U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-, INC.

DATE: SEPT. 20, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a cyber security company, seeks to temporarily employ the Beneficiary as its engineering manager 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 Petitioner did not establish, as required, that: (1) the Beneficiary was employed abroad in a managerial or executive capacity; (2) the Beneficiary is qualified to perform the intended services for the U.S. entity; and (3) the Beneficiary would be employed in a managerial or executive capacity under an approved petition.

On appeal, the Petitioner contends that the Director should have approved the petition and points to previously submitted evidence that it claims adequately addressed all three of the above adverse findings.

Upon *de novo* review, we find that the Petitioner has not overcome the Director's findings regarding the Beneficiary's employment capacity in his proposed U.S. position. Therefore, we will dismiss the appeal. We will, however, withdraw the two remaining two issues as the Petitioner provided sufficient evidence to establish that the Beneficiary was employed abroad in a managerial capacity and that he is qualified to assume the proposed position in the United States.

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).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Petitioner claims that the Beneficiary will be employed in a managerial capacity. Therefore, we will only address this claim in our decision and will not consider whether the Beneficiary would be 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.

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). The Petitioner must also 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 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 the 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. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Staffing

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.

In the present matter, the Petitioner claimed 14 employees, including the Beneficiary, at the time this petition was filed. The Petitioner claimed no net income and claimed $10 million in "funding" as its gross annual income.

In a supporting statement, the Petitioner stated that the Beneficiary's priority would be to recruit and train a staff of professional subordinates to occupy the positions of iOS developer, graphics designer, database administrator, and systems analyst. The Petitioner explained that it is waiting to hire the subordinate staff until the Beneficiary's arrival so that the Beneficiary can oversee the new hires. The Petitioner also provided an organizational chart in which the chain of command indicates that the Beneficiary would be subordinate to the engineering department director, who would answer directly to the company's CEO. The chart indicates that the Beneficiary will oversee five IT-based subordinates as indicated in the supporting statement. However, as the Petitioner readily admitted, the IT subordinates had not been hired at the time this petition was filed; thus, there would be no subordinate staff for the Beneficiary to oversee immediately upon his arrival.

In a request for evidence (RFE), the Director noted that although the Petitioner's organizational chart indicates that the Beneficiary will have a subordinate staff, it did not adequately explain how they will relieve the Beneficiary from having to perform primarily non-managerial duties. The Petitioner was instructed to submit employee job titles and job duties, payroll evidence, and employment agreements for newly hired employees whom the Beneficiary would manage.

The Petitioner provided a response statement claiming that the Beneficiary will have five subordinates who will relieve him from having to perform primarily non-managerial job duties and over whom the Beneficiary will have discretionary authority. In a separate letter, the Petitioner stated that the Beneficiary will start hiring his subordinates as soon as he begins his employment in the United States.

In the denial decision, the Director determined that the Petitioner did not establish that the Beneficiary would oversee and have the authority to hire, fire, or exercise other personnel actions over supervisory, professional, or managerial employees. We find that the Petitioner's organizational chart depicts the Beneficiary in a position where he would have authority over his prospective subordinates; however, given that there were no subordinates for the Beneficiary to oversee at the time this petition was filed, the Director correctly denied the petition based on a finding that the Petitioner did explain how the Beneficiary would be relieved from having to primarily perform non-managerial job duties.

On appeal, the Petitioner contends that the Beneficiary will first be required to hire a subordinate staff, which it claims is a managerial job duty. The Petitioner does not, however, provide a precise hiring timeline or explain who, other than the Beneficiary, would carry out the job duties of the engineering department in the meantime. While the Beneficiary is not required to allocate 100% of his time to managerial-level tasks, the Petitioner must establish that the non-managerial job duties would only be incidental to, as opposed to the main focus of, the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In the present matter, the Petitioner claims on appeal that the Beneficiary will rely on the foreign entity's engineering support staff until he is able to hire a U.S.-based staff to take over the engineering department's duties. However, it does not provide clarifying information explaining how an arrangement with the foreign entity's staff would work in terms of expecting a foreign-based staff to perform services simultaneously for the Petitioner and the foreign entity while working full-time for the foreign entity. It is also unclear why the Petitioner did not provide an organizational chart that is consistent with its current claim on appeal.

Furthermore, if the Petitioner was planning to rely on the foreign entity's support staff, even if only on a temporary basis, it is unclear why it did not make this claim at the time of filing or in the multiple statements it provided in response to the RFE. A petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). Thus, it 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). As the Petitioner in this instance did not, prior to filing this appeal, claim that the foreign-based staff would support the Beneficiary in his proposed position, we will not consider the new claim on appeal.

In sum, the Petitioner has not provided sufficient evidence to demonstrate that the engineering department was adequately staffed to support the Beneficiary in a managerial position at the time this petition was filed.

B. Duties

We also reviewed the Beneficiary's proposed job description and find that the Petitioner provided insufficient evidence to establish that the Beneficiary would perform primarily managerial job duties in his proposed position.

In a supporting exhibit, the Petitioner provided a list of 13 proposed job duties that the Beneficiary would carry out in his proposed position. Of those 13 job duties, nine pertained directly to taking some form of personnel action or communicating with existing personnel, as indicated by the Petitioner's reference to a "team" of employees.

In the RFE response, the Petitioner provided the same list of duties and responsibilities, adding a percentage breakdown to show how the Beneficiary would distribute his time among the list of his assigned job duties. The job duty breakdown indicates that approximately 65% of the Beneficiary's time would be spent on some type of interaction with personnel, including managing the engineering staff, ensuring that team members understand their respective roles, overseeing the work of subordinates, hiring and firing employees and taking disciplinary actions when necessary, monitoring employees' daily performances, rewarding employees for good performance, soliciting employee feedback, and resolving disputes among team members.

As discussed earlier in this decision, the Petitioner did not yet employ a "team" of employees for the Beneficiary to oversee, monitor, or coordinate. Therefore, at best, the job description is a projection of job duties that the Beneficiary may carry out at some indefinite time in the future. With the exception of hiring employees, to which the Beneficiary would allocate only 5% of his time, the Beneficiary could not have carried out the rest of his personnel management job duties at the time of filing, nor would he be able to carry out those duties upon commencing his employment with the Petitioner, as the engineering department would remain unstaffed until the Beneficiary hires the required employees to fill the positions that are currently vacant. We note that 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). Given the lack of a subordinate staff in the engineering department, it does not appear that the Petitioner had the capacity to employ the Beneficiary in a managerial capacity at the time of filing. In other words, the job description that the Petitioner provided is not an accurate reflection of the job duties that the Beneficiary could have realistically performed at the time this petition was filed. In fact, it is unclear when the Beneficiary would be able to perform his proposed job duties, given the undefined timeframe for hiring subordinate employees to staff the engineering department.

Although the Petitioner states that the Beneficiary is essential to its operations because he "knows all the ins and outs of the business," his level of knowledge does not establish that the job duties he would perform upon commencing his employment in the United States would be primarily managerial. The claim that the Beneficiary would be tasked with hiring five employees to staff the engineering department indicates that the Petitioner did not have the ability to relieve the Beneficiary from having to perform that department's operational tasks. Although the Petitioner claimed that employees from its related entity abroad would support the Beneficiary in his proposed position, it did not provide sufficient details about this claimed arrangement, nor did it make this claim prior to filing an appeal.

In light of the above, we find that the Petitioner did not establish that the Beneficiary would primarily perform managerial job duties in his proposed position.

III. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial capacity. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.

Cite as *Matter of S-, Inc.*, ID# 1637227 (AAO Sept. 20, 2018)