



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF N-P-I- INC

DATE: AUG. 29, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a designer, manufacturer, and seller of pet supplies, seeks to continue the Beneficiary's temporary employment as its operation director 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 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 submits additional evidence and asserts that the Beneficiary's entry into the United States was delayed due to a lengthy visa processing time at the U.S. Consulate in [REDACTED] South Korea, leaving him limited time to develop the business during the first year. The Petitioner contends that its evidence demonstrates that the Beneficiary was acting in a managerial capacity overseeing supervisors and professionals at the time it responded to the Director's request for evidence (RFE) in October 2017. In light of the circumstances, the Petitioner requests that we consider the company's ongoing growth subsequent to the date of filing, allow the Beneficiary to "recapture" the period of time he spent outside the United States, or grant the Petitioner an additional one-year period of approval as a new office.

Upon *de novo* review, we will dismiss the appeal.

¹ The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period August 1, 2016, until July 31, 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.

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.*

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 sole issue to be addressed is whether the Petitioner has established that the Beneficiary would be employed in a managerial capacity under the extended petition. The Petitioner does not claim that the Beneficiary would be employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary would be employed in a managerial 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.

When examining the managerial capacity of a given beneficiary, we will review 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 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, its staffing levels, and its organizational structure.

A. Duties

Based on the 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 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 parent company in South Korea "manufactures and wholesales fashion pet clothes and accessories" and that it planned on importing these products and selling them in the United States. The Petitioner indicated that the Beneficiary would spend 40% of his time on "people management," including hiring and dismissing personnel, allocating and assigning job duties to his subordinates, setting and executing policies, and establishing salaries and benefits. Further, the Petitioner explained that the Beneficiary would devote 30% of his time to "business and operation," performing such duties as overseeing and directing the entire operation, making decisions on the introduction and development of services and products, and implementing new business opportunities. In addition, it stated that this area of responsibility will also include: directing subordinates on market research and analysis; executing marketing, sales planning, and strategy; developing an immediate and long term business plan; selecting vendors and distributors; setting up goals, objectives, policies, and procedures; and implementing new sales technologies.

The Petitioner also indicated that the Beneficiary would be responsible for "financial control" 20% of the time, performing such duties as approving all financial and investment matters, controlling the company budget and major accounting activities, reviewing "staffing requirements required for certain projects," assuring that requested funds are provided for "the success of on-going projects," dealing with financial institutions for required loans for "new projects," and discussing the interjection of funds with the foreign parent. Lastly, it explained that the Beneficiary would spend 10% of his time on legal and contract matters, including negotiating contract terms with buyers and dealers, reviewing and signing sales contracts and loan agreements, and coordinating with tax advisors.

The submitted duty description is not sufficiently detailed and does not describe the Beneficiary's day-to-day managerial duties or credibly establish that he would devote his time primarily to qualifying tasks. Specifics are clearly an important indication of whether a beneficiary's duties are primarily 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 Beneficiary's duty descriptions include several generic duties that could apply to any manager acting in any business or industry and they do not provide insight into the actual nature of his role within the context of the Petitioner's pet supply distribution business. The Petitioner provided insufficient examples and little supporting documentation to demonstrate the Beneficiary's

performance of qualifying duties, such as personnel policies he set, managerial level decisions he made on introducing and developing services and products, “new business opportunities” he implemented, market research and analysis he directed, or long-term marketing and strategies he focused on. In fact, despite indicating that the Beneficiary would focus on market research and marketing strategies, its financial projections for 2018 indicated that the Petitioner would only spend \$2,708 on “advertising and promotions.”

Likewise, the Petitioner did not describe or document vendors and distributors the Beneficiary approved and negotiated with, goals, objectives, policies, and procedures he set up, or new sales technologies he discussed with the foreign parent. Further, it did not submit details and documentation to support financial and investment matters he approved, company budgets and major accounting activities he oversaw, staffing requirements he reviewed for “on-going projects,” loans he arranged with financial institutions, or buyers and dealers he negotiated with. This lack of detail and documentation leaves uncertainty as to whether the Petitioner provided a complete and accurate representation of how the Beneficiary would spend his time. Although we do not doubt that the Beneficiary has the appropriate level of authority and likely performs some managerial duties, the record does not support that the general duties listed would account for 100% of his time as claimed.

To the extent that the Petitioner submitted evidence relevant to the Beneficiary’s day-to-day tasks this evidence reflects his performance of a wide range of non-qualifying operational duties. For instance, the Petitioner submits several invoices and shipping documents that include the Beneficiary’s name and e-mail address, suggesting that he is handling these non-qualifying matters and not delegating them to subordinates. The Petitioner provided documentation reflecting that the Beneficiary arranged space at a pet supply expo in August 2017, and at flea markets in October 2017, for the purpose of marketing and selling the Petitioner’s goods.² Further, the Petitioner submitted photographs and emails indicating that the Beneficiary arranged to lease a stall to sell goods at a mall as late as September 2017. The Petitioner also provided documentation showing that the Beneficiary solicited clients after meeting them at an industry event and showing that he organized a photoshoot for its products. In contrast, there is no evidence demonstrating that the Beneficiary delegates these non-qualifying tasks to subordinates nor is there documentation reflecting that his subordinates perform these duties. In sum, the submitted documentation indicates that the Beneficiary is likely primarily engaged in the performance of non-qualifying operational duties.

