U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-I-S- INC.

DATE: SEPT. 18, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner,[1] which is engaged in the retail, wholesale, and import/export of minerals, seeks to temporarily employ the Beneficiary as its "manager" under the L-1A nonimmigrant classification for intracompany transferees.[2] *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 that: (1) the Beneficiary has been employed abroad in a managerial or executive capacity; and (2) the Beneficiary will be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner asserts that the Director erred by disregarding evidence it submitted in response to a request for evidence (RFE), and failed to raise the issue of the Beneficiary's U.S. employment capacity in the RFE. The Petitioner maintains that the Beneficiary has been employed abroad, and will be employed in the United States, in a managerial capacity.

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

[1] The Petitioner identified itself on the Form I-129, Petition for a Nonimmigrant Worker, as [redacted] The record reflects that these company names refer to two separate legal entities. Where asked to indicate its Federal Employer Identification Number (FEIN) on the petition, the Petitioner provided the FEIN for [redacted] Accordingly, we consider this entity to be the petitioning U.S. employer.

[2] The Petitioner stated on the Form I-129 that the Beneficiary is coming to the United States to open or to be employed in a "new office." The term "new office" refers to an organization which 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). Neither the Petitioner, which was established in 2011, nor its subsidiary [redacted] meets the definition of a new office. The Petitioner has been directly doing business in the United States for several years, and the limited liability company, although established in 2017, is part of an organization that has been doing business in the United States through its parent company for more than one year.

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).

II. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

The first issue to be addressed is whether the Petitioner established that the Beneficiary has been employed abroad in a managerial capacity. The Petitioner does not claim that the Beneficiary has been employed in an executive 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 assessing the managerial nature of a position, we examine a petitioner's description of the job's duties. *See* 8 C.F.R. § 214.2(l)(3)(ii) (requiring an L-1 petitioner to submit "a detailed description of the services to be performed"). 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 the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the beneficiary's actual duties and role in a business.

A. Job Duties

Based on the definition of managerial capacity, a petitioner must first show that the beneficiary performs 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 *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the company's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

In a supporting letter, the Petitioner stated that the Beneficiary has been employed by its French affiliate since March 2016. The Petitioner indicated that "she primarily managed the department of sale of all Europe" and "managed the department of shows of the product, which makes this entire company's survival."[3] The initial evidence included a copy of the Beneficiary's resume, in which she

[3] The Petitioner's supporting letter also includes a lengthier job description which purports to describe the Beneficiary's "tasks as executive assistant and show manager." However, the Petitioner did not otherwise identify the Beneficiary by this job title, and the body of the description refers to the holder of this position as [redacted]

states that she is employed as a "sales representative" for the French entity and performs the following duties:

- Organization and management of all relationships with clients and between administration staff
- Management of trainees
- Organization and participation in global trade fairs (All shows in Europe and USA)
- Responsible for online sales
- Organization of reception of containers and their transport

Based on the limited information provided at the time of filing, it was unclear if the Beneficiary has been managing sales for the French entity, or whether she has been responsible for directly performing the sales along with other operational and administrative tasks. The Beneficiary referred to her oversight of "trainees" and implied that she receives support from "administration staff"; however, as discussed further below, the Petitioner initially submitted an organizational chart for the French entity which identified only three employees – the owner/manager, the co-manager, and the Beneficiary as "show manager" with no staff subordinate to her.

In the RFE, the Director advised the Petitioner that the initial evidence did not provide sufficient information regarding the nature of the Beneficiary's job duties abroad. The Director requested a more detailed description of the Beneficiary's position identifying the specific tasks she performs and the amount of time spent on each duty. The Director also requested a complete organizational chart for the foreign entity which identifies any subordinate employees by name and position title, along with information regarding their job duties, educational level, and salary.

