping. The Beneficiary's continued authority over a foreign entity that is not doing business in the United States is not a basis for L-1A nonimmigrant status. Therefore, we will only consider the staffing of the petitioning U.S. entity.

According to an organizational chart in the initial submission, the Petitioner's 16 employees at the time of filing consisted of the following:

- Chairman of the Board of Directors
- Medical Director (a physician)
- Director of Nursing/Case Manager (a registered nurse)
- Director of Patient Care Services (a registered nurse)
- 3 Licensed Vocational Nurses
- 2 Certified Home Health Aides
- 4 Counselors
- Office Manager/Human Resources Officer
- Administrator/Chief Financial Officer
- Medical Biller

The Petitioner initially stated that only four of the above individuals were "Employees on Payroll," specifically the medical director, director of nursing, office manager, and administrator. The Petitioner asserted: "All Other Staff are paid . . . per visit for office and patient visits."

A second organizational chart submitted in response to the RFE showed substantial changes from the first version, both in the positions themselves and the people holding them. On appeal, the Petitioner submitted a payroll record, but it is a year-end report and therefore includes past as well as current employees, making it difficult to tell the company's current staffing.

The Petitioner has not established that any of the Beneficiary's subordinates work in primarily supervisory positions. The Petitioner did not submit job descriptions for the subordinate positions or

provide details about the degree of authority that some workers would have over others. The organizational chart showed some employees in superior positions above others, but this is not sufficient to demonstrate the nature of their work.

To determine whether the 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 United States 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 Director found that the Petitioner had not established that the Beneficiary would supervise any professionals. The Petitioner has consistently claimed to employ a physician as its medical director. By definition, a physician is a professional. But the 2017 payroll report submitted on appeal does not include the physician's name, either as an employee or as a contractor. Therefore, the Petitioner has not established that it employed the physician at all, although the Petitioner had initially specified that the medical director was on payroll.

The Petitioner has not established that any of the subordinates on its payroll qualify as professionals.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it will employ the Beneficiary in a managerial capacity in the United States.

III. QUALIFYING RELATIONSHIP

Beyond the issues discussed in the Director's decision, there is an additional ground for denial of the petition, relating to the Beneficiary's past employment as the general manager and operations manager of in the United Arab Emirates.

The Beneficiary's employment abroad must have been with a qualifying organization. Specifically, the Petitioner must establish that is a parent, branch, affiliate, or subsidiary of the petitioning U.S. employer. *See* 8 C.F.R. § 214.2(l)(1)(i) and the definitions of the respective terms at 8 C.F.R. § 214.2(l)(1)(ii). If the Petitioner does not establish a qualifying relationship with then the Beneficiary's employment abroad with that company cannot establish eligibility.

The Petitioner submitted copies of documents to establish that purchased the petitioning corporation, but was not the Beneficiary's foreign employer. The relationship between the Petitioner and is not a qualifying relationship with a foreign employer.[3]

[3] We note that purchase documents in the record require the seller to transfer to the buyer all share certificates and the accompanying ledger after close of escrow. If the Petitioner seeks to pursue this matter further, either by filing a motion

articles of incorporation authorized the issuance of 10,000 shares, but the Petitioner has not submitted documentary evidence to establish who owns those shares. A resolution purportedly dated January 2017 indicated that the board of directors of "assigned [the Beneficiary] to open a US subsidiary [called] " but this resolution is not *prima facie* evidence that has any ownership interest in We note that filed its articles of incorporation in November 2016, and initiated its purchase of the petitioning entity in December 2016, both before the January 2017 resolution.

To establish a parent-subsidiary relationship (as claimed), the Petitioner would need to establish that owns *See* 8 C.F.R. § 214.2(l)(ii)(K). In the alternative, the Petitioner could establish that the two entities are affiliates by showing that the owners of also own similar proportions of *See* 8 C.F.R. § 214.2(l)(ii)(L). The Petitioner has done neither.

Without evidence of ownership, the Petitioner has not established that a qualifying relationship exists between the petitioning entity and

IV. CONCLUSION

The Petitioner did not establish that it will employ the Beneficiary in a primarily managerial capacity, or that it has a qualifying relationship with the Beneficiary's foreign employer.

ORDER: The appeal is dismissed.

Cite as *Matter of V-H-S- Inc.*, ID# 1416497 (AAO Sept. 6, 2018)

in this proceeding or by filing a new petition, then the Petitioner would have to establish that this transfer took place and show the issuance of new share certificates reflecting ownership of the petitioning entity.