Whether a beneficiary is a managerial employee turns on whether the petitioner has sustained its burden of proving that their duties are “primarily” managerial. *See* section 101(a)(44)(A) of the Act. Here, the Petitioner does not document what proportion of the Beneficiary’s duties would be managerial functions and what proportion would be non-qualifying. The Petitioner submits evidence indicating the Beneficiary’s involvement in operational-level tasks that do not fall directly under managerial duties as defined in the statute, but does not quantify the time he spends on these duties. For this reason, we cannot determine whether the Beneficiary is primarily performing the

² We note that the petition was filed on July 25, 2017.

duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Even though the Beneficiary holds a senior position within the organization, the fact that he will manage or direct the business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section 101(a)(44)(A) of the Act. By statute, eligibility for this classification requires that the duties of a position be “primarily” managerial in nature. *Id.* 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 his actual duties would be primarily managerial in nature.

B. 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.

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. The Petitioner does not assert that the Beneficiary would act as a function manager; therefore, we will only analyze whether he would qualify as a personnel manager. 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) 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).

The Petitioner claimed to have three employees at the time of filing and submitted an organizational chart indicating that the Beneficiary would supervise a sales and marketing manager and an office service manager.³ This chart also reflected that the Petitioner intended to hire a fashion designer subordinate to the Beneficiary and a sales representative reporting to the sales and marketing manager.

In response to the Director’s request for evidence (RFE) in October 2017, the Petitioner emphasized that the Beneficiary had been delayed in entering the United States due to a lengthy visa application process at the U.S. Consulate in [REDACTED]. The Petitioner stated that the Beneficiary did not obtain his

³ We note that the individual identified as the “sales and marketing manager” at the time of filing [REDACTED] was later identified as a part-time sales associate. The “office service manager” identified on the initial organizational chart worked for the Petitioner for only four weeks in July and August 2017.

L-1A visa until January 2017 and that he did not enter the United States until March 2017, giving him only approximately four months to sufficiently launch the business. The Petitioner provided an updated organizational chart as of October 2017 which reflected that the Beneficiary was overseeing a manager (also referred to as the office service manager) and an assistant manager (elsewhere referred to as the assistant sales manager), with two subordinate sales associates and another subordinate responsible for “packing.” It also submitted an “employee list” indicating that only the Beneficiary and the office service manager worked full-time, while the assistant sales manager, sales associates, and packing employee all worked part-time. The Petitioner contends that we should consider its October 2017 staffing and organizational structure due to the Beneficiary’s delay in entering the country; or, in the alternative grant the Petitioner an additional one year period as a new office.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows a new intended U.S. operation one year within the date of approval of the petition to support a managerial position. There is no provision in USCIS regulations allowing for an extension of this one-year period, nor is there a provision that would allow a petitioner to file more than one new office petition for the same beneficiary. If the business does not have the necessary staffing to sufficiently relieve the Beneficiary from performing operational and administrative tasks when the new office validity period expires, the Petitioner is ineligible for an extension. Therefore, the Petitioner’s claim that we must consider hiring that occurred after the filing of the petition, and/or grant it an additional year as a new office, is not persuasive.

As of the date of the petition, the Beneficiary had only two subordinates, a part-time “sales and marketing manager” who was later identified as a sales associate, and an office service manager, neither of who had subordinates of their own. As such, the Beneficiary did not qualify as a personnel manager based on his supervision of managerial or supervisory subordinates as of the date the petition was filed.

The remaining question is whether the Beneficiary supervised professional subordinates at the time of filing. In determining whether a 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 U.S. 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.” Here, the Petitioner did not submit evidence to substantiate that the Beneficiary’s subordinates held bachelor’s degrees. In fact, the record indicates that both subordinates were both college students at the time of filing. Further, the duties of these subordinates do not indicate that their positions required bachelor’s degrees. For instance, the duties of the office services manager reflected that she was tasked with various administrative duties, while the “sales and marketing manager” performed duties largely consistent with a sales representative. The Petitioner did not describe in detail why these positions required bachelor’s degrees.

Therefore, the Petitioner did not establish that the Beneficiary acted as a personnel manager when the petition was filed. 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).