In response, the Petitioner submitted a letter from the French entity's "Owner Manager" who clarified that the Beneficiary's position title is "Sales Manager" and indicated that she spends 60% of her time performing the following duties:

- [The Beneficiary] makes the stock inventory in Europe and in USA. She updates it every week for upcoming Gem shows . . . according to the choices and preferences of customers for the next shipment. . . . She is able to delegate those tasks with her team also.
- Ensures in Europe and in United States the reception of all containers from our Subsidiary company [redacted] in [redacted] by managing temporarily at least 3 employees from the same origin country of the products. She gives them instructions about customs formalities, administration of materials for the upcoming show or in the warehouse, located in [France or California]. Plus, takes care of the disposition of the minerals and fossils in the warehouse in order to facilitate the delivery and reception of containers.
- By leading the temporarily [*sic*] employees, she gives instructions to her team for the customers' repertories data and information in the computer . . . and calls, sends

[redacted]' The record reflects that this individual serves as a Production Department Head in the Petitioner's [redacted] operations. We find that this duty description, which refers to the oversight of 50 workshop employees in [redacted] does not pertain to the Beneficiary's position in France, and it bears no resemblance to the lengthier description the Petitioner submitted in response to the RFE. Therefore, we have disregarded it.

and replies emails, or sends photos to them to advertise the merchandise in order to invite them to go to shows or visit our showroom.
- Orders every supply needed for upcoming shows or in the warehouse (price labels, tape, bags, boxes, card machine, newspaper for packaging).
- Follows the customers' orders/request by email, phone or on the company website[.]
- Manages travel schedule and accommodation for employees such as airline tickets, train tickets, car rental reservations, house rentals, hotel room bookings.

The foreign entity's Owner Manager stated that the Beneficiary spends the remaining 40% of her time participating in various gem shows in Europe and the United States, performing the following duties:

- She organizes and designates the employees to participate in each minerals and fossils show.
- Communicates with the show promoter concerning the set up and show dates, the booth size and fees, electricity, badges . . . .
- Sets up the booth . . . .
- She is always the leader at the booth and is able to lead, independently to a supervisor, a team of many employees . . . Makes sure to bring all necessary supplies from the warehouse such as labels, cardboard paper, bags, boxes, lights, etc.
- Sets beforehand sales prices based on purchase price and travel expenses, but also customer preferences, quality, quantity and forms of stones as well.
- Gives instruction to her team and is able to make decision for each situation. Divides the tasks with her employees into two sections: sales and packaging.
- She is primarily responsible for the sale but also puts herself at disposal to advise and inform the customers . . . due to her great knowledge about the specificity of stones, minerals and fossils[.]
- She is in charge, with her team, of packing up all the merchandise remaining on the booth and contact the carrier to send them back to the warehouse.
- Makes the financial report of the show to us, her superiors, and saves all the data in the copy book related or in the computer such as names of employees, income and expenses per day. Deposits money in the bank.
- They redo the inventory of the stock according to what was sold to prepare the next minerals and fossils show.

We agree with the Director's conclusion that the Beneficiary's job description includes a number of non-managerial duties. The duties that require 60% of her time include creating and updating stock inventory, handling the disposition of incoming containers, marketing and advertising the company's products by telephone or email, ordering supplies, following up customer orders, and managing travel schedules and accommodations for any employees who accompany her to trade shows. While the Petitioner indicates that she delegates some tasks to staff based in [redacted] and refers to other "temporary" employees, the description as a whole suggests that the Beneficiary primarily performs non-managerial tasks necessary for the day-to-day operations of the French sales office. As discussed further below, the record does not corroborate the Petitioner's claim that the Beneficiary regularly supervises a team of employees.

Further, while the description of the Beneficiary's gem show responsibilities refer to her discretion to set prices and give direction to any lower-level sales employees who may accompany her to a given show, it is evident that she is directly involved in various administrative and operational tasks associated with the company's attendance at trade shows, such as making all the arrangements, purchasing and bringing supplies, setting up the company's booth, selling the company's products, completing the necessary documentation, and inventory responsibilities. The Petitioner has not explained how these duties are managerial as that term is defined at section 101(a)(44)(A) of the Act.

Whether a given beneficiary is a managerial employee turns on whether the petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See* section 101(a)(44)(A) of the Act. Here, the submitted list of duties and breakdown of the Beneficiary's time indicates that her duties are more likely than not primarily non-managerial in nature. The record show that the owners of the company entrust her with sales responsibilities and handling of the company's products, and have given her some authority to give direction to other employees when the company attends gem or trade shows. However, most of her responsibilities, as described in the record, are sales, operational or administrative tasks, not managerial duties.

B. Staffing and Organizational Structure

On appeal, the Petitioner states that the Director erred by relying "solely on the job description" and did not review the submitted evidence showing the staffing and structure of the foreign entity.

At the time of filing, the Petitioner submitted an organizational chart for the French entity which included the owners of the company as manager and co-manager, and the Beneficiary as "show manager," with no subordinates.

