U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-G- INC.

DATE: APR. 17, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a clothing and art store, seeks to temporarily employ the Beneficiary as director of sales of its new office[1] 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 new office would support a managerial or executive position within one year after approval of the petition.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Beneficiary is already performing in a managerial or executive capacity.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, 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.*

The petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner

[1] The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

II. DEFINITIONS

"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.

"Executive capacity" means 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.

Based on the statutory 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.

III. MANAGERIAL OR EXECUTIVE POSITION

The Director concluded that the Petitioner did not establish that the new office would support a managerial or executive position within one year. The Director based this conclusion largely on a finding that the Beneficiary's duties would not be primarily those of a manager or executive, and that the company's proposed staffing was not adequate to support such a position. The Petitioner asserts on appeal that the Beneficiary is already acting in such a capacity. We disagree.

A. Duties

When examining the managerial or executive capacity of the Beneficiary, we will review the Petitioner's description of the Beneficiary's 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). In this instance, the

Petitioner has not specified whether the position would be managerial or executive; the Petitioner has consistently used both terms.

The Petitioner provided the following description for the director of sales position:

> [The Beneficiary] is primarily responsible for motivating and energizing the staff to make proactive decisions in all their communications with clients; creating and advertising weekly, monthly and quarterly sales goals; preparing sale reports and signing off on their accuracy before submitting them; assessing the competitive landscape and instituting changes to sales program in response to competitor'[s] changes; establishing a referral network with international and local business as well as finding ways to maximize value from those connections; implementing a sales training and orientation program to educate new hires as our company grows.
>
> The table of Beneficiary's estimate of the percentage of time is dedicated to each specific duty. The beneficiary's main duties as Director of Sales include, but [are] not limited to the following:
>
> . . . .
>
> **A. Investigate and survey market area; Report and communicate to parent company in China** [30% of her time]
>
> [The Beneficiary] needs to assign the manager to monitor and research about the characters, patterns and trends of [the] local market . . . . She is responsible for reports and communications to . . . the parent company . . . regarding the results of the market research and marketing research.
>
> **B. Draw up marketing plans; Make timely sales summaries; Evaluate sales** [30% of her time]
>
> [The Beneficiary] sets goals, gross-profit plans and strategies on [a] weekly, monthly, quarterly and annual basis . . . . She has the authorization to adjust the goals and strategies . . . [and] is responsible for proper and well-established communication with [the] General Manager for business proposals . . . . She executes and controls the proceedings of the strategies and goals of the company and develops [the] strategic plan . . . . She evaluates the status sales, analyzes trends and assigns staff to complete sales summaries based on the result of her supervision and observation.
>
> **C. Set up outdoor sites and retail stores; Manage retail stores; Work out exhibition plans in U.S.; Assign exhibition work; Assist with local U.S. suppliers in development of company's products** [20% of her time]

> [The Beneficiary] has the authorization to decide the location of retail stores, products to display and sell, personnel to employ as well as other business-related matters. She makes policies and rules . . . [and] is also responsible for exhibition plans . . . . She makes sure the suppliers meet the company's business development strategies . . . . Besides, she is in charge of the development of new products as well as communication with U.S. suppliers for the techniques used and design of the products. . . .
>
> **D. Recruit and train sales executives** [10% of her time]
>
> [The Beneficiary] has to . . . select the most qualified personnel . . . . She assigns accountabilities and appraises job results of employees. She also coaches, orients, trains, counsels, monitors and disciplines executives and managers to ensure business goals are met.
>
> **E. Executive Performance** [10% of her time]
>
> . . . [The Beneficiary] is responsible for supervising the performance of the entire Department and leading the executives and managers to achieve goals [in a] timely manner by standardized procedures.

The record does not support crucial claims inherent in the above job description. Organizational charts in the record do not show any executives under the Beneficiary's authority. The record does not provide further substantive information about the exhibitions mentioned in the job description. With respect to "development of [the] company's products," the record does not indicate that the Petitioner develops or manufactures its own products or has any employees with those responsibilities. The record also does not corroborate the assertion that the Petitioner has any input into the development or design of the products that it purchases from its suppliers. With respect to exhibitions, the revised organizational chart shows a still-vacant position for an event planner, but that individual is under the authority of the operations director, not the sales director.

The Director denied the petition, stating that many of the Beneficiary's prospective tasks appear to be routine operational tasks rather than the duties of a manager or executive.

