U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12484199

Date: JUN. 1, 2021

Appeal of Texas Service Center Decision

Form I-140, Petition for Multinational Manager or Executive

The Petitioner, a provider of Internet commerce systems and implementation services, seeks to permanently employ the Beneficiary as a principal engineer. The company requests his classification under the first-preference, immigrant category for multinational managers and executives. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C).

After first denying the filing due to abandonment,[1] the Director of the Texas Service Center reopened the proceedings and denied the petition on other grounds. The Director concluded that the Petitioner did not demonstrate the claimed, managerial nature of the Beneficiary's proposed U.S. work or his prior employment abroad.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will dismiss the appeal.

I. MULTINATIONAL MANAGERS AND EXECUTIVES

A petitioner for a multinational manager or executive must demonstrate that it has been doing business for at least one year and would employ a beneficiary in the United States in a managerial or executive capacity. Section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(D), (5). A petitioner must also establish that, in the three years before a beneficiary's nonimmigrant admission to the United States, the petitioner, an affiliate, or a subsidiary employed the beneficiary abroad for at least one year in a managerial or executive capacity. Section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(B), (C).

[1] The Director initially found the Petitioner's response to a written request for additional evidence (RFE) to be untimely. *See* 8 C.F.R. § 103.2(b)(8)(iv) (requiring a petitioner to submit an RFE response within 12 weeks of a request's issuance). A later review, however, revealed the response's timely submission. After reopening the proceedings, the Director issued the Petitioner a written notice of intent to deny (NOID) the petition.

II. THE PROPOSED U.S. WORK

The term "managerial capacity" means work that "primarily" involves: 1) managing an organization or a department, subdivision, function, or component of it; 2) supervising and controlling the work of other supervisory, professional, or managerial employees, or managing an essential function within an organization, department, or subdivision; 3) having authority to hire and fire subordinates or to recommend those and other personnel actions, or, if no other employee is directly supervised, functioning at a senior level within an organizational hierarchy or regarding a function managed; and 4) exercising discretion over the daily operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A); 8 C.F.R. § 204.5(j)(2).

A petitioner for a multinational manager must demonstrate that a beneficiary's proposed work would meet all four elements of the definition of "managerial capacity." A petitioner must also establish that a beneficiary would "primarily" perform managerial-level duties, as opposed to operational tasks. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006).

The definition of "managerial capacity" allows management of personnel or essential functions. The Petitioner does not assert the Beneficiary's management of an essential function either in the United States or abroad.[2] We will therefore consider his work only as a personnel manager. A personnel manager must primarily supervise and control the work of other supervisory, managerial, or professional workers. Section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. § 204.5(j)(2). "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; 8 C.F.R. § 204.5(j)(2).

When considering the managerial nature of proposed work, USCIS examines the job duties of an offered position. *See* 8 C.F.R. § 204.5(j)(5) (requiring a petitioner to "clearly describe the duties to be performed by the alien"). USCIS also considers: the nature and structure of the U.S. business; the existence of other workers who could relieve a beneficiary from performing operational duties; the proposed job duties of a beneficiary's subordinates; and any other factors potentially affecting a beneficiary's business role.

The record indicates the Petitioner's temporary employment of the Beneficiary in the offered position of principal engineer since December 2014, when he transferred to the U.S. company to work in L-1 nonimmigrant visa status.[3] The Petitioner seeks to permanently employ the Beneficiary in the same position, contending that the job is managerial in nature. The Petitioner stated that the offered position involves managing projects to help corporate clients update and improve their information technology systems.

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[2] The Petitioner submitted a letter stating that the Beneficiary would manage "a critical function" of the company's business. The Director, however, did not interpret the statement as asserting the Beneficiary's management of an "essential function." *See* section 101(a)(44)(A) of the Act; 8 C.F.R. § 204.5(j)(2). On appeal, the Petitioner does not fault the Director's interpretation. We therefore will not consider the Beneficiary's qualifications as a function manager. *See Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009) (declining to consider an issue that a party did not raise on appeal).

[3] L-1 status allows qualified intracompany transferees to temporarily work in the United States. *See* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The Petitioner's RFE response, however, discloses that, since the petition's filing almost one year prior, the company "promoted" the Beneficiary to "the more senior position of Distinguished Engineer." The RFE response also indicates his work on a different client project than at the time of the petition's filing.

