U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-D- INC.

DATE: DEC. 19, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a food products distribution company, seeks to temporarily employ the Beneficiary as the general manager 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 Vermont Service Center denied the petition, concluding that the Petitioner did not establish, as required, that: (1) the new office would support a managerial or executive position within one year of approval of the petition; and (2) the Beneficiary had at least one year of full-time continuous employment abroad in a managerial or executive capacity in the three years preceding the filing of the petition.

On appeal, the Petitioner submits additional evidence of the Beneficiary's foreign employment and asserts that he has been employed by its foreign parent company, and will be employed in the United States, in a managerial or executive capacity.

Upon *de novo* review, we withdraw the Director's adverse finding regarding the Beneficiary's employment abroad.[2] However, as the Petitioner did not overcome the remaining ground for denial, we will dismiss the appeal.

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[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.

[2] The record now contains documentation of the Beneficiary's full-time employment with the Petitioner's parent company dating back to January 2014. While the Beneficiary was in the United States in F-1 status for the year immediately preceding the filing of the petition, he has the required one year of employment abroad in the three years preceding the filing of the petition in January 2017. *See* 8 C.F.R. § 214.2(l)(3)(iii). Further, the Petitioner demonstrated that the Beneficiary, as general manager in a firm with 22 employees, supervised subordinate professionals, managers and supervisors, and more likely than not performed primarily managerial duties consistent with the definition of "managerial capacity" at section 101(a)(44)(A) of the Act.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification for 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. Section 101(a)(15)(L) of the Act. The petitioner must also establish that the beneficiary's prior education, training, and employment qualifies him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

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 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).

"Managerial capacity" means as 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.

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director determined that the Petitioner did not establish that its new office would be able to support a managerial or executive position within one year of approval of the petition.

Specifically, the Director determined that the Petitioner did not demonstrate that the Beneficiary would supervise a subordinate staff of managerial, supervisory, or professional employees within one year, or that the projected subordinate staff would perform certain non-qualifying duties, such as delivering products to customers. Further, the Director noted that the Petitioner revised its financial projections in the response to a request for evidence (RFE) without explaining the reasons for the

changes, thus making it difficult to determine the company's financial goals and objectives for the first year of operations. Accordingly, the Director concluded that the evidence was insufficient to establish that the new office would support a qualifying executive or managerial position within one year.

On appeal, the Petitioner asserts that it satisfied all requirements for an L-1A new office petition. The Petitioner maintains that the Director misinterpreted the projected revenue figures in its business plan and reiterates that it anticipates total sales of over $1.1 million during its initial year.

A. Business Plan and Projected Staffing

In the case of a new office petition, beyond the description of a beneficiary's proposed job duties, we review the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial or executive capacity. 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 managerial or executive position is 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 Petitioner submitted a business plan indicating that it plans to operate as a distributor for Brazilian food brands in North Florida, Alabama, and Georgia.[3] The Petitioner indicated that it "has a deal with four companies" and identified the brands it will distribute as [redacted] fruit snacks, [redacted] frozen fruit bars, [redacted] coffee, and [redacted] snacks. Although the Petitioner claims that it has agreements in place with all four brands, it submitted only one product distribution agreement, which authorized the Petitioner to sell [redacted] products in nine Florida counties.

The Petitioner's projected first year revenues of $1.1 million[4] are contingent upon its sales of these four brands in several states, therefore it is reasonable to expect corroborating evidence of the distribution agreements. Without this evidence, we cannot determine whether the Petitioner's projections are realistic. The record supports that the Petitioner is prepared to sell one brand of products [redacted] in a limited geographic area in Florida.

The Petitioner has consistently stated that it will hire six full-time employees, not including the Beneficiary, during its initial year, with all positions filled by the fourth month of operations. The subordinate positions include a sales manager, three sales representatives, a warehouse specialist, and an administrative assistant, with the sales manager depicted as a supervisor on the Petitioner's

[3] The business plan, in some instances, identifies the Petitioner's targeted markets as Florida, Georgia, and Massachusetts.

[4] The Petitioner has provided consistent revenue projections for its initial year throughout this proceeding. The Director determined that the Petitioner revised these projections in response to an RFE, but appears to have misinterpreted the financial information submitted included in the RFE response.

proposed organizational chart. The Petitioner submitted three different sets of job descriptions for the subordinates, which makes it difficult to determine the nature of these positions. For example, one version of the administrative assistant job description indicates that this employee will be recruiting, selecting, disciplining, and training employees, and performing accounting tasks, while another description limits the role to clerical duties and ordering office supplies. One version of the sales representative job description refers to seeking out "customers in store" but the Petitioner does not intend to operate a store. Further, despite the placement of the sales manager on the organizational chart, the Petitioner did not consistently indicate that this position would manage or supervise the lower-level sales staff.