Further, even if we were to consider the Petitioner's staffing at the time of the RFE response, the record does not demonstrate that the Beneficiary acted as a personnel manager at that time. When it responded to the RFE in October 2017, the Petitioner submitted a new organizational chart depicting six employees, including the Beneficiary, a manager responsible for administration, an assistant manager responsible for import/export, two sales associates, and a packing employee.⁴ However, the Petitioner submitted internal payroll documentation for the period from January 2017 through the end of October 2017 reflecting that it had paid wages to only the Beneficiary, the newly hired manager/office services manager, the former office services manager, and one part-time sales associate. Therefore, the Petitioner's own records do not corroborate the organizational chart provided in response to the RFE. Although the Petitioner submitted copies of resumes, employment agreements, and/or IRS Forms W-4 for its new staff, three claimed employees - the assistant manager, the packing employee, and one of the part-time sales associates - were not on the payroll at the time of the RFE response.⁵

The Petitioner did not submit evidence reflecting that the Beneficiary delegated duties to his claimed subordinates and there is no documentation demonstrating his asserted subordinates performing duties for the company. As discussed, the record includes substantial evidence of the Beneficiary performing most of the operational tasks of the business, including handling invoicing, soliciting clients, shipping and receiving goods, and arranging for the sale of goods at flea markets and malls.

The Petitioner also did not demonstrate that any of the Beneficiary's asserted subordinates in October 2017 were professionals. As we have discussed, the Petitioner did not submit documentation to substantiate that he had subordinates with bachelor's degrees nor did it articulate why these positions require bachelor's degrees. Therefore, contrary to the Petitioner's assertions, it did not demonstrate that the Beneficiary oversaw managerial and professional subordinates at that time.

Furthermore, the Petitioner did not establish that it had developed sufficiently to support its asserted organizational chart and to support the Beneficiary in a managerial capacity. Even if we consider the Petitioner's asserted finances as of the date of the RFE in October 2017, this reflects that the company had only earned \$91,041.05 in revenue since January 2017 up to this time. The Petitioner

⁴ The Petitioner's accompanying letter in response to the RFE referred to the same individuals by different job titles. Specifically, it identified the "manager" as "office service manager" and the assistant manager as "assistant sales manager."

⁵ The Petitioner did submit an internal "employee performance review" for the "assistant sales manager" for the review period "10/13 - 10/19/2017." This document is insufficient to demonstrate that the Petitioner actually hired this individual with an October 1, 2017, start date as claimed and that it employed him at the time of the RFE response. The Petitioner did not explain why this employee did not appear on its payroll in October 2017.

states that Beneficiary's salary is \$60,000 and that it would pay \$90,000 in salaries to its five other asserted employees. Based on its current operations, it is not clear how it would maintain its claimed organizational chart. In fact, the Petitioner submitted an email from the Beneficiary to a leasing representative at a mall in late September 2017 in which the leasing representative provides information on leasing a small kiosk in a mall to sell its goods; however, the Beneficiary responded that he would get back to the leasing representative when "the company is more stable." Otherwise, the Petitioner provides little detail as to its current financial status and the evidence discussed above leaves question as to whether it has developed sufficiently to support the Beneficiary in a managerial capacity.

Finally, we will address the Petitioner's claim that the Beneficiary is eligible to "recapture" the time he spent outside of the United States during the validity of his previously approved L-1A petition. Specifically, the Petitioner requests that the Beneficiary be allowed to recapture time he spent in South Korea awaiting issuance of his L-1 visa.

However, the Beneficiary is not eligible to recapture time spent outside the United States during the validity of his previously approved petition. Section 214(c)(2)(D) of the Act states that the period of authorized admission for an L-1 nonimmigrant admitted to render services in a managerial or executive capacity shall not exceed seven years. *See also* 8 C.F.R. § 214.2(l)(15)(ii). While it is true that only time spent physically present in the United States shall be counted towards the seven-year maximum period of admission, the Petitioner may not seek to recapture the time spent outside the United States in an extension proceeding. Rather, the Petitioner may request that any full days spent outside the United States during the period of petition validity be added back to the Beneficiary's total maximum period of stay, such that the Beneficiary, if otherwise eligible for L-1A classification, would be able to receive extensions beyond a seventh year. There are no regulatory or statutory provisions that would allow for reissuance of an approval notice for a prior petition for the purpose of recapturing days spent outside the United States during the validity of that specific petition.

The Petitioner points to a memorandum issued in 2005 by then Acting Associate Director for Domestic Operations of USCIS as a basis for its asserted recapture. *See* Memorandum from Michael Aytes, Acting Associate Director for Domestic Operations, USCIS, HQPRD 70/6.2.8, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants* (Oct. 21, 2005). However, we note that the referenced memorandum states explicitly that it was "intended for training a guidance of USCIS personnel" and was "not intended to . . . and may not be relied upon to create any right or benefit." Further, the memorandum supports our interpretation of the regulatory provisions as discussed above. As such, the Petitioner's citation to the Aytes Memorandum as a basis for recapturing time the Beneficiary spent outside the United States during the validity of his previous L-1A petition is not persuasive.

For the reasons discussed above, the Petitioner has not established that the Beneficiary would act in a managerial under the extended petition.

III. CONCLUSION

The appeal must be dismissed because the Petitioner has not established that the Beneficiary would be employed in a managerial capacity under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of N-P-I- Inc*, ID# 1277746 (AAO Aug. 29, 2018)