U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-T-S-USA, INC.

DATE: SEPT. 26, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a clothing and fashion company, seeks to continue the Beneficiary's temporary employment as its president and chief executive officer (CEO) 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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner contends that the Director ignored the legal and factual substance of the Petitioner's assertions. The Petitioner states that it has clearly established that the Beneficiary oversees managerial and professional subordinates who will relieve the Beneficiary from performing non-qualifying operational duties.

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. 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.

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period August 25, 2015, to August 24, 2016. 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).

The statute defines an "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 of the organization; 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.

The law defines the term "managerial capacity" as an assignment in which an 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; has the authority to hire and fire or recommend those as well as other 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. 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.*

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) takes 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.

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that it was sufficiently operational as of the date of the petition to support the Beneficiary in a managerial or executive capacity, and concluded that it was more likely than not that the Petitioner did not have sufficient staff to relieve the Beneficiary from significant involvement in non-qualifying operational tasks.

On appeal, the Petitioner asserts that the Beneficiary qualifies as a personnel manager and executive overseeing subordinate managers and professionals and contends that she "never" performs day-to-day operational duties. The Petitioner states that the Director overemphasized the small size of the company and did not take into account the reasonable needs of the organization as required by the regulations. The Petitioner further contends that the Beneficiary qualifies as a function manager responsible for establishing the goals and policies of the organization and overseeing its growth and development. The Petitioner states that the Beneficiary's duties are sufficiently detailed and asserts

that they overwhelming demonstrate that she would spend a majority of her time on qualifying managerial or executive tasks under the extended petition.

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, USCIS examines 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. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the business and its staffing levels.

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.

The Petitioner stated that its business is focused on "the online sales of designer clothes for women including dresses, tops, skirts made by talented Ukrainian designers." The Petitioner indicated that it launched the [redacted] brand featuring Ukrainian designers and stated that it would focus on online sales of clothing through its own website.

We agree with the Director that the Petitioner submitted a vague duty description for the Beneficiary that does not convey her actual day-to-day tasks or establish that she would devote her time primarily to managerial or executive duties. The Beneficiary's duty description includes several general duties that could apply to any executive or manager acting in any business or industry and does not provide insight into the nature of her role within the scope of the Petitioner's online retail business. For example, the Petitioner stated that the Beneficiary "devises strategies, formulates all strategic policies and objectives," "implements administrative and operation policies or procedures," "establishes marketing, sales, and financial goals," "directs the overall operation of the business," "implements the company's guidelines," "establish[es] goals and policies," "directs the company's financial goals," "controls the investment of funds," "executes capital-raising strategies," and "propose[s] purchases of equipment," amongst other duties.

The Petitioner provided few examples and little supporting documentation to demonstrate the Beneficiary's performance of these duties, such as strategic policies or objectives she implemented, policies or procedures she established, marketing, sales, or financial goals she set, guidelines she implemented, goals and policies she put in place, investments she managed, capital she raised, or

equipment she purchased. The Petitioner has not clearly articulated what the Beneficiary does on a daily basis. 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).

Further, as noted by the Director, the Petitioner indicated that the Beneficiary would continue to perform the exact same duties under the extended petition that she performed during the Petitioner's initial year of operations. However, the Petitioner has provided substantial supporting evidence reflecting the Beneficiary's performance of non-qualifying duties during the previous year. This evidence includes numerous emails and transactional documents showing that she has been shipping clothing, investigating customs matters related to shipment, dealing with blog posts and edits thereto, attending fashion shows, and purchasing clothing. In fact, the Beneficiary's duties state that she "is responsible for purchasing, sales, hiring, [and] customer services quality control" and that she "approves all manufacturers, vendors, and suppliers, as well as merchandise orders." Therefore, the Beneficiary's duties and supporting documentation reflect that she has been and will be involved in nearly all operational matters of the business, including tasks related to the acquisition, sale, and shipment of clothing and the creation of marketing materials. The Petitioner does not assert that this will change during the second year or demonstrate that the Beneficiary would be delegating these tasks to the subordinates who were in place at the time of filing.

