U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E- INC.

DATE: SEPT. 28, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner,[1] which sells children's clothing manufactured by its foreign parent company, seeks to extend the Beneficiary's temporary employment[2] as its president 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 record did not establish, as required, that the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by not fully considering the company's future plans.

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.*

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[1] The Petitioner identified itself as " " on the petition form and appeal form, but the record shows that the Petitioner's full legal name is " "

[2] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf, approved for the period from March 29, 2016, until March 28, 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.

There are additional requirements when a petitioner seeks to extend an L-1A visa petition that involved the opening of a new office. The new petition must include evidence to show: a qualifying relationship still exists between the employers in the United States and abroad; the U.S. entity has been doing business for the previous year; and the financial status of the U.S. operation. The Petitioner must also submit statements describing the Beneficiary's past and intended future duties in the United States, and details of the staffing of the new operation. *See* 8 C.F.R. § 214.2(l)(14)(ii).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director found that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner has repeatedly referred to the Beneficiary's position as managerial. Therefore, we restrict our analysis to whether the Beneficiary will be employed in a managerial, rather than executive, capacity.[3]

A managerial capacity is an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization, and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A personnel manager supervises and controls the work of other supervisory, professional, or managerial employees; the duties of a first-line supervisor are not considered managerial unless the employees supervised are professional. A personnel manager must also have the authority to execute or recommend personnel actions such as hiring, firing, and promotions. A function manager need not directly supervise other employees, but must manage an essential function within the organization, or a department or subdivision of the organization, and function at a senior level within the organizational hierarchy or with respect to the function managed. *See* section 101(a)(44)(A) of the Act.

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) must 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

When examining the managerial or executive capacity of the Beneficiary, we will look first to the Petitioner's description of the Beneficiary's job duties. The Petitioner's description of the job duties

[3] Prior to the appeal, the Petitioner consistently referred to the Beneficiary's position as "managerial." On appeal, the Petitioner states that the Beneficiary's "day-to-day duties correspond to discretionary activities and executive level," but does not elaborate. This statement appears to be in response to the Director's statement in the denial notice that the Petitioner had not shown that the Beneficiary served "as an executive within the first year of business." The Petitioner has not offered a coherent, sustained argument that it seeks to employ the Beneficiary as an executive rather than a manager.

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).

The definition of managerial capacity has two parts. First, the Petitioner must 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 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 described the Beneficiary's intended duties, along with the approximate percentage of time the Beneficiary would devote to each responsibility:

Managerial tasks (30%)

- Develop a strategic plan to advance the company's mission and objectives and to promote revenue, profitability, and growth
- Oversee the fiscal activities of the organization including budgeting, reporting and audit
- Approve company operational procedures, policies, and standards
- Review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions
- Recruit and oversee staff and evaluate his performances [*sic*]
- Reviews reports submitted by employee to recommend approvals or to suggest changes
- Represent the company as required, including attendance of important functions, events and public meetings

Sales and marketing tasks (70%)

- Develop and implement strategic marketing and sales plans and forecast to achieve corporate objectives for products and services
- Develop and manage sales/marketing operating budgets
- Direct sales forecasting activities and set performance goals accordingly
- Develop and recommend product positing [*sic*], packaging, and pricing strategies
- Meet with key clients, suppliers, and related parties to maintain relationships and negotiate and close deals
- Review sales performances against programs, quotes and plans to determine effectiveness
- Oversee and evaluate market research and adjust marketing strategy to meet changing market and competitive conditions
- Directs and coordinates activities of businesses involved with buying, selling, or providing products of financial services such as methods of payment

The Beneficiary's job description refers to oversight or delegation of a number of functions, such as financial reporting and market research. The Petitioner, however, did not specify who would actually perform these functions. If the Beneficiary himself is performing non-managerial functions such as preparing financial reports and sales plans, then he has less time to devote to managerial activities.

It is not clear what the Petitioner means with the assertion that the Beneficiary "directs and coordinates activities of businesses involved with buying, selling, or providing products of financial services such as methods of payment." The Petitioner sells children's clothing, not "products of financial services."

The description refers to multiple "businesses" that the Beneficiary "directs and coordinates," without identifying the other businesses. If the Petitioner copied this passage from a template job description, then it does not necessarily apply to the Beneficiary's job. If it does apply, then the Petitioner has omitted crucial information that would have shed light on the nature and scope of the Beneficiary's responsibilities. Also pointing to a generic template is the reference to meeting with "suppliers." The Petitioner has not indicated that it sells any products other than those manufactured by its foreign parent company. For these reasons, we cannot determine whether the description accurately reflects the Beneficiary's actual duties within the scope of the Petitioner's wholesale clothing business.