In response to the RFE, the Petitioner submitted an organizational chart depicting the Beneficiary as "sales manager" supervising: (1) a sales representative who installs and sells products during European gem shows; (2) a "qualified worker" responsible for unloading containers and assisting with installing and uninstalling duties at European shows; and (3) a driver who picks up and delivers materials. The Petitioner did not provide an explanation for the addition of subordinate staff to the foreign entity's organizational structure. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Further, we note that one of the workers identified on the revised French organizational chart [redacted] also appears on the submitted organizational chart for the related [redacted] entity in the position of "team leader" at the company's [redacted] workshop. Additional evidence would therefore be required to establish that he and the other named subordinates identified on the revised organizational chart actually work in France and assist the Beneficiary with the day-to-day sales and other operational tasks associated with the European office, as opposed to just traveling to France or other parts of Europe as necessary to assist with gem shows.

While the Beneficiary may have the authority to delegate some tasks to visiting employees during gem show exhibitions, the Petitioner has not established how any limited supervisory duties she performs qualify her as a manager. 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 shown that the Beneficiary has the authority to hire and fire staff or to recommend or take any personnel actions. The record does not establish that she has staff available to assist her on a regular and ongoing basis, and as discussed, the Beneficiary's own position description indicates that she spends the majority of her time on tasks such as sales, inventory, logistics, and making arrangements for the foreign entity to participate in trade shows. The job description does not reflect her regular supervision of a subordinate staff who relieves her from having to perform primarily non-managerial tasks associated with the operations of the French office.

For similar reasons, the record does not establish that the Beneficiary primarily manages an essential function of the foreign entity. 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 has not articulated a claim that the Beneficiary has been managing an essential function. The record indicates that she is likely the sole full-time employee responsible for sales (including trade show sales) in Europe and it is more likely than not that she primarily performs this function, as opposed to managing the function. Accordingly, the Petitioner has not established that the Beneficiary has been employed abroad in a managerial capacity.

III. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The remaining issue in this case is whether the Petitioner established that it would employ the Beneficiary in the United States in a managerial capacity. As noted, although the Petitioner stated that the Beneficiary would be working in a new office, specifically, for its subsidiary which was established in 2017, the Petitioner provided its own employer identification number on the Form I-129, and indicated that the Beneficiary would be working at its own office located in [redacted] California, as evidenced by a lease agreement, which was signed by the Petitioner prior to the establishment of the subsidiary entity. Also, the Petitioner did not provide evidence that [redacted] was registered to do business in California.

In its supporting letter, the Petitioner indicated that the Beneficiary would be "as a show manager of the showroom and sale department" and would allocate 80% of her time to: "taking decision and act for all administration matters in place of the Owner Manager"; "hire or dismiss the appropriate staff"; "staff supervision"; "discretion to resolve customer complaints and disputes"; and "exercise discretion over the day-to-day operation of the show and sales department."

The Petitioner indicate that the remaining 20% of the Beneficiary's time would be spent as follows:

- Create and participate to the presentation of an internal policy
- Analyze the performance and probability of sales
- Ensure the effectiveness of the promotion
- Project the sales provision according to the trend of the market
- Develop and regularly evaluate the success plan
- See the opportunity of new business favorable with our project
- Apply the new procedures, set up together with the owners[,] the rules for the new markets
- Define the work of each of [her] subordinates
- Identify, evaluate and develop the market strategy
- Study aspects of financial market to launch activities in the United States
- Determine the budget to develop the [o]ffice

In the RFE, the Director advised the Petitioner that the description lacked adequate detail regarding what the Beneficiary would be doing on a day-to-day basis. In response, the Petitioner submitted an organizational chart for its U.S. operations in which it briefly listed her proposed duties as:

- Manage the showroom;
- Responsible of the administration;
- Manage the employee; and
- Take part in US shows.

On appeal, the Petitioner asserts that the Director did not specifically request a more detailed description of the Beneficiary's duties or other evidence related to the Beneficiary's U.S. employment capacity, and it maintains that it met its burden because it submitted at least some of the evidence requested in the RFE, including a U.S. organizational chart. While the Director did not instruct the Petitioner that it needed to submit every item listed, the burden remains on the Petitioner to establish eligibility. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The RFE provided the Petitioner with adequate notice of the evidentiary deficiencies with respect to the proposed U.S. employment.