On appeal, the Petitioner asserts that the Beneficiary's duties are "absolutely reasonable" and that the Director did not take the submitted evidence into consideration. The Petitioner states that the Beneficiary "is authorized to perform top level function[s]" such as signing the lease on the retail space, and that "she is usually on [site] to supervise employees." The Petitioner indicates that the Beneficiary is already running the sales department, presumably without compensation because her B-2 nonimmigrant status does not permit employment in the United States.

The Petitioner asserts that, because the company is still in the start-up phase, the Beneficiary also has responsibility over "operation and finance functions." In a new office petition, the Petitioner must

establish what the Beneficiary's role will be at the end of the first year, once the company is more fully operational. The Petitioner cannot meet this burden through short-term responsibilities that the Beneficiary has assumed purely because key positions are unstaffed.

Even granting that a new office is not fully operational, the Petitioner must provide sufficient information to show that the new office will support a managerial or executive position within a year. In this instance, beyond delays documented in the record, the Petitioner's plans appear to be insufficiently developed. The Petitioner states that it is normal for plans to change as a new business grows and develops, but the deficiencies in the record go beyond these usual parameters. As discussed further below, the Petitioner has set forth ambitious but poorly detailed plans, with little concrete information about how the company intends to realize those plans.

The Petitioner has established that the Beneficiary will have discretionary authority over its sales department, but not that the Beneficiary's duties will be *primarily* those of a manager or executive.

B. Staffing

The position description alone is insufficient to establish that a beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as a petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the proposed position. A petitioner has the burden to establish that it would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the evidence must be considered in analyzing whether the proposed duties are plausible considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

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.

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 Petitioner has not stated that the Beneficiary will be a function manager, nor has the Petitioner articulated a specific function that

the Beneficiary will manage. Instead, the Petitioner has focused on the Beneficiary's authority over sales and other personnel.

The Petitioner stated that it has "hired and trained a few employees and set the company's basic structure," consisting of "Sales, Operations and Finance Departments." This structure is consistent with the Petitioner's organizational charts, which show approximately 10 positions to be filled in these departments. However, the Petitioner's "Employment Plan" (included in its business plan), indicates that the company will have a much different structure, including a creative department, a branding department, a merchandise display department, a marketing department, and a retail store department, with up to 20 or more total employees, during the first year. The Petitioner did not consistently describe its intended structure or the number of employees to be hired. Although the Petitioner later submitted a revised employment plan that was more in line with its proposed organizational chart, it did not indicate who would be performing the duties attributed to the staff identified in the original employment plan.

The Petitioner stated that the Beneficiary "will work under the CEO [chief executive officer], and will directly supervise the Sales Manager . . . , as well as a Sales Team currently being recruited." The Petitioner indicated that the sales manager would manage sales staff "and retail stores."

When the Petitioner filed the petition in October 2016, it indicated that it had opened one store location in [redacted] and planned to open a second store in June 2017, and a [redacted] in December 2016. During this first year, however, the Petitioner projected employing only "1 to 2" store managers. (The Petitioner planned to open additional stores in [redacted] and elsewhere after the first year.)

The Director advised that the Petitioner had not established that it "will have an organizational structure sufficient to elevate the beneficiary to a position that is primarily executive in nature." In response, the Petitioner submitted a reformatted business plan. Like the earlier version, the second business plan indicated that the Petitioner would open a [redacted] in December 2016. The Petitioner submitted this second business plan in July 2017, several months after that target date, but the Petitioner did not establish that the site had opened as planned (or provide much information about the nature of the [redacted] or its projected staffing requirements).
The revised business plan listed the sales manager's duties: "Follow Director's instructions. Overse[e] salespeople. Develop sales strategies and plans. Set targets for the sales team and manage their performance. Prepare sale[s] reports [for] Director." The Petitioner added: "Education Level: Bachelor and/or Above."

The organizational chart submitted in July 2017 identified [redacted] as the sales manager; pay receipts showed part-time employment of 10 to 15 hours per week. The same chart named [redacted] as the full-time operations manager, outside the Beneficiary's line of authority.

In the denial notice, the Director found that the Petitioner had not established that the Beneficiary would supervise managers, supervisors, or professionals. On appeal, the Petitioner asserts that, as "a newly founded company," the Petitioner's structure is not yet fixed.

The Petitioner must establish eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(1). The new office need not be fully staffed or operational at the time of filing, but the Petitioner must provide enough evidence and information at the time of filing to show that a primarily managerial or executive position will exist within a year.