In addition, the Petitioner submitted a description of the Beneficiary's "typical daily routine" which included several tasks that are not supported by the evidence. For instance, the daily routine stated that the Beneficiary meets daily with a logistics manager. However, the supporting evidence does not establish that this employee had been hired at the time of filing, as the Petitioner's organizational charts states that this position would be filled in "Year 2." Likewise, the daily routine states that the Beneficiary would meet with the company's outside accountant and attorney on a daily basis. Yet, the Petitioner's evidence does not suggest that these outside resources provide extensive services or that the Beneficiary would meet or interact with them every day. The Petitioner's 2016 federal tax return shows that it spent only $3,594 on "legal and professional" services and $5,330 on "outside services and independent contractors." Further, the daily routine states that the Beneficiary will hold a daily call with the vice president of operations, coordinate with "banking experts to review and resolve any financing," and "hold a few phone meetings with major clients." However, the supporting documentation does not substantiate that the company regularly coordinates with banking experts or that it has major clients. In sum, the discrepancies and unsupported statements in this proffered daily routine leave doubt as to whether it provides a complete or accurate account of the Beneficiary's actual duties as of the date of the petition.

Moreover, several duties included in the daily routine appear more consistent with the Beneficiary's focus on non-qualifying operational tasks, which are also reflected in the submitted emails and other supporting evidence. For example, the daily routine states that the Beneficiary will "plan out dates when the payments that are due will be paid," "analyze our payable and receivable accounts," "resolve any questions/concerns in regards to the available product inventory," and "review the company's online sales efforts." The evidence indicates that the Beneficiary would continue her

significant involvement in non-qualifying duties under an extended petition, rather than performing primarily managerial or executive tasks.

Even though the Beneficiary holds a senior position within the organization, the fact that she will manage or direct 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. The Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making; however, the position descriptions alone are insufficient to establish that her actual duties would be primarily managerial or executive in nature.

B. Staffing

In support of the petition, the Petitioner provided an organizational chart reflecting that the Beneficiary supervised a vice president of operations, who in turn, oversaw "accounting & bookkeeping services (outsourced)," a sales and marketing specialist, an administrative manager, and "online marketing and SEO (outsourced)" identified as [redacted] The Petitioner provided evidence that it employed the Beneficiary and the three claimed employees at the time of filing.

The Petitioner has referred to the Beneficiary's position as both executive and managerial, emphasizing in response to the Director's request for evidence that she would oversee a subordinate manager and professionals. 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. 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."[2] Section 101(a)(44)(A) of the Act. If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act.

The Petitioner has not submitted sufficient supporting evidence to demonstrate that the Beneficiary supervises a managerial subordinate as asserted. The Petitioner provided a vague duty description for the Beneficiary's sole claimed direct subordinate, the vice president of operations. For instance,

[2] To determine whether the 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 United States 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."

the Petitioner states that this position will be responsible for "implementing the administrative and operational policies and procedures," oversee "contractual negotiations" and "investment," set "strategic policies and objectives," and formulate "key decisions." Not only are these duties vague and not reflective of the employee's actual day-to-day tasks, they overlap significantly with the Beneficiary's stated duties. The Petitioner's supporting evidence show that the vice president is a party to the Beneficiary's email conversations on various day-to-day operational matters, such as coordinating the purchase and delivery of goods, but the record does not support that this employee is performing managerial duties.

Furthermore, the Petitioner provides little explanation or evidence to demonstrate that the Beneficiary would supervise professional employees. We acknowledge that the Petitioner provided evidence that the vice president of operations holds a foreign degree in maritime navigation, but this is not established as the equivalent of a U.S. bachelor's degree and this degree is unrelated to the duties of his asserted position. Otherwise, the Petitioner does not articulate the bachelor's degrees required for any of the subordinate positions and has not documented that any other employees hold such a degree. In sum, the Petitioner has not shown that the Beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act when seeking classification as an L-1A manager based on the supervision of personnel.

In addition, the Petitioner's future hiring plans suggest that the company's existing staff was not sufficient to relieve the Beneficiary from performing a number of non-managerial duties at the time of filing. The Petitioner submitted a projected organizational chart for its second year of operations, including plans to hire an online shop specialist, a logistics specialist, and a customer services representative, all subordinate to the vice president of operations. However, the lack of these operational level employees leaves question as to who was handling these non-qualifying tasks when the petition was filed, such as directing and monitoring transportation and shipping activities, handling the company's online sales, and responding to customer service inquiries.

