U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF BLTB-A- INC.

DATE: SEPT. 25, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a plastic materials and products importer and exporter, seeks to continue the Beneficiary's temporary employment as its operation manager under the L-1A nonimmigrant classification for intracompany transferees.[1] *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 will be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner asserts that the Beneficiary will perform executive and managerial duties, while two subordinate employees will carry out the majority of the day-to-day non-managerial tasks required to operate the business. The Petitioner also contends that one of the Beneficiary's subordinates is a professional and supervisory employee.

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 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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period April 21, 2016 , until March 6, 2017. 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.

The Act defines the term "managerial capacity" as an assignment within an organization in which the employee primarily manages the organization or a department, subdivision, function, or component; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function; if the employee directly supervises other employees, has the authority to take personnel actions, or if no other employee is directly supervised, functions at a senior-level within the organization 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.

The Act defines the term "executive capacity" as an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function thereof; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

These are two distinct definitions and the Petitioner must satisfy the requirements of one or the other definition to establish that the Beneficiary is primarily a managerial employee or primarily an executive employee.

Additionally, a petitioner seeking to extend an L-1A new office petition 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. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Petitioner's parent company produces plastic containers which can pack liquid nonhazardous material for transportation. The record includes a copy of the Petitioner's February 2017 Business Plan which states that its goal is to expand the parent company's business as the direct sales and distribution conduit in North America and to also directly source product from the North American market to the Chinese market. On appeal, the Petitioner states that its purpose is to "conduct international business and trading of raw plastic materials products in producing flexitank [a specific type of plastic container] for its overseas Chinese company." The Petitioner states on the Form I-129, Petition for Nonimmigrant Worker, and its letter of support that it employs five U.S. workers.

The Director noted discrepancies in the record regarding the Petitioner's number of U.S. workers and the time frame the workers were employed. The Director concluded that the record was insufficient to establish the Petitioner's number of employees, their positions, and job duties. The Director also found that the description of the Beneficiary's duties did not establish that the Beneficiary's role would be primarily managerial or executive in nature.

The Petitioner addresses the discrepancies the Director pointed out on appeal. The Petitioner notes that the initial organizational chart submitted was not properly updated before submission and provides the February 2017 version. The Petitioner also identifies the employees who have adopted an English version of their name to clarify its references to specific individuals in the record and to show that the individuals referenced correspond to the individuals listed on the Petitioner's tax documents. With this clarification and the Petitioner's 2017 first quarter Employer's Quarterly Wage Report, the record includes sufficient evidence to demonstrate that the Petitioner employed six individuals when the petition was filed in February 2017. Although the Petitioner also addresses the Director's determination that it had not established that the Beneficiary will be employed in a primarily managerial or executive capacity, the Petitioner has not overcome the Director's decision on this issue.

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 or executive 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 or executive 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. Additionally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive 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.

A. Duties

Based on the definitions of managerial and executive 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.

In the letter submitted in support of the petition, the Petitioner stated that the Beneficiary, in the position of operation manager, would have the following responsibilities:

1. Provide leadership and direction for the Operation Department of subsidiary, review the general operations of the Operation Department with the lower level management staff to ensure operations are running efficiently and smoothly (20%);
2. Assist the President in contributing towards the achievement of company's strategic and operational objectives (20%);

3. Assist the [s]ubsidiary in improving the operational systems, processes and policies in support of organizations [*sic*] mission – specifically, support better management reporting, information flow and management, business process and organizational planning; manage and increase the effectiveness and efficiency of support services, through improvements to each function as well as coordination and communication between support and business functions (20%);
4. Represent the company in purchasing materials, plan · inventory and ensure warehouse efficiency (15%);
5. Evaluate and make decision on Operation Department staffs' [*sic*] performance in the subsidiary, administrate personnel actions such as hiring, firing, promotion, and demotion of department staffs [*sic*] (15%); [and]
6. Report directly to the President about the overall operation of the subsidiary (10%).

The Petitioner's overview of these general responsibilities does not convey an understanding of the Beneficiary's actual day-to-day duties. Reciting vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. For example, the broad statement of providing leadership and direction and reviewing the general operations of the department with staff do not describe the actual tasks that will engage the Beneficiary in performing these responsibilities. Similarly, assisting the president in achieving strategic and operational objectives does not express the tasks the Beneficiary will use to accomplish the objectives. The Petitioner has not provided the necessary detail and explanation of the Beneficiary's activities in the course of her daily routine. 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). The duties described are so broadly-stated it is not possible to ascertain what duties are executive duties, what duties are managerial duties, and what duties are non-qualifying duties.

The fact that the Beneficiary will manage or direct a department within a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. As noted above, the Petitioner has not sufficiently described what the Beneficiary will actually do for at least 40 percent of her time. Additionally, spending 15 percent of her time representing the company in purchasing materials, planning inventory, and ensuring warehouse efficiency indicates it is the Beneficiary who will be performing these tasks. On appeal, the Petitioner broadens this responsibility to include signing contracts in purchasing material and services with suppliers, intermediaries, and third-party service providers, but still does not include sufficient detail to establish how these duties are managerial or executive in nature.

The Petitioner also claims that the Beneficiary will assist the company in improving the operational systems, processes, and policies in support of the organization's mission and refers to generic tasks

regarding better management practices and organization. However, supporting better management and managing and increasing the effectiveness and efficiency of support services are the goals of most organizations. The Petitioner does not describe the Beneficiary's actual tasks that relate specifically to its business, its products, or its staff.

