U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-F-, INC.

DATE: SEPT. 13, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an importer and seller of hardwood flooring and related products, seeks to continue[1] the Beneficiary's employment as its "Director Communications and Ownership Liaison" 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 Texas Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under an extended petition.

On appeal, the Petitioner contends that the Director overemphasized its smaller size and asserts that it submitted a detailed duty description for the Beneficiary and other supporting evidence that demonstrates that he would qualify as a function manager.

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 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.*

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[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period from August 9, 2017, to August 8, 2018. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary 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 one year within the date of approval of the petition to support an executive or managerial position.

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The sole issue we will address is whether the Petitioner established that the Beneficiary would act in a managerial capacity under an extended petition. The Petitioner does not claim that the Beneficiary would be employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary would 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.

When examining the managerial 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 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 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.

The Petitioner stated that it "imports and sells solid and engineered prefinished hardwood flooring and related products to floor-covering wholesale distribution companies." The Petitioner indicated that it imports these flooring products from the Beneficiary's former foreign employer and stated that it "provides samples and sales literature to distributor representatives."

The Petitioner indicated that the Beneficiary would devote her time to the following duties, among others:

- plan and implement short-term and long-term communications/marketing and sales strategies,
- supervise all external company communications to the public, media, and government agencies,
- oversee all responses to customer or potential customer complaints or inquiries,
- manage the implementation and execution of all company directives and strategies,
- monitor internal communications between the company's departments of advertising/marketing and finance,
- manage subordinate staff members carrying out strategies and plans,
- identifying challenges and areas of improvement, including corrective action,
- develop and manage the communications and sales marketing budget, and
- organize and lead a team of communications consultants responsible for representing the business externally in the event of a new product launch or public relations crisis.

In addition, the Petitioner provided the following additional tasks, among others, to be performed by the Beneficiary:

- direct the development and execution of global marketing communications initiatives including product launches and promotional campaigns,
- develop and execute strategic marketing and communications plans to achieve sales targets,
- set performance goals for sales teams,
- own and drive a strategic internal and external communication strategy,
- ensure new communication campaigns and programs aimed and reaching sales targets and adjust as necessary,
- craft national, regional and/or international sales plans,
- prepare periodic sales reports to present to the president,
- review analytics and evaluation techniques such as on-line surveys for areas of improvement,
- build and manage the production of high quality publications and materials,
- manage relationships with outside vendors and contractors,
- drive continual process improvements and implement best practices,
- develop and maintain effective relationships with key stakeholders related to the flooring industry such as retailers, suppliers, and government agencies as it relates to transportation and shipping,
- supervise the implementation of corrective action,

- review and analyze reports, such as sales analysis reports, marketing communications plans, and those related to receiving and inventory, and
- address any issues regarding inbound receiving and logistical issues related to sales and delivery, including cost, delays, or damage or quality issues.

The duty descriptions submitted by the Petitioner do not sufficiently establish that the Beneficiary would devote her time primarily to qualifying managerial tasks. The descriptions include several generic duties that could apply to any manager working in any industry and they provide little insight into her actual day-to-day managerial tasks. For instance, the Petitioner did not detail or document the communications, marketing, and sales strategies the Beneficiary implemented, challenges she identified and improved through guidance, corrective actions she put in place, budgets she developed and managed, or global marketing initiatives, product launches, or promotional campaigns she directed.

Likewise, the Petitioner did not describe or document new communication campaigns and programs the Beneficiary started, national, regional, or international sales plans she crafted, online surveys she conducted and reviewed, publications and materials she built, vendor and contractor relationships she managed, or process improvements and best practices she drove. This lack of detail and documentation leaves question as to the Petitioner's assertion that the Beneficiary would devote 75% of her time to qualifying managerial tasks as claimed. Specifics are clearly an important indication of whether a beneficiary's duties are primarily 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).