Further, the Petitioner has not provided additional details regarding the Beneficiary's proposed job duties on appeal. We agree with the Director's conclusion that the position description provided for the Beneficiary is insufficient to establish what she will actually do on a day-to-day basis, and does not meet the Petitioner's burden to provide a detailed description of the proposed employment. The duties are stated in vague terms and do not provide insight into the nature of her expected daily tasks. For example, we cannot determine that the Beneficiary's responsibilities to "act for all administration

matters," "see" business opportunities, "ensure the effectiveness of the promotion," forecast and analyze sales, evaluate the "success plan," study the market, or resolve customer complaints would involve tasks that are primarily managerial in nature. Reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *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). Here, the Petitioner has not provided the necessary detail or an adequate explanation of the Beneficiary's proposed activities in the course of her daily routine.

We acknowledge the Petitioner's stated intent to place the Beneficiary in the most senior position at one of its claimed subsidiary locations, where she may exercise some discretion over day-to-day activities and supervise any employees hired. However, the Petitioner must also establish that higher level managerial responsibilities would primarily occupy the Beneficiary's time and to make this determination, we review the totality of the evidence. The Beneficiary's discretionary authority is only one of several factors we consider in determining whether the Petitioner would employ her in a qualifying capacity.

B. Staffing and Organizational Structure

The Petitioner indicated on the Form I-129 that it has two employees and gross annual income of $1,636,519. The Petitioner stated that its subsidiary, [redacted] was not yet doing business but had five sites "opened" in the United States. These five sites were described as: a showroom in [redacted] California; a leased house in [redacted] California; a purchased house located in [redacted] Arizona; a leased apartment in [redacted] Arizona; and an office located in [redacted] The Petitioner indicated that it had filed L-1A petitions on behalf of four of its foreign affiliates' employees with the intention of having them manage these locations.

The Petitioner did not submit an organizational chart or any evidence of wages paid to employees at the time of filing. A business plan for the [redacted] subsidiary indicated each of its retail locations would have separate "wings" or departments focused on [redacted] tourism, handicrafts, foods and beverages, and industrial stones, with each department staffed by an "associate" and additional employees.

The Petitioner submitted an IRS Form I-9, Employment Eligibility Verification, dated April 2017, but did not provide evidence of wages paid to the individual named or evidence showing that he would work under the Beneficiary's supervision at the address listed on the petition. The employee was hired to work at the Petitioner's [redacted] Arizona office and he joined the company prior to the establishment of the [redacted] subsidiary. The Petitioner did not provide evidence of wages paid to this individual or any other employee.

In response to the RFE, the Petitioner submitted an organizational chart indicating that each [redacted] location would employ an "assistant," "driver" and "workers" and provided very brief position descriptions as follows:: the assistant will "help during the installation of the materials / Do the secretarial works"; the driver will "take care of the pickup and the delivery of the materials"; and the "workers" will "unload containers / unpacking and packing."

As noted above, the Petitioner submitted a business plan indicating that each of the [redacted] locations would have four separate divisions specializing in the retail sale of different types of products, with each staffed by an "associate" and other staff. This structure was not reflected in the [redacted] proposed organizational chart. This ambiguity raises questions regarding the nature of the business, its intended staffing, and the Beneficiary's claimed supervisory duties. In addition, the record does not establish that the Petitioner or its subsidiary were staffed at the time of filing. 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, even if the Petitioner could rely on its inconsistent future hiring plans for its subsidiary, the limited information provided would not establish that the Beneficiary would be employed in a managerial capacity based on her supervisory duties. As noted, the statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act. Here, the Petitioner indicates that the Beneficiary would supervise employees, and has not articulated a claim that she will primarily manage an essential function of the organization. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. *Id.*

The Petitioner's organizational chart indicates that the Beneficiary would supervise an "assistant," "driver," and "workers," none of which were claimed to be supervisory or managerial positions. 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." Therefore, we must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The Petitioner did not establish that the proposed positions of assistant, driver, or "worker" would require a bachelor's degree. Even if we were to consider the company's vague hiring plans, the record indicates that the Beneficiary's U.S. role would be limited to first-line supervision of non-professional employees.

For the reasons discussed, the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial capacity.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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 M-I-S, Inc.*, ID# 6410398 (AAO Sept. 18, 2019)