U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-M-, INC.

DATE: SEPT. 6, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which installs roof and wall panels manufactured by its foreign parent company, seeks to temporarily employ the Beneficiary as its chief executive officer under the L-1A nonimmigrant classification for intracompany transferees.[1] 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 would employ the Beneficiary in the United States in a managerial or executive capacity; and (2) the Beneficiary has been employed abroad in a capacity that is managerial, executive, or involved specialized knowledge.

The matter is now before us on appeal. In its appeal, the Petitioner submits copies of previously submitted materials and asserts that the Director should have recognized that the Beneficiary qualifies as a manager because he "manages and directs work at the job site."

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 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 qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

[1] The Beneficiary previously held L-1A status from December 2016 to December 2017, but a petition to extend that status was denied.

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

The Director found that the Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity. The Petitioner has specified that the position is managerial rather than executive. Therefore, we restrict our analysis to whether the Beneficiary will be employed 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). 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 claimed 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.

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. 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*).

The Petitioner described the Beneficiary's intended U.S. employment:

> [The Beneficiary] will be responsible for the management of [each] jobsite and direct hiring of personnel working on the project. In the performance of his duties, he will coordinate and direct with the on-site manager (client).
>
> . . . He will make a comparison analysis chart, to show the clients and assure them that the company is providing them the same type of product they need.
>
> . . . . [The Beneficiary] will manage work at the job site, educating and informing the jobsite supervisor [about] the basics of panel installation, job site conditions, construction standards, and jobsite safety before the commencement of the installation work.
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> . . . .
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> In [the event of complications, the Beneficiary] would revise the drawings and submit an RFI to coordinate with the owner. This work requires knowledge about negotiation and drawing at the jobsite if there is no time to stop construction work.
>
> Once the design work has been finalized, [the Beneficiary] will manage and direct work at the job site at a rate faster than others.

The Petitioner did not explain who would perform the work at the aforementioned job sites. The company's claimed personnel structure at the time of filing did not include construction workers, installers, or jobsite supervisors.

The Petitioner submitted a daily schedule, indicating that the Beneficiary would meet with clients and subordinates in the morning, inspect work sites and meet with contractors in the late morning and early afternoon, and prepare reports in the late afternoon and early evening. A weekly schedule seemingly contradicted the daily schedule; it contained the following basic information:

Monday	Organize last week's work progress
Tuesday	Organize this week's work progress
Wednesday	Sales Activities
Thursday	Sales Activities
Friday	Organize information and material for report
Saturday	Korea Headquarters Weekly Report

The submitted schedule showed several meetings with individuals who left the company before the Petitioner filed the petition, and therefore would not be available to meet with the Beneficiary or accept delegated tasks.

The Petitioner's organizational chart showed over 17 positions; the exact number cannot be determined, because of references to "teams" with no specified number of members. Most of these were vacant, and three of the employees named on the chart left the company before the Petitioner filed the petition. The Petitioner's business plan projected only six employees during the company's fifth year of operations, which represents a significant conflict with the organizational chart.

On the petition form, the Petitioner claimed four U.S. employees, but only provided payroll records and job descriptions for two employees who were still with the company. One of those employees has the title "chief financial officer" (CFO). Her job description indicates that she calculates the budget, negotiates prices, and prepares financial materials such as payments and estimates. The organizational chart placed the CFO on the same level as the Beneficiary, and did not indicate that the Beneficiary had any managerial authority over the CFO.

The other employee has the title "general manager," but her duties do not appear to be managerial, professional, or supervisory. Those duties include clerical and administrative functions such as answering the telephone, scheduling meetings, sending mail, and ordering materials. We note that the organizational chart showed that employee as an "Accountant," subordinate to the CFO.

To qualify as professional, a given position must generally 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 Petitioner indicated that both of the two employees described above hold two-year degrees rather than baccalaureate degrees, and the Petitioner did not show that those degrees (one in "Communication," the other in "Tourism Interpretation") are relevant to the positions held. Therefore, there is no evidence that their positions are professional.