In addition, as noted, the record does not establish whether the Petitioner's sales projections are reasonable given its submission of only one product distribution agreement. While it may be feasible to pay the projected $250,000 in salaries with revenues of over $1.1 million, it is unclear that the Petitioner would be able to achieve those revenues absent corroborating evidence that it has four distribution agreements in place. Therefore, the lack of evidence in this regard calls into question the Petitioner's ability to hire and compensate six full-time workers, and its ability to hire sufficient staff to relieve the Beneficiary from significant involvement in non-qualifying duties within one year.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i)-(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. Section 101(a)(44)(A)(ii)-(iii) of the Act.

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"). 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." Therefore, we must focus on the level of education required by the position, rather than the degree held by a subordinate employee.

The Petitioner initially stated that only the sales manager position would require a bachelor's degree, but in response to the RFE, it referred to all subordinate positions as "professionals" without further explanation. As noted, the record does not include a consistent explanation of the sales manager's proposed duties sufficient to establish that the position would be supervisory or that it would require an individual with a bachelor's degree. In addition, without evidence to support the Petitioner's

claim that it is prepared to commence distribution of four different brands in at least three states, it is unclear that it would have the sales volume to warrant the hiring of four full-time sales staff.

Due to inconsistencies in the subordinate employee's job descriptions and the omission of evidence related to the company's distribution agreements, the record does not demonstrate that the Beneficiary would be primarily engaged in supervising subordinate managers, supervisors, or professionals within one year.

Further, as noted by the Director, the Petitioner has not identified, for example, an employee who would be responsible for driving the delivery truck depicted in the submitted photographs. The Petitioner also does not have a position for a bookkeeper or accountant. The Petitioner indicate that the Beneficiary will spend a substantial portion of his time managing a "purchase manager" but has not otherwise identified a proposed position with this title or an employee responsible for purchasing or procuring the goods the Petitioner will sell. A company's size alone may not be the determining factor in denying an L-1A visa petition without taking into account the reasonable needs of the organization. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, there are several non-managerial functions that are not accounted for in the projected hiring plan.

As discussed further below, the Petitioner's description of the Beneficiary's duties, considered in light of the staffing and business plans, does not establish that he would perform primarily managerial or executive duties within one year. Even though the Beneficiary would hold a senior position within the organization, the fact that the Beneficiary will manage a business and supervise subordinate employees does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial or executive in nature. Sections 101(A)(44)(A) and (B) of the Act.

B. Duties

At the time of filing, the Petitioner described the Beneficiary's proposed duties at the end of the first year of operations as follows:

- Manage and supervise the work of the Sales Manager, Purchase Manager, and other professionals; (up to 30%)
- Manage general activities related to making products and providing services; (up to 20%)
- Establishes sales strategies and marketing goals, evaluating performance of the company and its staff, and determines areas of cost reduction and program improvement; (up to 10%)

- Supervise the implementation of the corporation's accounting practices and financial policies, analyzing reports, audits, deciding investment risks, budget, allocation of resources; (up to 20%)
- Hire and supervise the training of professionals to work in the company; (up to 15%)
- Supervise the Sales Manager and Purchase Manager in analyzing sales information, such as price, future trends, and investment risks, making investment decisions, estimating forecast of business and preparing plans of action. (up to 5%)

As noted, the Petitioner does not otherwise indicate that it plans to hire a purchase manager and it is unclear who would actually perform the duties normally associated with this position. The Petitioner also does not have subordinate staff to implement the accounting and financial activities the Beneficiary is claimed to oversee. Beyond these unexplained references to non-existent subordinates, the description is very general and provides little insight into what the Beneficiary would actually be doing in order to "manage general activities" and establish goals and policies. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Another position description for the Beneficiary appears in the Petitioner's business plan and bears little resemblance to the one referenced above. This description indicates that the Beneficiary is responsible for market analysis, building the company image, maintaining quality service, contributing to "team effort" by "accomplishing related results," expansion and branding plans, and establishing "procurement, production, marketing, field, and technical services policies. This description also places much less emphasis on supervising subordinates, an activity that accounts for 50% of the Beneficiary's time in the initial job description above. The Petitioner did not provide an explanation for the two different descriptions.

The Petitioner has conveyed the Beneficiary's discretionary authority to set up the company and establishes its policies and strategies, but has not offered a clear or consistent description of what it expects him to do on a day-to-day basis by the end of the first year of operations. Even though the evidence indicates that the Beneficiary will occupy the senior position in the new office, the Petitioner has not submitted a job description or supporting evidence sufficient to demonstrate that he would primarily engage in managerial or executive duties, or that the new office would support a managerial or executive position, after the initial year of operations.

III. CONCLUSION

The Petitioner has not established that it will employ the Beneficiary in a managerial or executive capacity within one year.

ORDER: The appeal is dismissed.

Cite as *Matter of P-D- Inc.*, ID# 698867 (AAO Dec. 19, 2017)