U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-C-S-C- INC.

DATE: SEPT. 14, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an air cargo charter company, seeks temporarily employ the Beneficiary as its manager, commercial jets, under the L-1A nonimmigrant classification for intracompany transferees. *See* 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 has been employed abroad, or would be employed in the United States, in a managerial or executive capacity.

On appeal, the Petitioner asserts that the Beneficiary is employed in a managerial capacity abroad and would continue to act in this capacity in the United States.

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, or in a position involving specialized knowledge, for one continuous year within three years preceding the beneficiary's application for admission into the United States. 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. Section 101(a)(15)(L) of the Act.

The Petitioner does not claim that the Beneficiary was employed abroad, or that she would be employed in the United States, in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary will has been, and will be, employed in a managerial capacity.

The term "managerial capacity" is defined as "an assignment within an organization in which the employee primarily":

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) 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;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) 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. Further, "[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.* Additionally, 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.

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.

II. FOREIGN EMPLOYMENT IN A MANAGERIAL CAPACITY

When examining the managerial or executive capacity of the Beneficiary, we will look first 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 capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we also examine the claimed managerial capacity of a beneficiary, including 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.

The Petitioner indicated that the Beneficiary's foreign employer is a charter air service provider that has been operating in the United Kingdom since 1990. The Petitioner stated that the Beneficiary has been employed with the foreign employer since 2010 in the positions of flight services manager, broker, and, since May 2015, as a senior charter account manager. The Petitioner provided an organizational chart for the foreign entity's [redacted] division which reflects that she reports to an assistant director, who in turn is supervised by the director of the [redacted] division of the business. The Petitioner provided a duty description for the Beneficiary's foreign position indicating that she spends 40% of her time on "management of the [redacted] key operations," 30% on "management of the professional subordinate staff of the [redacted]" and 30% on "establishing international sales strategies and representing the company in matters involving external parties, and negotiating contracts with high level client organizations."

The Petitioner contends that the Beneficiary acts as a personnel manager overseeing professional subordinates and that she also qualifies as a function manager overseeing an essential function of the organization. Although a beneficiary is not required to supervise personnel, if a petitioner claims that a beneficiary's duties involve supervising employees, then a petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* section 101(a)(44)(A)(ii) of the Act.

The Petitioner indicated that 30% of the Beneficiary's time is spent overseeing subordinates. The Petitioner provided an organizational chart reflecting that the Beneficiary supervises a senior broker and a trainee broker and does not assert that either of these subordinates are supervisors or managers. As such, we will assess whether the Beneficiary's subordinates are professionals. 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 the subordinate employees. 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.

The Petitioner has not established that a bachelor's degree is actually necessary to perform the duties of the senior or trainee broker positions. We acknowledge that the resumes of the senior and trainee broker indicate that they hold bachelor's degrees in marketing and air transport planning and management respectively, and that these degrees are generally relevant to their positions. However, the Petitioner does not establish that a bachelor's degree is required to perform the duties of these positions, or articulate or support why these broker positions require a bachelor's degree as a minimum requirement. We note that the Beneficiary, who does not have a bachelor's degree based on the Petitioner's description of her qualifications, previously served in the broker position with the foreign entity. Therefore, the Petitioner has not sufficiently established that the position requires a

bachelor's degree, that the Beneficiary's subordinates qualify as professionals as defined by the regulations, or that she devotes 30% of her time to supervising professional subordinates.

Further, the Petitioner has not adequately supported its claim that the Beneficiary spends 40% of her time making management decisions related to the entire division. For instance, the Beneficiary's duties indicate she is responsible for "business development and sales operations," "business plan and direction and marketing plans," and "overall corporate business development plans and client satisfaction" for the division. However, the organizational chart indicates that the Beneficiary reports to an assistant director and director of the division. Given the titles of these employees, it is reasonable to conclude that the employees who supervise the Beneficiary have far ranging responsibility for the development, operations, business and marketing plans, and direction of the department. Further, the organizational chart shows four other subordinate managers within this department who also overseeing brokers and other administrative employees. Out of 21 department employees, the Beneficiary has authority over two trainees and one senior broker. The Petitioner submits little supporting evidence to demonstrate that the Beneficiary spends a significant portion of her time directing the department, such as documentation substantiating her overall management of this division.

In fact, the supporting documentation indicates that the Beneficiary is significantly focused on identifying and closing deals with clients, and on the training of her subordinate brokers. For instance, the Petitioner states that the Beneficiary has previously trained 28 brokers and that she is "9th out of 49 brokers" in sales. A paystub for the Beneficiary also shows that two-thirds of her pay was based on sales commission. This evidence indicates that the Beneficiary more likely acts in the capacity of a sales manager, pursuing clients and getting assistance from her subordinates on closing accounts, while also training them on these sales skills. In fact, the foreign employer directly states this in its support letter submitted in response to the Director's request for evidence, and the Petitioner provides performance evaluations and emails relevant to her subordinates reflecting her day-to-day involvement with sales activities and the arrangement of services for clients.

Therefore, the evidence does not support the Petitioner's assertion that the Beneficiary devotes 40% of her time making higher level management decisions with respect to the department. Indeed, the preponderance of the evidence suggests that she will act primarily as a first line supervisor of non-professional employees working on closing sufficient client deals to meet a sales target.

Given this evidence, the record does not support a finding that the foreign entity employs the Beneficiary, in the alternative, 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a petitioner must clearly describe 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).

