U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-S-P-USA, LLC

DATE: SEPT. 24, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a wholesale importer of ceramic kitchenware (manufactured by its foreign parent company) and exporter of live seafood, seeks to continue the Beneficiary's temporary employment as its manager 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 the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity. The Petitioner filed a motion to reopen. The Director granted that motion and again denied the petition for the same reason.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that it "has submitted sufficient detail and ample documentation" to establish eligibility for the benefit sought.

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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period from May 15, 2017 to May 14, 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 Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. Early submissions referred to the Beneficiary as an "executive manager" and a "managerial executive," but on appeal, the Petitioner clarifies that "the Beneficiary's role in the United States is Managerial. Therefore, the analysis should be limited to whether the Beneficiary would be employed in a primarily managerial capacity in the United States." As such, we need not discuss the separate requirements for an executive capacity assignment.

"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 or executive 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 managerial or executive 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.

A. Duties

The Petitioner stated that the Beneficiary divides his time as follows:

- Manages the Organization (50% of his time)
  - Oversee the implementation of the annual business plan, investment plan and financing plan (10%)
  - Determine the most effective course of action needed to reach that goal by directing future leadership with his immediate subordinate managers by maintaining a positive culture (10%)
  - Meet daily and oversee with all levels of management in the organization to improve our customer service system by tracking and responding to complaints . . . (10%)
  - Approve or reject business plans and budgets, submitted by the Administration Manager and Marketing Manager that achieve business growth (sales and profit) and ensure innovative cost controls in all areas (10%)
  - Approve and oversee business restructuring or resource integration (10%)
- Hire, Fire, Supervise and Control the Work of other Managerial Employees (30%)
  - Recruit, hire and fire the management of each department . . . . Oversee his immediate subordinates' hiring and firing of department staff (5%)
  - Provide performance appraisals, promote and transfer of employees . . . (5%)
  - Supervision of all departments to accomplish employment goals to provide excellent customer service to reduce shipping delays (5%)
  - Oversee each department manager in the performance management and improvement systems (5%)
  - Oversee employment and compliance to regulatory concerns with department managers from situation [*sic*] and problems that arises [*sic*] with customers['] complaints . . . (5%)
  - Approve policy development and documentation for exporting of products (3%)
  - Approve employee policy handbook for two (2) departments (2%)
- Exercises Discretion Over the Day-to-Day Operations (20%)
  - Designate tasks and responsibilities to department managers . . . (5%)
  - Meet and oversee with two (2) Department Managers to ensure all departments are working towards the same objectives and goals (5%)
  - Exercise sole discretion making power over the approval of the organizational structure and chain of command within the company by approving goals and budgets for the immediate managers to allow them to directly contact vendors and suppliers in the purchase of live seafood and ceramic dinnerware (2%)
  - Oversee creative commercial strategies and plans . . . (2%)
  - Assign work and granting authority to subordinate managers to ensure full functionality of the premises (2%)
  - Approve recommendations for capital growth plans and oversee implementation of capital projects with Administration Manager; for purchase of an owner-occupied real property (2%)

- Oversee the output of each department manager to ensure each employee's performance meets those standards based on customer feedback to ensure compliance with the Marketing Manager (2%)

Within each of the sub-categories, the Petitioner listed actions that the Beneficiary has taken or will take. Some of these actions entail approval or oversight of the work of subordinates whom the Petitioner did not always identify; others simply restate the duty (such as "Approved business plan" under the heading "Approve or reject business plans"). Other actions are overlapping or repetitive. For example, the Petitioner stated that the Beneficiary "Executed Employment Agreements to retain two (2) department managers," and, separately, that "[a]n Administration Manager and a Marketing Manager have been hired." The Petitioner did not explain the distinction.

For some of the Beneficiary's stated responsibilities, the Petitioner did not adequately explain exactly what tasks the Beneficiary would perform. For instance, the Petitioner did not explain the meaning of "ensur[ing] compliance with the Marketing Manager."

Asked to provide more details, the Petitioner submitted "a summary of the beneficiary's typical managerial duties." This summary, however, included several general statements such as "Contributing recommendations to the corporate strategic plan by synthesizing creativity and operations information" and "Oversight of creativity research efforts for the determination of consumer needs and preferences for current as well as future services." Such statements shed little light on the actual nature of the Beneficiary's specific duties.

The Director denied the petition, stating that the Petitioner had not established the Beneficiary's managerial capacity. On motion, the Petitioner submitted examples of the Beneficiary's work product, such as:

- "Executive Team Meeting Minutes," assigning to the Beneficiary's immediate subordinates tasks such as "[f]inding new suppliers for sea urchin," "[f]inding new office space," and creating a company website. The Beneficiary himself would be responsible for training employees regarding the parent company's manufacturing process; and
- "Project Charter Forms" and "Key Tasks Status Reports" showing that the Beneficiary approved the development of a website and a search for new office space.

The Director denied the petition a second time, finding that the Petitioner had not provided enough details about the Beneficiary's actual duties (rather than general areas of responsibility). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or 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). 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. *Id.*

On appeal, the Petitioner asserts that it "has described in great detail with supporting documentation the Beneficiary's duties." The Petitioner repeats the initial job description. That description lists

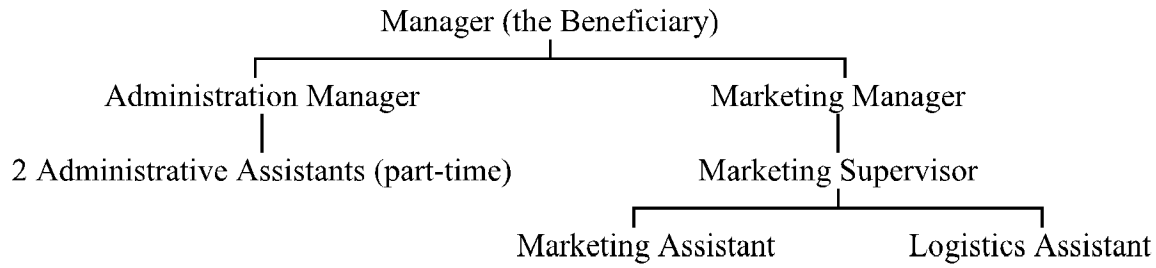
various functions that the Beneficiary would "oversee" or "approve." Decision-making authority is consistent with a managerial position, but it is not dispositive. The Petitioner has not shown that the daily operations of the business require the Beneficiary to make so many decisions that, collectively, they constitute the Beneficiary's predominant task.

