U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7512066

Date: MAR. 5, 2020

Appeal of Texas Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, a used automobile dealership, seeks to permanently employ the Beneficiary as its "Finance Manager" under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish, as required, that the Beneficiary was employed abroad in a managerial or executive capacity or that a qualifying relationship exists between the Petitioner and the Beneficiary's employer abroad. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we find that the Petitioner has not established that the Beneficiary's employment abroad was in a managerial capacity.[1] Therefore, we will dismiss the appeal. Because of the dispositive effect of this finding, we will reserve the remaining issue.

I. LEGAL FRAMEWORK

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

[1] The Petitioner does not claim that the Beneficiary was employed abroad in an executive capacity.

II. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

The primary issue to be addressed in this decision is whether the Petitioner provided sufficient evidence demonstrating that the Beneficiary was employed abroad in a managerial capacity.[2]

"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.

The Petitioner must establish that the Beneficiary was employed abroad in a managerial capacity. *See* 8 C.F.R. § 204.5(j)(3). Based on the statutory definition of managerial capacity, the Petitioner must first show that the Beneficiary performed certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). The Petitioner must also prove that the Beneficiary was *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.

Beyond the Beneficiary's job duties, we examine the company's organizational structure, the duties of the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the 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 foreign employer's business and staffing levels.

A. Procedural History

In a supporting cover letter, the Petitioner stated that the Beneficiary worked abroad as the foreign entity's human resources manager. The Petitioner offered the following four groups of job duties to describe the activities the Beneficiary performed during his employment abroad:

[2] As the Petitioner does not claim that the Beneficiary was employed in an executive capacity, we will not address this issue and will limit our discussion to whether the Beneficiary's employment abroad was in a managerial capacity.

- Formulated policies and procedures regarding employee recruitment, placement, orientation, benefits, and labor and industrial relations;
- Planned, directed, supervised, and coordinated subordinate staff's activities regarding employment, compensation, and labor employee relations;
- Directed the preparation and distribution of information regarding employee benefits, compensation, and personnel policies; and
- Planned, directed, and coordinated human resource management functions, including compensation, recruitment, and personnel policies.

The Petitioner also provided the foreign entity's organizational chart showing the Beneficiary's position as directly subordinate to the company's general manager. The chart indicates that the Beneficiary oversees a "human resources executive," a legal consultant, and a "warehouse executive," the latter of whom is shown as overseeing two production workers, four packaging workers, and one maintenance worker.

In a request for evidence (RFE), the Director informed the Petitioner that it did not provide sufficient evidence to establish that the Beneficiary was employed abroad in a managerial capacity. The Petitioner was therefore instructed to provide a statement from the foreign employer describing the Beneficiary's specific daily job duties, the percentage of time to be allocated to each duty, and an organizational chart with employee job titles, brief job descriptions, and educational levels as well as evidence establishing any contractors the foreign entity may have hired along with their job duties.

The Petitioner's response included a statement from the foreign entity containing the Beneficiary's foreign job duty breakdown. The statement reiterated the above information and added a percentage of time to each of the four groups of duties, indicating that the Beneficiary allocated 25%, 30%, 10%, and 15% to each of the above groups, respectively. The Petitioner added a fifth group of duties stating that the Beneficiary spent the remaining 20% of his time planning, directing, and coordinating "supportive services," such as record and file keeping, mail distribution, collecting and issuing invoices, overseeing maintenance and custodial operations, coordinating activities among clerical and administrative personnel, and organizing "office operations." The Petitioner also provided an updated organizational chart, which reflected staffing changes that took place after the Beneficiary's departure.[3]

In the denial, the Director noted that the RFE response referred to the Beneficiary's position as "administration and human resources manager," instead of human resources manager, as originally indicated, and listed job duties that were not part of the initial job description. The Director therefore found that a human resources manager's job duties are not representative of the Beneficiary's position as administration and human resources manager. The Director also found that the Petitioner did not establish that the Beneficiary managed professional subordinates because it did not provide evidence showing that a minimum of a bachelor's degree was required to fill the subordinates' respective positions.

The Petitioner disputes the Director's decision, contending that the Beneficiary assumed a managerial position in which he supervised professional subordinates.

[3] As the new organizational chart does not address the Beneficiary's former employment with the foreign entity, that chart is not relevant to the matter at hand and need to be discussed further.

B. Analysis

We find that the Petitioner has not provided sufficient evidence demonstrating that the Beneficiary was employed abroad in a managerial capacity. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature when claiming that a beneficiary's past or proposed employment is in a managerial capacity. Section 101(A)(44)(A) of the Act. Here, the job descriptions the Petitioner provided indicate that the Beneficiary did not allocate his time primarily to tasks of a managerial nature, nor is there evidence demonstrating that the Beneficiary primarily managed subordinate employees and authority to hire and fire.

Despite claiming that the Beneficiary was a personnel manager, the job duty breakdown provided in the RFE response indicates that the Beneficiary spent approximately 55% of his time formulating policies that pertained to human resource issues, directing the preparation and distribution of employee benefits information, and planning and coordinating "supporting services" and coordinating activities among clerical and administrative personnel. Although these job duties indicate that the Beneficiary worked with employee-related issues, they do not demonstrate that he primarily managed subordinate personnel. Further, despite stating that the Beneficiary supervised and coordinated subordinates, the Petitioner did not allocate a percentage of time to these individual job duties and instead grouped them together with other duties to which the Beneficiary was claimed to have allocated 30% of his time. Regardless, the Beneficiary's performance of these supervisory job duties indicates that personnel management was, at best, ancillary to his position and did not occupy the primary portion of his time.

On appeal, the Petitioner contends that the Beneficiary managed the two individuals who provided the Beneficiary's employment verification letters and asserts that each employee "has the education capacity or sufficient experience to be considered degreed personnel." The Petitioner did not, however, provide evidence showing the position requirements of the Beneficiary's subordinates. In evaluating 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"). Therefore, even if the Petitioner were to establish that the Beneficiary's subordinates had bachelor's degrees, it would still have to provide evidence showing that such degrees were among the job requirements of the respective positions. Here, the Petitioner did not provide such evidence. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The Petitioner also contends that as a result of "the wrong advice" given by an unnamed paralegal, the Petitioner asks that we "ignore" the statements it submitted in response to the RFE; the Petitioner claims that it made a "material error" by changing the Beneficiary's job title and "adding duties not natural and not related" to the Beneficiary's position as the foreign entity's human resources manager. The Petitioner does not specify which job duties were "not natural and not related" to the Beneficiary's position, nor did it provide evidence establishing precisely what job duties the Beneficiary actually carried out. Moreover, even if the Petitioner accepted deficient legal advice from a paralegal, there is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. *See* 8 C.F.R. § 292.1; *see also Hernandez v. Mukasey,* 524

F.3d 1014 (9th Cir. 2008) ("nonattorney immigration consultants simply lack the expertise and legal and professional duties to their clients that are the necessary preconditions for ineffective assistance of counsel claims"). We only consider complaints based upon ineffective assistance against accredited representatives. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).

Lastly, the Petitioner points to its previously approved L-1A petition, indicating that the instant petition should also be approved based on the prior approval. The Director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same evidence contained in the current record, the approval would constitute an error on the part of the Director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be unreasonable for USCIS or any agency to treat acknowledged errors as binding precedent. *Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center Director had approved the nonimmigrant petitions on behalf of the Beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 1999).

In light of the deficiencies discussed earlier in this decision, we find that the Petitioner did not establish that the Beneficiary was employed abroad in a managerial capacity and therefore we cannot approve this petition.

ORDER: The appeal is dismissed.