Although the Beneficiary is "financially accountable for a significant portion of the company's revenue" through her sales efforts, this does not demonstrate that she is tasked with managing an essential function of the organization. The organizational chart reflects that she reports to two other senior managers and that she acts parallel to several other similarly placed managers overseeing brokers in the division. Further, as noted, the evidence also suggests that the Beneficiary devotes a substantial portion of her time pursuing and closing deals with clients, operational tasks not consistent with the overall management of an essential function of the organization. Further, even if we accept that the Beneficiary's role involves an essential function, the Petitioner has not established that she will primarily manage the function rather than perform duties related to the function. In fact, as we have discussed, the weight of the evidence suggests that the Beneficiary acts a sales manager, pursuing clients with the help of two to three subordinate brokers and trainees, and is not relieved from performing non-qualifying operational tasks alongside these employees.

For these reasons, the Petitioner has not established that the Beneficiary is employed abroad in a managerial capacity.

III. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

Next, we will analyze whether the Petitioner demonstrated with sufficient evidence that the Beneficiary would act in a managerial capacity in the United States.

The Petitioner stated that the Beneficiary would be transferred to the United States to oversee the company's ' division" and report to this company's president. Similar to the Beneficiary's asserted foreign employment, the Petitioner asserts that she would act as a personnel manager supervising professional subordinates and as a function manager overseeing an essential function of the organization. The Petitioner sets forth duties for the Beneficiary's role in the United States similar to those provided with respect to her foreign employment. Specifically, the Petitioner states she would be spending 45% of her time providing for the overall direction and management of the division; 25% "establishing, developing and managing the implementation of corporate policies and business plans" for this department, including "advanced business and marketing plans" and building relationships with "major airlines within the United States"; 20% overseeing and managing professional subordinates; and 10% "participating in executive/management meetings, developing promotional plans, and negotiating contracts with high level client organizations."

However, the Petitioner's statements and submitted documentation with respect to the Beneficiary's proposed role in the United States do not indicate that it has staff in place to relieve her from

significant involvement in non-managerial tasks. For instance, the Petitioner acknowledges the underperformance of the department within its California office and states that the Beneficiary will be tasked with building up this portion of the business. The Petitioner notes in the Beneficiary's duty description that she will be responsible for "creating four (4) new jobs and eventually ten (10) new jobs" within the department. However, these statements leave question as to whether the department was sufficiently operational to sustain the Beneficiary in a qualifying managerial capacity at the time it filed the petition. For instance, the provided organizational chart indicates that the Beneficiary will have one subordinate, a trainee broker responsible for performing duties consistent with a sales representative. An email from the Beneficiary dated a few months prior to the petition reflects that the trainee broker has just begun to "take the lead on communicating with the client[s]" and goals listed in his performance review just prior to the date of the petition indicate that he planned to book his first flight by February 2017.

This evidence suggests that the Beneficiary will devote a significant portion of her time to non-qualifying operational tasks, such as pursuing and closing deals with clients, and making arrangements for the provision of their flights, duties more consistent with a sales representative than a qualifying personnel manager. Therefore, the Petitioner has not established with sufficient evidence that the Beneficiary will be primarily responsible for the qualifying managerial tasks listed in her duties such as "monitoring sales operations," creating "business development plans," implementing "effective business development strategies," and overseeing a team of professional employees. Indeed, the Beneficiary's duties state that she will oversee a team of professional brokers "in due course," not upon the approval of the petition. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

Further, as previously discussed, the Petitioner has not established that a bachelor's degree is necessary to perform the duties of the trainee broker or broker positions in support of its claim that the Beneficiary will eventually manage a team of professionals. We acknowledge that the resume of the U.S.-based trainee broker indicates that he holds a bachelor's degree in entrepreneurship, a degree generally relevant to the position. However, the Petitioner does not corroborate this degree with supporting documentation, nor does it establish that a bachelor's degree is a minimum requirement for the position. Further, as the Beneficiary will initially have only one subordinate, the record does not establish that she will be primarily engaged in supervising subordinates. In fact, as we have stated, the Petitioner suggests that this will only become a significant responsibility once her department is sufficiently developed through her sales efforts and when additional brokers have been hired. Therefore, the Petitioner has not established that the Beneficiary would be employed as a personnel manager.

Furthermore, the Petitioner has not established that the Beneficiary would be employed as a function manager. Although we acknowledge that the Beneficiary would likely have some responsibility for the direction of her new department, the Petitioner has not demonstrated that it is an essential function as of the date of the petition and that she will be relieved from primarily performing non-qualifying operational tasks. As we have discussed, the Petitioner acknowledges that the

department within its California affiliate has not been sufficiently developed and that it has been lagging behind projected growth, thus the reason for the Beneficiary's transfer. The Petitioner's organizational chart indicates that this department is essentially the Beneficiary and her subordinate trainee broker. As such, it appears likely that the Beneficiary would be significantly tasked with non-qualifying operational tasks such as identifying and closing deals with clients, and arranging for their services within this region. The Petitioner has not credibly demonstrated how the Beneficiary would be relieved of these non-qualifying tasks.

The record does not establish that the Beneficiary would act in a managerial capacity in the United States.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary is employed abroad and will be employed in the United States in a primarily managerial capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of A-C-S-C- Inc.*, ID# 607162 (AAO Sept. 14, 2017)