A petitioner must establish eligibility "at the time of filing the benefit request." 8 C.F.R. § 103.2(b)(1). Also, "a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to [immigration service] requirements." *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). The Director found that the Petitioner improperly changed the Beneficiary's offered position from principal engineer to distinguished engineer. The Director stated that "[s]ubsequent developments or events in the [Beneficiary's] career cannot retroactively establish that he was already eligible for the classification sought as of the filing date."

The record, however, does not establish that the Beneficiary's "promotion" to the position of distinguished engineer materially affects his eligibility for the requested benefit. The Petitioner described the job duties of the new position as largely the same as the Beneficiary's prior duties. The new description in the Petitioner's NOID response combines duties in the prior categories of "People Management" and "Team Management and Leadership" into one category on which the Beneficiary would devote 25% of his time. The description also changes the name of the "Project Management, Estimation, and Strategy" category to "Client Account Management, Estimation and Strategy." But, besides a few, additional job duties in the categories of "Client Account Management, Estimation and Strategy" and "Client Management," the duties remain the same as originally described. Thus, contrary to the Director's finding, the record does not establish the Petitioner's material change of the offered position.

The Director also found that the Petitioner's descriptions of the proposed job duties do not establish "what the beneficiary would actually be doing 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 [of the terms managerial and executive capacity] 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). As the Director found, the Petitioner initially described some of the Beneficiary's proposed duties in vague terms. The company's NOID response, however, provides a sufficiently detailed list of job duties.

The Director further found that the Petitioner's descriptions of the Beneficiary's proposed job duties do not demonstrate that he would "manage[] the organization, or a department, subdivision, function, or component of the organization." *See* section 101(a)(44)(A)(i) of the Act; 8 C.F.R. § 204.5(j)(2) (defining the term "managerial capacity"). The Director found that the Beneficiary's proposed supervision of client projects does not establish his proposed management of the petitioning organization or a component of it. The Director stated: "Outside clients are not the organization, or a department, subdivision or component of the organization."

The record indicates that the Petitioner's business involves sending workers to perform services at client sites. As the Petitioner stated in its NOID response and argues on appeal, "[a]n essential component of [our] business is the management of programs and offered services to the company's

clients." Thus, we find that, under section 101(a)(44)(A)(i) of the Act, the Beneficiary's proposed management of project teams could constitute management of a component of the Petitioner if the teams primarily consist of company employees.

We share the Director's concerns, however, that the Beneficiary's duties and scope of his purported managerial responsibilities may vary from project to project. The Director noted that, after completing client assignments, the Beneficiary would move to other projects with potentially different workers. The Director found that USCIS could not determine whether the Beneficiary would primarily supervise and control the work of other supervisory, professional, or managerial employees "if the supervised [workers] are constantly changing."

The Petitioner's NOID response states: "Although the professionals managed by [the Beneficiary] are assigned to a particular project managed by him, please note that many, if not all, of these direct reports may continue to be managed by [the Beneficiary] on future client account programs." The record, however, does not establish that the Beneficiary would continue to manage most of his current subordinates. Evidence indicates that, on his new client project, the Beneficiary does not supervise any of his subordinates from his immediate, prior project. Thus, the record suggests that, on future projects, the Beneficiary may continue to manage different workers and possibly those who are not supervisors, professionals, or managers. Also, although the Petitioner submitted copies of resumes and university degrees of the Beneficiary's current subordinates, the record lacks sufficient evidence that the Petitioner (or its Indian affiliate) employs them. Thus, contrary to sections 101(a)(44)(A)(i), (ii) of the Act, the Petitioner has not demonstrated that the Beneficiary would primarily manage a component of the Petitioner, or primarily supervise and control the work of other supervisory, professional, or managerial employees. We will therefore affirm the petition's denial.

Also, although unaddressed by the Director, inconsistencies of record cast additional doubts on the claimed, managerial nature of the proposed work. As listed in the Petitioner's responses to both the RFE and NOID, the percentages of time the Beneficiary would spend on his job duties total 110%. The company has not explained how the Beneficiary could spend more than 100% of his time on the duties. This unresolved discrepancy casts doubt on the accuracy of the proposed duties and their corresponding percentages of time. A petitioner must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Also, although we find that project teams can constitute components of petitioners under section 101(a)(44)(A)(i) of the Act, evidence indicates that the Beneficiary would manage client employees as well as those of the Petitioner. The company's initial letter states that, in the offered position, the Beneficiary "ensures that the *project and client teams* are streamlined" and discusses "key decisions and roadmap strategies with the *client and project teams*." The references to both client and project teams suggest that, besides employees of the Petitioner, the Beneficiary would manage client employees. Because the Beneficiary may manage teams containing client employees, the record does not demonstrate that he would primarily manage a component of the Petitioner.