To the extent that the Beneficiary submits detail and documentation regarding the Beneficiary's daily duties, this evidence reflects her involvement in non-qualifying operational tasks. For instance, the Beneficiary's duty descriptions stated that she would address *any* receiving, logistical, or damage or quality issues, prepare sales reports for the president, draft publications, be involved with prospecting and pre-call planning, address issues with wood types and production times, and purchase and ship logs and lumber. Further, the duties of the Beneficiary's lone fulltime subordinate indicated that the Beneficiary would be involved with *all* inbound and outbound documentation. The Beneficiary's substantial involvement with these non-qualifying operational duties is reinforced by emails the Petitioner submits on appeal reflecting her direct performance of these tasks, such as her communicating all orders to the foreign employer, coordinating all shipments from the foreign employer, dealing with color issues in ordered flooring, securing bonding for international shipments, designing the company's website, and coordinating lumber purchasing.

In sum, the Beneficiary's duties and the supporting evidence indicate that she was significantly involved in the non-qualifying operational aspects of the business as of the date the petition was filed. In contrast, there is little supporting documentation substantiating that the Beneficiary delegated these tasks to her asserted subordinates or that she was devoting 75% of her time to high-level, qualifying managerial duties as of the date the petition was filed.

Whether the Beneficiary is a managerial employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See* sections 101(a)(44)(A) of the Act.

Here, the Petitioner does not sufficiently document what proportion of the Beneficiary's duties would be managerial functions and what proportion would be non-qualifying. The Petitioner lists the Beneficiary's duties as including both managerial tasks and administrative or operational tasks, but does not adequately quantify the time she spends on these different duties. This lack of documentation is important because several of the Beneficiary's daily tasks, as discussed, do not fall directly under managerial duties as defined in the statute. For this reason, we cannot determine whether the Beneficiary was primarily acting in a managerial capacity duties. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Even though the Beneficiary holds a senior position within the organization, the fact that she will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section 101(a)(44)(A) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial 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 her actual duties would be primarily managerial in nature.

B. Function Manager

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 only contends that the Beneficiary qualifies as a function manager, not as a personnel manager or executive. 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 Petitioner indicated that the Beneficiary manages an operations manager/inside sales representative and three outside sales representatives. Further, the Petitioner emphasized that the Beneficiary receives support from a flooring marketing manager, a vice president of operations, and over 40 other foreign entity employees.

As discussed, the Petitioner submitted evidence indicating the Beneficiary's substantial involvement in non-qualifying operational tasks. Therefore, the submitted evidence indicates that the Beneficiary would primarily be involved in performing her asserted function rather than managing it. For instance, the Petitioner provides numerous invoices for the sale of foreign employer flooring which were

processed and delivered since its inception. However, the submitted documentation indicates that the Petitioner has only one other fulltime employee devoted to operational matters, the warehouse specialist/inside sales representative. The warehouse specialist/inside sales representative duties do not include the coordination of orders and shipments with the foreign employer and the split nature of their role leaves question as to the amount of time they would devote to supporting non-sales functions thereby relieving the Beneficiary of these non-qualifying tasks. In fact, the Petitioner acknowledges that the Beneficiary is the only avenue for communication between it and the foreign employer, the supplier of its flooring products, suggesting that she is exclusively responsible for coordinating all orders and shipments between these entities. Indeed, the Petitioner submits several emails on appeal reflecting the Beneficiary handling these non-qualifying operational matters and there is little evidence to indicate that she is primarily delegating these tasks to subordinates in the United States or abroad.

Likewise, although the Petitioner asserts that the Beneficiary also supervises and delegates to three other outside sales representatives, it submits limited documentation to corroborate its engagement of these claimed contractors. For example, the Petitioner only provided 2017 IRS Forms 1099, Miscellaneous Income, related to two of these asserted sales representatives indicating that it paid them nominal amounts during that year, or approximately $6,000 and $3,000 respectively. Otherwise, the Petitioner submits little other evidence to establish that the Beneficiary would devote substantial time to overseeing three subordinate sales contractors under an extended petition, such as documentation reflecting her claimed coordination, training, and management of these contractors.

Furthermore, the Petitioner has also not sufficiently substantiated that the Beneficiary is supported by, and that she directs, foreign entity employees as part of her duties in the United States as claimed. The Petitioner submits a foreign employer organizational chart and states that the Beneficiary works closely with a flooring marketing manager, a vice president of operations, and numerous other foreign entity employees. However, the Petitioner again provides little evidence to corroborate that the Beneficiary is primarily relieved from her apparent non-qualifying operational tasks by these foreign employees.