The Beneficiary may have hiring and firing authority, but the company had only eight employees at the time of filing and the record does not show sufficient turnover to make personnel functions a major element of the Beneficiary's work.

The Petitioner also asserts that the Beneficiary's authority over subordinates is managerial. Therefore, we must examine the submitted information about the subordinate staff.

B. Staffing

The Petitioner's organizational chart showed the following structure at the time of filing the petition:



The Petitioner provided job descriptions for the subordinate employees. The Petitioner indicated that the Beneficiary's immediate subordinates have the following duties:

Administration Manager

- Maintain company staff by recruiting, selecting, orienting and training employees according to authorized personnel policy.
- Approve and implement administrative systems.
- Provide communications systems by identifying needs and options.
- Implement tasks and responsibilities to employees with skill sets.
- Achieve financial objectives by anticipating requirements; approve budget preparation.
- Approve policy development, documentation and performance standards from situation and problems that arises [*sic*].

Marketing Manager

- Approve the marketing strategy and plan.
- Implement organizational structure and chain of command.
- Management of the marketing mix and logistics.
- Implement performance standards and monitor inventory.
- Report on external opportunities.

- Identify aspects of the business that affect customer satisfaction through approval of policy development and documentation.

Although the organizational chart identified three different subordinates to the marketing manager, the Petitioner provided the same job description for all three, involving collecting marketing information; managing inventory and seafood forwarding; entering sales and price data into the database; taking inventory; and placing orders.

The assertion that the administration manager has authority to "approve budget preparation" and "policy development" necessarily implies that someone else, at a lower level, is preparing the budget and developing policy. But the Petitioner did not show that this is the case. At the time of filing, the administration manager's only subordinates were administrative assistants, whose stated duties consisted of preparing financial statements (which are not the same thing as budgets), preparing invoices and other shipping documents, arranging customs clearance, and maintaining inventory records.

Four weeks after filing the petition, the Petitioner entered into an agreement with an outside party "to introduce [the Petitioner's] product(s), market, sell, brand build, and assist with business development in the USA market." This agreement would appear to overlap with the responsibilities of the Petitioner's own marketing department, which comprises most of the company's employees.

On motion, the Petitioner submitted materials relating to tasks performed by the Beneficiary's immediate subordinates, such as training records showing that the two lower-level managers trained new hires, and office memoranda prepared by the administration manager. These materials indicate a chain of command and delegation of tasks, but do not suffice to show that the Beneficiary's own duties are primarily managerial.

Other materials submitted on motion raise questions of credibility. The Petitioner submitted a "Market Analysis Report," dated June 1, 2018, and a "Business Development Plan," dated June 13, 2018, both attributed to the Petitioner's marketing manager and reviewed by the Beneficiary. These dates and the author credit, however, are not credible. In a prior submission, the Petitioner had submitted a June 13, 2018 "Business Development Plan" prepared by the third-party marketing firm mentioned previously. Language from that third-party document has been copied and rearranged into the two documents that the Petitioner submitted on motion.

Similarly, an "Employee Handbook" is credited to the administration manager, but it contains information that does not apply to the petitioning company (such as references to "the CEO, President, or CFO," titles that according to the Petitioner's organizational chart do not exist at the company), and therefore appears to have been copied from a generic template. The adaptation of such a document from an existing source would presumably take substantially less time than drafting an original handbook.

Raising further questions, the motion filing included job descriptions for the "Sales and Marketing Supervisor," "Sales and Marketing Executive," "Sales and Marketing Assistant," "Logistics Coordinator," "Administrative Assistant," and "Administrative Coordinator." Many of these positions

did not exist when the Petitioner first filed the petition, and any subsequent restructuring of the organization cannot retroactively establish eligibility. A petitioner must meet all eligibility requirements at the time of filing, and continue to demonstrate eligibility throughout adjudication. *See* 8 C.F.R. § 103.2(b)(1). 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).

Furthermore, the new descriptions are inconsistent with respect to who is subordinate to whom:

Title	Subordinates
Sales and Marketing Supervisor	Sales and Marketing Executive; Sales and Marketing Assistant
Sales and Marketing Executive	Sales and Marketing Supervisor; Sales and Marketing Assistant
Sales and Marketing Assistant	Sales and Marketing Supervisor; Sales and Marketing Executive
Administrative Assistant	Logistics Coordinator; Administrative Coordinator
Administrative Coordinator	Logistics Coordinator; Administrative Assistant

The contradictory chains of authority significantly impair the credibility of the job descriptions. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Petitioner has established that the company is doing business and employs a small staff over which the Beneficiary exerts ultimate authority. But discrepancies in the record cast doubt and prevent a finding that the Petitioner has met its burden of proof. Discretionary authority is a necessary, but not a singularly sufficient, element of a managerial capacity. Because of the unanswered questions about the roles of the Beneficiary and his subordinates, we will dismiss the appeal.

III. 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 T-S-P-USA, LLC*, ID# 5018887 (AAO Sept. 24, 2019)