Further, the record does not establish that the Beneficiary would primarily perform managerial-level job duties. Pursuant to the definition of the term "managerial capacity," the Petitioner's job-duty descriptions in the categories of "People Management," "Team Management and Leadership," and

"Project Management, Estimation, and Strategy" demonstrate the Beneficiary's proposed supervision and control of others' work. But the descriptions indicate that he would spend only 45% of his time on these duties. The record therefore does not demonstrate that the Beneficiary would "primarily" serve as a personnel manager. *See* section 101(a)(44)(A) of the Act.

In addition, the Petitioner's job-duty descriptions contain redundant tasks. Under "Team Management and Leadership," the proposed duties of leading and managing a software project team and directing and reviewing project plans appear to include the tasks of overseeing project plans, scope, estimation, development, and strategies listed in the category of "Project Management, Estimation, and Strategy." Similarly, the categories of "Team Management and Leadership," "Technical Advising," "Client Management," and "Business Development" all involve discussing key decisions, strategies, systems, or project status with clients. The redundant duties cast further doubt on the accuracy of the Petitioner's job-duty descriptions and the corresponding time percentages.

The Director did not inform the Petitioner of these additional, evidentiary deficiencies. Thus, in any future filings in this matter, the Petitioner must resolve the discrepancies with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591.

For the foregoing reasons, the Petitioner has not demonstrated its proposed employment of the Beneficiary in a managerial capacity. We will therefore affirm the petition's denial.

III. THE WORK ABROAD

Like a petitioner claiming the managerial nature of proposed U.S. work, a petitioner asserting a beneficiary's managerial employment abroad must demonstrate that the foreign work met all four elements of the definition of "managerial capacity." A petitioner must also establish that the beneficiary "primarily" performed managerial-level duties, as opposed to operational tasks. *See Family Inc.*, 469 F.3d at 1316.

When determining the managerial nature of a beneficiary's work abroad, USCIS examines the job duties. *See* 8 C.F.R. § 204.5(j)(5). The Agency also considers: the nature and structure of the foreign business; the existence of other employees who relieved a beneficiary from performing operational duties; the job duties of a beneficiary's subordinates; and other factors that affected a beneficiary's business role abroad.

The record shows the Beneficiary's prior employment by the Petitioner's affiliate in India. The Petitioner asserts that, before the Beneficiary's transfer to the United States in December 2014, he served the affiliate for more than 10 years in the managerial position of "specialist platform."

The Director found the Petitioner's job-duty descriptions too broad to establish the Beneficiary's foreign work in a managerial capacity. The descriptions, however, provide enough details to render them credible. We will therefore withdraw the Director's contrary finding.

As the Director's decision notes, the Beneficiary entered the United States in L-1B nonimmigrant status as a "specialized knowledge professional." A specialized knowledge professional is a member of the professions who has "specialized knowledge." 8 C.F.R. § 214.2(l)(1)(ii)(E). The term

"specialized knowledge" means "special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures." 8 C.F.R. § 214.2(l)(1)(ii)(D).

Because USCIS admitted the Beneficiary to the U.S. based on his specialized knowledge, the Director found insufficient evidence that the Beneficiary worked abroad in the claimed, managerial capacity. The Director stated: "Since the beneficiary held a specialized knowledge position and not a managerial position abroad before coming to the United States, the beneficiary does not have the qualifying period of managerial or executive employment abroad to qualify for this classification."

Contrary to the Director's conclusion, however, we do not find specialized knowledge and managerial/executive capacities to be mutually exclusive. Conceivably, a beneficiary could have worked abroad in a capacity that was both managerial/executive and involved specialized knowledge. We note, for example, that specialized knowledge includes special knowledge of an organization's "management." 8 C.F.R. § 214.2(l)(1)(ii)(D). Also, while the definitions of both "managerial capacity" and "executive capacity" require a beneficiary to have "primarily" worked in those roles, the definition of "specialized knowledge" does not similarly require a foreign national to have "primarily" worked in a capacity involving specialized knowledge. *Compare* sections 101(a)(44)(A), (B) of the Act *with* 8 C.F.R. § 214.2(l)(1)(ii)(D). Thus, the Beneficiary's U.S. admission in L-1B status does not foreclose his employment abroad in a managerial capacity.