A new organizational chart submitted on appeal in September 2017 showed [redacted] as the sales manager and [redacted] as the sales team leader. By this time, the Petitioner had hired two additional sales personnel. Pay receipts from August 2017, nearly ten months after the filing date, showed that [redacted] was the only full-time employee in the department. The Petitioner has not established that three part-time sales workers would require or justify an additional level of managerial authority above their full-time supervisor. While the Petitioner plans to open additional stores, the Petitioner has not shown that this would occur within the one-year timeframe of a new office.

Oversight over supervisors *may* qualify as managerial, but the Petitioner has not established that the Beneficiary's supervision of [redacted] would occupy enough of her time to qualify as one of her primary responsibilities. We have already identified various problems with the Petitioner's breakdown of the Beneficiary's claimed duties.

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 Director found that the Petitioner had not established that the Beneficiary's subordinates are professionals whose occupation requires at least a bachelor's degree. On appeal, the Petitioner proposes a new definition of the term "professional," stating: "the so-called professional employees should be employees who have knowledge in sales, art and related fields." This is not a tenable definition of a "professional" for the purposes of determining the Beneficiary's eligibility as a personnel manager; the term is not simply synonymous with "well-qualified."

Furthermore, the Petitioner had previously claimed that the sales manager position required a "Bachelor and/or Above." The Petitioner has retreated from this claim now that the sales manager is [redacted] whose résumé lists no education beyond a high school diploma.

The Petitioner has not shown that the Beneficiary will primarily supervise managers, supervisors, or professionals during the first year after approval of the petition. Therefore, the Petitioner has not

established that it will employ the Beneficiary as a personnel manager during the time permitted for a new office.

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 a beneficiary 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 an 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.*

As we have already discussed, the Petitioner has not shown that the Beneficiary will direct the management of the petitioning entity or a major component or function thereof. The latest organizational chart shows an operation manager under the authority of a director of operation. The Petitioner asserts that the position of director of operation remains vacant, so the Beneficiary also oversees the operation manager. This, however, is admittedly a short-term temporary arrangement in the absence of a director of operation, and therefore it does not show us the Beneficiary's expected authority once the company is fully established. Furthermore, the latest chart shows that every position subordinate to the operation manager is vacant, which means that the operation manager is the department's only employee. As such, that employee is unlikely to be functioning in a truly managerial capacity rather than performing the tasks that would otherwise be delegated to subordinates.

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 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.

On appeal, the Petitioner states: "We expect to finish our recruitment for current locations in 2018," more than a year after the petition's October 2016 filing date. The record indicates that the company's progression has been slower than anticipated, which further impedes any finding that the company would be able to fully support a primarily managerial or executive position within a year.

IV. ADDITIONAL NEW OFFICE ISSUES

Beyond the Director's decision, our *de novo* review of the record shows other issues relating to the new office petition requirements.

A petitioner seeking to open a new office must establish the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States. 8 C.F.R. § 214.2(l)(3)(v)(C)(*2*). The Petitioner's business plan anticipated "$2 million dollars investment . . . for 2016 to 2018." The Petitioner initially documented $160,000 in incoming wire transfers from its parent company, which accounts for only 8% of the anticipated investment in the company. The Petitioner later submitted a list of financial transactions, showing that in early 2017 the parent company carried a bank balance of around 9 million yuan, roughly equivalent to $1.42 million in U.S. currency. The submitted evidence does not show that the foreign entity would be able to invest a further $1.84 million in the U.S. entity over the next two years, or that the company would be able to reach its stated development goals without that capital.

Furthermore, the revised business plan and organizational chart submitted in July 2017 indicated that the Petitioner was recruiting warehouse staff under the Beneficiary's control "by June 2017." The Petitioner did not, however, show that it had secured warehouse space to employ such a staff. The only lease agreement documented in the record is for the Petitioner's first retail store. A new office petition anticipates that growth will occur after the petition's filing date. Still, the Petitioner must establish at the time of filing that it has secured sufficient physical premises to house its business operations. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). If the Petitioner plans to hire warehouse workers, but has no warehouse, then it has not secured sufficient physical premises to house its business operations.

V. CONCLUSION

The Petitioner has not established that its new office will support a managerial or executive position within a year after approval of the petition. The Petitioner has also not met new office requirements concerning financial support and physical premises.

ORDER: The appeal is dismissed.

Cite as *Matter of D-G- Inc.*, ID# 958952 (AAO Apr. 17, 2018)