The fact that the Beneficiary will manage a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial 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" managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over the Petitioner's operations and possess the requisite level of authority as the senior member of its two-person staff, the position description alone is insufficient to establish that his actual duties would be primarily managerial in nature.

B. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial 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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 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." 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.

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."

At the time the Petitioner filed the petition, the Beneficiary had one subordinate employee, a sales manager, with the following job description:

- Contact new and existing clients to discuss their needs and to explain how specific products and services can meet these needs;
- Confirm orders, request dispatch of products, and balance accounts;
- Research the details of any issues and prepare requirements to attend fairs and exhibitions;
- Organize promotional events, and manage client lists and conduct promotional activities via email and telephone;
- Attend meetings and report overall business relevant issues Respond [*sic*] to client complaints and comments; and
- Research online and offline market and examine related regulations and laws

The Petitioner stated that the sales manager held a bachelor's degree with a major in "Clothing and Textiles." The Petitioner did not initially document this degree, but submits evidence on appeal showing that the sales manager has earned a "Bachelor of Science in Clothing and Textiles" and an "Associate Applied Science" in "Fashion Merchandise Management."

What makes an occupation is a profession is that the job requires at least a bachelor's degree. If it does not require that degree, then it does not matter whether or not the person in that position happens to have a degree. Here, the Petitioner has not shown that the duties of its sales manager position require a bachelor's degree.

Also, the Petitioner has not established that the sales manager position is managerial. Notwithstanding the word "manager" in the title, the position includes front-line sales and marketing duties, including cold-calling potential customers and handling orders, and also administrative tasks such as keeping lists of clients and coordinating shipping.

The Petitioner has not shown that the Beneficiary's only subordinate is a manager or professional. Because the company has no other employees, that subordinate cannot be a supervisor. Therefore, the Petitioner has not shown that the Beneficiary was a personnel manager at the time of filing.
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, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties dedicated 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 the duties related to the function.

The Petitioner's business plan described future plans to hire additional staff in store management, sales, and warehouse labor. On appeal, the Petitioner states that it will employ "three managers with bachelor degrees or higher . . . by 2019." Under 8 C.F.R. § 103.2(b)(1), the Petitioner must establish eligibility at the time of filing the petition. When the Petitioner filed the petition, it did not employ these workers, and therefore they were not available to perform non-qualifying functions relating to non-qualifying tasks such as sales, storage, and shipping. The Petitioner did not explain who performed many of these tasks in the absence of employees who could relieve the Beneficiary from having to do them himself.

The Petitioner had previously filed a petition for a new office, which allows a petitioner to rely on projections for the year following the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This one-year period cannot be extended; after a year, a petitioner is no longer a new office. After the approval of the initial new office petition, any future filings seeking to extend the beneficiary's stay as an L-1A nonimmigrant must rest on conditions at the time of filing, rather than anticipated future circumstances.

The Petitioner has established some outside support for sales activity. The Petitioner submitted a copy of a "Territory Sales Commission Agreement," in which a Texas company agreed to act as the Petitioner's exclusive sales representative in seven U.S. states. On appeal, the Petitioner claims to have 13 such agreements for various territories, but the Petitioner does not provide more details or supporting evidence. The Petitioner also sells products online through wholesale clothing marketplaces which sell to retailers rather than to the general public.

The sales agreements, however, do not relieve the Beneficiary of operational or administrative tasks other than certain aspects of sales. It is difficult to say precisely what the Beneficiary's remaining tasks are, because the Beneficiary's job description contains vague elements which, at times, do not appear to apply readily to the wholesale garment trade. 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). The actual duties themselves reveal the true nature of the employment. *Id.* Therefore, 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.

In a new statement on appeal, the Beneficiary states that it has tens of thousands of items in inventory, stored in "three storage spaces." Neither the Beneficiary nor the Petitioner explains who directly handles this inventory; the Beneficiary specifically states that the company has not yet hired warehouse staff. Receiving, stocking, and shipping inventory are not the tasks of a manager, supervisor, or professional, and therefore the Beneficiary would not be acting as a manager if handles the inventory himself or supervises his only subordinate in doing so.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa petition for classification as a multinational manager or executive. *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. *See, e.g., Family Inc.*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

For the reasons discussed, the Petitioner has not overcome the Director's determination.

III. CONCLUSION

The Petitioner did not establish that it will employ the Beneficiary in a managerial capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of E- Inc.*, ID# 654766 (AAO Sept. 28, 2017)