The record does not support the Director's denial of the petition based solely on the Beneficiary's U.S. admission in L-1B visa status. We will therefore withdraw the Director's contrary finding. But additional, evidentiary deficiencies, unaddressed by the Director, prevent the Petitioner from establishing the Beneficiary's work abroad in the claimed, managerial capacity.

Contrary to the requirements of a personnel manager, the record does not establish that the Beneficiary primarily supervised and controlled the work of others in India. *See* section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. § 204.5(j)(2). The Beneficiary's proposed job duties include personnel management duties, such as assigning tasks, and managing and assessing employee performance. But the job-duty descriptions do not demonstrate that he "primarily" performed those tasks. Rather, the descriptions indicate that he spent most of his time on other duties, such as: defining technical designs and architectural approaches; and assuming responsibility for high quality codes and adherence to applicable company and/or client standards in solutions deliveries. The Petitioner has not demonstrated that these other tasks involved supervision and control over others' work.

Also, the Petitioner's initial letter states that, in India, the Beneficiary managed a team of two employees, both in the position of "Senior Associate Technology L1." In contrast, the company's NOID response includes a letter and organizational chart indicating the Beneficiary's direct supervision of six employees abroad. Also, neither the names nor positions of any of the six employees match those of the two employees identified in the initial letter. The unexplained discrepancies in the number, names, and positions of the Beneficiary's subordinates abroad cast doubt on the accuracy of the Petitioner's evidence and thus on the claimed, managerial nature of the foreign work. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record).

The record does not support the Director's denial of the petition based solely on the Beneficiary's L-1B admission into the United States. In any future filings, however, the Petitioner must resolve the inconsistencies discussed above regarding the claimed, managerial nature of the Beneficiary's foreign work.

IV. ABILITY TO PAY THE PROFFERED WAGE

Also unaddressed by the Director, the record does not establish the Petitioner's ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

The Petitioner stated that the Beneficiary would earn $159,131 a year in his new position as a distinguished engineer. The petition's priority date is December 19, 2017, the date of the petition's filing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

As proof of its ability to pay, the Petitioner submitted a 2017 letter from its chief financial officer (CFO). If a petitioner employs at least 100 people, a director "may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." 8 C.F.R. § 204.5(g)(2). The CFO's letter states that, in 2016, the Petitioner employed more than 3,000 U.S. workers and generated more than $40 million in net income. As previously indicated, however, the petition's priority date is December 19, 2017. Thus, contrary to 8 C.F.R. § 204.5(g)(2), the letter does not demonstrate the Petitioner's ability to pay the proffered wage "at the time the priority date [was] established" or thereafter.

Also, USCIS records indicate the Petitioner's filing of multiple Form I-140 petitions. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Thus, the Petitioner here must demonstrate its ability to pay the combined proffered wages of this and any other petitions it filed that were pending or approved as of this petition's priority date of December 19, 2017, or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not establish its ability to pay the combined proffered wages of multiple petitions).[4]

The record lacks the proffered wages and priority dates of the Petitioner's other, applicable Form I-140 petitions. USCIS is therefore unable to calculate the total, combined proffered wages that the Petitioner must demonstrate its ability to pay in 2017, 2018, 2019, and 2020. The record therefore does not establish the company's continuing ability to pay the proffered wage.

For the foregoing reasons, the record does not establish the Petitioner's ability to pay the proffered wage. Thus, in any future filings in this matter, the company must submit an acceptable letter from a

[4] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked without pending appeals. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of their corresponding petitions or after the dates their corresponding beneficiaries obtained lawful permanent residence.

financial officer or copies of annual reports, federal tax returns, or audited financial statements demonstrating the company's ability to pay in 2017, 2018, 2019, and 2020. The company must also submit the proffered wages and priority dates of its other Form I-140 petitions that were pending or approved as of December 19, 2017, or filed thereafter. The Petitioner may submit additional evidence of its ability to pay, including proof of any wage payments to applicable beneficiaries in relevant years or materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

V. CONCLUSION

The Petitioner has not demonstrated its proposed employment of the Beneficiary in a managerial capacity. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.