The duties as described are insufficiently detailed to establish that the Beneficiary's proposed duties satisfy all the elements of the definitions of managerial capacity or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. The Petitioner does not clearly establish whether the Beneficiary will primarily establish the policies of the company, will primarily supervise or direct other employees, or will primarily perform operational tasks such as signing routine contracts, assessing inventory, and other tasks necessary to sustain the Petitioner's daily operations. The Petitioner's descriptions of the Beneficiary's duties do not clearly establish the Beneficiary's primary daily duties. Without additional detailed information on the Beneficiary's proposed position, we cannot ascertain the Beneficiary's actual role within the U.S. company. Moreover, without a more definitive description of the Petitioner's business purpose and the Beneficiary's day-to-day responsibilities in regard to that purpose, the Petitioner has not established that the position described is a managerial or an executive position as defined in the statute.

B. Staffing

The Petitioner submitted its updated organizational chart on appeal which shows the individual previously in the "Administrator" position had been moved to the acting president position. The revised chart also lists an additional employee in the operation department, the department headed by the Beneficiary.

The record also includes an overview of the duties of the president, the marketing and sales department manager, the marketing and sales department office assistant, the part-time administrator, the Beneficiary's position of operation manager, and the operation office assistant. The Petitioner does not include a position description for the operation department's "assistant," the individual hired in January 2017 and shown on the organizational chart as reporting to the "operation office assistant." The Petitioner does not indicate who performs the duties of the part-time administrator, now that the individual in that position has been moved to the position of acting president.

The Petitioner does not sufficiently clarify whether it is claiming that the Beneficiary performs primarily as manager or an executive. On appeal, however, the Petitioner emphasizes that the Beneficiary "manages and controls the work of other employees, the [o]peration [a]ssistant, a supervisory and professional employee, and the [a]ssistant, a subordinate who is supervised by the [o]peration [a]ssistant," and that the Beneficiary manages the operation department, a department "which is inherent and indispensable to the petitioner's operations."

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) 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." Section 101(a)(44)(A)(iv) of the Act. 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*).

In this matter, the Petitioner has not established that the Beneficiary is primarily a personnel manager. Although the Petitioner claims that the Beneficiary will spend 20 percent of her time reviewing the general operations of the department and 15 percent of her time making decisions on the operation department's staff, these duties do not encompass a majority of the Beneficiary's time. Additionally, although the Petitioner claims that the operation assistant is a supervisory and professional position, the record does not support that claim. The Petitioner's addition of an assistant position below the operation assistant's position on the revised organizational chart is insufficient to establish that the operation assistant's position is primarily a supervisory position. The operation assistant's duties as described in the record do not include supervisory duties and although the description of duties indicates this position backs up the Beneficiary's position in performing business operations duties, it does not detail what this responsibility actually entails.

Further, the duties of the operation assistant's position include updating operation procedures, coordinating with the manager to schedule team meetings, and supporting the manager to manage and resolve operational issues. These duties are not sufficiently detailed to demonstrate that the operational assistant position is a professional position. When evaluating whether a beneficiary manages professional employees, we 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"). Therefore, we focus on the level of education required by the position, rather than the degree held by the subordinate employee. 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. Here, the Petitioner offers no evidence that a bachelor's degree is actually necessary to perform the position of operation assistant.

The record does not include sufficient evidence to establish that the Beneficiary's position is more than a first-line supervisory position of non-professional employees.

The Petitioner implies on appeal that the Beneficiary's position is a function manager position when describing the operations department as "indispensable." 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).

In this matter, the Petitioner describes the importance of the operations department but does not effectively describe the tasks that will engage the Beneficiary when "managing" the department. Moreover, the Petitioner does not describe how the operation assistant and the assistant position will carry out the day-to-day tasks of the department, thereby relieving the Beneficiary from performing the non-qualifying tasks necessary to operate the business. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a beneficiary as long as those tasks are not the majority of a beneficiary's duties, a petitioner still has the burden of establishing that a beneficiary will "primarily" perform managerial or executive duties. *See* section 101(a)(44) of the Act. Whether a beneficiary is an "activity" or "function" manager turns in part on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See Id.* The Petitioner has not submitted sufficient probative evidence to establish the Beneficiary primarily manages a function within the Petitioner's organization, rather than performing the supply chain logistics duties, including sourcing and procurement, inventory, and transportation and delivery of products.

The Petitioner also has not established that the Beneficiary will primarily perform executive duties. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and they must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* Here, the Petitioner does not establish that the Beneficiary's duties or her subordinates' duties correspond to their placement in an organization's structural hierarchy. Creating artificial tiers within the organization's structure and inflating job titles will not establish that an organization is sufficiently complex to support an executive or manager position.

Finally, the Petitioner refers to an unpublished decision in which we determined that a beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though the beneficiary supervised only one employee. However, the Petitioner has not established that the facts of this petition are analogous to those in the unpublished decision. While 8 C.F.R.

§ 103.3(c) provides that our precedent decisions are binding on USCIS, unpublished decisions are not similarly binding.

III. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary will be employed in a primarily managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of BLTB-A- Inc.*, ID# 660682 (AAO Sept. 25, 2017)