For instance, the Petitioner does not submit duty descriptions for these claimed foreign entity employees, including the referenced flooring marketing manager and vice president of operations. Further, the Petitioner states that the Beneficiary is the only U.S.-based employee responsible for communicating with the foreign employer, as noted, the source of its flooring products. As such, this indicates that the Beneficiary is engaged in all of the Petitioner's supply orders and shipments, and submitted emails appear to reflect her direct involvement in coordinating orders and shipments from the foreign entity and working on resolving issues such as color problems in the flooring. Therefore, the submitted evidence does not demonstrate that the Beneficiary is primarily relieved from non-qualifying operational duties by foreign entity employees as claimed; in fact, the preponderance of the evidence reflects that she is more likely engaged in performing her asserted function rather than managing it.

The Petitioner has also not provided sufficient evidence to establish the Beneficiary's asserted function. The Petitioner indicates that the Beneficiary would primarily manage the company's communications; and other related functions such as sales and marketing, advertising, marketing studies, and publications. However, the Petitioner has submitted little evidence to demonstrate that

this function exists for the Beneficiary to manage. For example, the Petitioner's 2017 Form 1120, U.S. Corporation Income Tax Return reflected that it only spent approximately $21,000 on advertising; while a financial statement specific to the first half of 2018 indicated that it had no apparent marketing or advertising expenses. The Petitioner has also provided little supporting evidence to substantiate the Beneficiary's function, such as advertisements it issued or marketing studies it completed; and it only provided one example of sales literature it produced. Therefore, the weight of the evidence does not reflect that the Beneficiary's asserted function is substantial enough to require a full-time manager or that duties related to this function would account for most of her time.

In addition, the Petitioner also provided financial documentation indicating that it did not sufficiently develop during its first year of operation to support the Beneficiary in a managerial capacity after one year. The Petitioner submitted a 2017 IRS Form 1120 reflecting that it lost over $500,000 in 2017. The Petitioner also stated in response to the request for evidence in September 2018, approximately three months after the filing of the petition, that its "former President...has been arrested for embezzling approximately $600,000...in funds" and that "his actions have not only caused financial stress but greatly weakened [its] position and brand reputation in the U.S. market."

We acknowledge that these events are very unfortunate. However, despite this, the regulations provide no exception to the requirement that the Petitioner must develop sufficiently during the first year of operation as a new office to support the Beneficiary in a managerial capacity. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the intended U.S. operation one year within the date of approval of the petition to support a managerial position. There is no provision in the regulations allowing for an extension of this one-year period. We also note that the regulations also require that a Petitioner seeking the extension of a new office petition submit evidence of their financial status after one year, indicating that we are expected to assess this in determining whether it as developed sufficiently during the first year to support the Beneficiary in a managerial capacity. 8 C.F.R. § 214.2(l)(14)(ii)(E).

If the business does not have the necessary staffing and operations after one year to sufficiently relieve the Beneficiary from performing operational and administrative tasks, the Petitioner is ineligible for an extension. The submitted documentation and statements related to the Petitioner's "stressed" financial position after one year leave significant question as to whether it developed sufficiently to support the Beneficiary in a managerial capacity within one year.

Lastly, the Petitioner contends on appeal that the Director improperly considered its size in denying the petition. The Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in a managerial capacity. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial operations of the company or a company that does not conduct business in a regular and continuous manner. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS

notes discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

In this matter, the Petitioner submitted a duty description for the Beneficiary which included few credible details regarding her qualifying managerial tasks and little supporting documentation to substantiate that she would devote a majority of her time to these duties. In fact, the Petitioner provided substantial documentation indicating the Beneficiary's involvement in non-qualifying operational tasks. Further, the Petitioner did not sufficiently establish that the Beneficiary is primarily relieved from these non-qualifying duties by subordinate staff and foreign parent employees as claimed. The Petitioner also asserted that the Beneficiary managed a function for which there was little supporting documentation to demonstrate that this would account for the majority of her time under an extended petition. As such, we disagree that size alone was the basis of the Director's denial, or in turn, our dismissal of the appeal.

For the foregoing reasons, the Petitioner has not established that the Beneficiary would act in a managerial capacity under an extended petition.

III. 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 G-F-, Inc.*, ID# 4701700 (AAO Sept. 13, 2019)