Further, the submitted evidence reveals several other operational tasks, including writing blog posts to promote the company's designers, updating the company's online presence and social media, searching for designers, purchasing and receiving clothing, posting clothing for sale on the company's website, and shipping sold clothing. Without explanation, it is not clear who is handling these non-managerial tasks, which include identifying clothing items, contacting suppliers, ordering clothing, and assuring payment to vendors. As discussed, the Petitioner provides several emails reflecting that the Beneficiary and the vice president of operations have been performing these types of tasks, including coordinating with a contact in New York for the shipment of dresses, and arranging the Beneficiary's attendance at a fashion show. The Petitioner also provided invoices related to the purchase of clothing bearing the Beneficiary's name, and [redacted] receipts related to the shipment of goods also including the Beneficiary's name. The evidence does not support the Petitioner's assertion that the Beneficiary "never" performs any non-qualifying duties. Without explanation and supporting evidence, it is reasonable to conclude that the Beneficiary will continue to perform various non-qualifying operational tasks into the second year of operations, when the Petitioner may hire staff to perform these types of duties.

In addition, the Petitioner asserts that its organizational structure includes independent contractors supervised by the vice president of operations, including a company handling its accounting and bookkeeping services and a company performing online marketing duties for the company, [redacted] However, as noted, the submitted evidence does not support a conclusion that these independent contractors are regularly engaged such that they can be considered part of the company's organization structure. Again, the Petitioner's 2016 tax return shows that the company spent only $3,594 on "legal and professional" services and $5,330 on "outside services and independent contractors." Otherwise, the Petitioner provides only a few invoices from [redacted] and a high level market research analysis provided by this vendor for the company in late 2015. There is not sufficient corroborating evidence that these outside resources are significant contributors to the Petitioner's day-to-day operations.

In the alternative, the Petitioner also asserts that the Beneficiary would primarily manage an essential function of the organization. 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 furnish a written job offer that clearly describes 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 we acknowledge that the Beneficiary would likely be responsible for the direction of the company in general, the Petitioner has not demonstrated that she will be primarily tasked with managing an essential function of the organization and sufficiently relieved from performing non-qualifying operational tasks. The Petitioner does not identify a specific essential function which the Beneficiary manages, nor explained it in detail. It is not sufficient for the Petitioner to merely state that the Beneficiary will be the president and CEO and manage the company as a whole to establish her management of an essential function. As we discussed, the Petitioner has provided vague duties for the Beneficiary that do not establish her management of an essential function. Further, it has provided duties and evidence indicating that the Beneficiary is likely substantially engaged in the performance of non-qualifying operational tasks and it has not adequately supported its assertion that she has been sufficiently relieved of these tasks as of the date of the petition. As such, the Petitioner has not established that the Beneficiary qualifies as a function manager.

On appeal, the Petitioner also makes reference to the Beneficiary acting in an executive capacity. 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, even though the Beneficiary has the appropriate level of authority, the Petitioner has not established that, as of the date of filing, she was primarily concerned with the broad policies and goals of the organization, that the day-to-day management rested with a subordinate tier of management, or that she would be relieved from substantial involvement in the day-to-day operations of the business. We acknowledge that a company's size alone may not be the determining factor in denying an L-1A visa petition without taking into account the reasonable needs of the organization. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *Family Inc.*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As discussed, the Petitioner did not consistently or sufficiently describe the Beneficiary's duties and we cannot determine that her role would primarily involve executive-level tasks. Further, the Petitioner provides substantial evidence reflecting the Beneficiary's involvement in non-qualifying operational duties and the provided duty description and supporting evidence do not reflect that she has been sufficiently relieved of these tasks. In addition, the Petitioner has not demonstrated that the Beneficiary had managerial or professional subordinates as of the date of the petition, or that her claimed subordinates would relieve her from performing non-qualifying operational duties. For all of these reasons, the appeal will be dismissed.

III. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of I-T-S-USA, Inc.*, ID# 620822 (AAO Sept. 26, 2017)