If the organizational chart was accurate at the time of filing (apart from the three named employees whose departures the Petitioner acknowledged), then the Beneficiary's position had no subordinate employees at that time. The Petitioner did not explain who performed the duties of the vacant subordinate positions such as "Technical Manager," "Project Manager," and "Site Manager." If, on the other hand, the organizational chart was not accurate, then it has no weight as evidence of eligibility.

After the Director advised the Petitioner that the initial evidence did not establish eligibility, the Petitioner asserted: "the Beneficiary, as shown in the schedule, also supervises employees of the Foreign Company." The Petitioner did not elaborate on this point or submit supporting evidence to show officials in the U.S. subsidiary have managerial authority over employees at the foreign parent company. The schedule indicated that the Beneficiary would file reports with the headquarters office in Korea, and discuss specifications with the factory manager, but did not indicate that the Beneficiary would supervise employees abroad.

The Director denied the petition, citing several factors:

- There were apparent discrepancies in the organizational chart;
- The personnel structure at the time of filing did not appear to warrant a managerial position;
- The Petitioner claimed that the Beneficiary would supervise foreign staff, but did not provide more details or supporting evidence;
- The Beneficiary appeared to be, at most, a supervisor;
- The Beneficiary's stated duties appear to be primarily operational; and
- The Petitioner had not shown that the Beneficiary would serve as a function manager.

On appeal, the Petitioner asserts that the Beneficiary's job duties are only one consideration among other factors such as "the nature of the business, the entity's organizational structure, the beneficiary's position in the structure, and evidence of the overall ability to relieve the manager of having to primarily perform the daily operational tasks of the business." But the Petitioner has not shown how these factors establish the Beneficiary's eligibility in this case.

The Petitioner states that the company's accountant has temporarily assumed the responsibilities of the general manager pending approval of the petition. Many discrepancies remain, however. The organizational chart showed many more positions than the Petitioner actually intends to fill, according to the five-year business plan. Because the Petitioner's chief business activity involves installation and construction, it is very relevant to ask who performs this work. The record does not show that the Petitioner hires subcontractors to perform installation work. Rather, the record contains several subcontracts and sub-subcontracts indicating that other companies have engaged the Petitioner for those services. But the Petitioner apparently had between two and four employees at the time of filing, and the Petitioner did not identify any employed construction or installation workers on its payroll.

The Petitioner asserts that the Beneficiary "manages work at the job site," but the supervision of a construction/installation crew would not constitute management. The Petitioner refers to an intermediate "jobsite supervisor" but it is not evident who that person is. The "Site Manager" position is unfilled, marked "T.B.D." (to be determined) on the organizational chart, and the person identified as "Project Manager" left the company more than six months before the petition's filing date.

Beyond construction work, the weekly schedule also includes the claim that the Beneficiary would devote two days a week to "sales activities," but the Petitioner has not identified any sales staff to which the Beneficiary could delegate non-managerial sales functions.

Every position subordinate to the Beneficiary appears to be vacant; the CFO would not report to the Beneficiary, and the accountant would report to the CFO. Because the Petitioner has submitted incomplete and conflicting information, it is not clear who performs the operational tasks of the company. The Petitioner has not shown that a subordinate structure, requiring and justifying the employment of a high level manager, existed at the company at the time of filing.

The Petitioner also has not articulated a specific function that the Beneficiary will manage. The term "function manager" applies generally when a beneficiary's managerial capacity derives not from supervising or controlling a subordinate staff, but instead from primarily 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). In this matter, the Petitioner has not described or provided evidence that the Beneficiary manages an essential function.

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

III. MANAGERIAL OR EXECUTIVE CAPACITY ABROAD

A qualifying organization must have employed the beneficiary outside the United States "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.

The Petitioner specified that the Beneficiary's experience abroad was in a managerial capacity. The Director found that the Petitioner had not shown that experience to have been primarily managerial. The description of the Beneficiary's duties abroad is largely similar to the U.S. job description.

Because our conclusion regarding the Beneficiary's intended U.S. employment, by itself, warrants denial of the petition and dismissal of the appeal, we need not reach the separate issue regarding the Beneficiary's foreign employment and therefore reserve it.

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-M-, Inc.*, ID# 5168752 (AAO Sept. 6, 2019)