U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-L- INC

DATE: FEB. 27, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an importer and retailer of LED lighting products, seeks to temporarily employ the Beneficiary as chief executive officer 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 that the new office would support the Beneficiary in a managerial or executive capacity within one year of approval of the petition.

On appeal, the Petitioner asserts that the Beneficiary will oversee managerial and professional subordinates within one year and thereby will be employed in a qualifying managerial and executive capacity.

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

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 the 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 qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

[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.

The petitioner must also 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 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 statute defines an "executive capacity" as 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 sole issue to address is whether the Petitioner established that it will employ the Beneficiary in a managerial or executive capacity within one year.

In order to determine whether the Petitioner established that its new office will support a managerial or executive position within one year, we will review the Beneficiary's proposed job duties, along with the Petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the Beneficiary in the intended managerial or executive capacity. 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).

A. Duties

In a support letter, the Petitioner stated that the Beneficiary's foreign employer "is a renewable energy product manufacturer" and that the new U.S. office was established to "expand the imports and sales of LED lighting products to U.S. customers." The Petitioner indicated that it would not manufacture LED lighting products in the United States, but "focus on marketing, negotiating new business cooperation, and sales expansion," import its products from China, and target retail stores interested in these products.

The Petitioner provided a duty description for the Beneficiary indicating that he would devote 30% of his time to overseeing the development of the Petitioner, giving directions and providing "proper strategic goals," including "making decisions on operational activities and setting goals," "setting time table[s] in executing the plans and making major decisions on purchase," establishing and communicating "goals and objectives," "supervising the finances of the company," and setting strategies and providing guidance. The Petitioner also indicated that the Beneficiary would spend 20% of his time on "directing the overall operation of [the Petitioner] specifically on the human resource aspect," including "determining staff requirements, duties, salary and benefits," determining and approving "the need for training of new personnel," establishing and implementing "policies to share the Company's values, vision strategies, and performance standards with the employees." The Petitioner further explained that the Beneficiary would "have the sole and final authority to recruit, hire, train, promote and terminate employees."

In addition, the Petitioner stated that the Beneficiary would be responsible 10% of the time for "setting the direction of the Company on the marketing aspect[s] of the business," consisting of "identifying opportunities for distribution," "making plans to differentiate the Company from other LED wholesale companies," "analyzing sales and marketing activity reports," and determining "areas of cost reduction and program." The Petitioner further indicated that the Beneficiary would devote 40% of his time to managing "integrated project plans pertaining to delivery of products, pre-sale and post-sale activities to ensure successful, on-time and on-budget accomplishment of task." The Petitioner explained that this 40% consisted of "developing scope[s] of work for all projects to define tasks, deliverables, cost estimates, and timing," "formulating strategies for implementation to assist customers choose [*sic*] the products which will best answer their needs," and "building business relationships with logistics partners to establish efficient transportation and storage processes."

Furthermore, the Petitioner listed additional "more detailed" duties for the Beneficiary in a submitted business plan, stating that he would be tasked with establishing goals and policies, "expanding the product and partner network," "expanding marketing channels," "directing the overall establishment" of the Petitioner, "interviewing experienced U.S. candidates...and all other future subordinate positions," and "drafting the Company's income and expenditure budget." Some additional duties in the business plan duty description included the Beneficiary's responsibility for implementing "approved short- and long-term business plans," "establishing qualitative and quantitative goals," "evaluating the quality with which the Company's products," representing the company at industry events, "preventing excessive costs or delays," and "directing and approving pricing policies."

The Petitioner has submitted vague duty descriptions for the Beneficiary that do not adequately convey his actual proposed day-to-day tasks or establish that he would devote his time primarily to managerial or executive duties within one year. The Beneficiary's duty description includes several general duties that could apply to any manager or executive acting in any business or industry and they do not provide insight into the actual nature of his role. The Petitioner has provided few specifics related to how the Beneficiary's day-to-day duties fit specifically within the company's first year business plans; for instance, what specific actions he will take during the first year to

assure that the business develops as necessary to support him in a managerial or executive capacity. In fact, the Beneficiary's duty description includes few references to the company's projected business. The Petitioner submits few examples of what strategic goals the Beneficiary will set, major decisions he will make, "additional company departments" he will establish, training he will provide to new personnel, policies he will implement, distribution opportunities he will pursue, sales and marketing plans he will put in place, or business relationships with logistics partners he will build.

In addition, the duty description submitted in the Petitioner's business plan, which the Petitioner described as "more detailed," similarly sets forth few details as to the Beneficiary's day-to-day tasks, such as "product and partner networks" or "marketing channels" he will expand, how he will "direct the establishment" of the Petitioner, or budgets he will draft. 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).

In fact, to the extent that the Petitioner provided more detail regarding the Beneficiary's proposed duties in the United States these are suggestive of his performance of non-qualifying operational tasks directly related to the provision of goods and services. For instance, the Beneficiary's duty description indicates that he would devote a significant 40% of his time to integrating "project plans pertaining to delivery of products, pre-sale and post-sale activities to ensure successful, on-time and on-budget accomplishment of task," "developing scope[s] of work for *all* [emphasis added] projects to define tasks, deliverables, cost estimates, and timing," and "formulating strategies for implementation to assist customers choose [*sic*] the products which will best answer their needs." Indeed, this portion of the duty description reflects that the Beneficiary will be involved in all projects, defining scopes of work, deliverables, and costs for each, suggesting he will be substantially involved in the non-qualifying operational aspects of the business and delegating these tasks to subordinates. The Petitioner does not clearly indicate how the Beneficiary will delegate and be relieved of these tasks within one year.

An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The Petitioner also questionably asserts that the Beneficiary would devote 20% of his time on "directing the overall operation of [the Petitioner] specifically on the human resource aspect," including "determining staff requirements, duties, salary and benefits," determining and approving "the need for training of new personnel," establishing and implementing "policies to share the Company's values, vision strategies, and performance standards with the employees." However, the Petitioner projected hiring plans indicate that it will hire four employees during the first year, and add two employees in its second year. Meanwhile, the Petitioner asserts that it has already hired two of its first year hires. As such, it appears unlikely, as noted by the Director, that the Petitioner would

devote 20% of his time on a daily basis to human resources related activities, such as "determining staff requirements, duties, salary and benefits" and "the need for training of new personnel."

The fact that the Beneficiary will manage a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial or executive in nature. Section 101(A)(44)(A) of the Act. Even though the Beneficiary would exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial or executive in nature within one year.

B. Business Plan and Projected Staffing

The new office regulations recognize that a designated manager or executive responsible for setting up operations may be engaged in a variety of low-level activities not normally performed by employees at the managerial or executive level and that often the full range of managerial responsibility cannot be performed in that first year. However, a petitioner's evidence in support of a new office petition should demonstrate a realistic expectation that the enterprise is prepared to commence business operations and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. Accordingly, the entire record must be considered to determine 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).

At the time of filing, the Petitioner stated that it planned on hiring an administrative manager, a sales and marketing manager, a warehouse assistant, and a sales representative. An accompanying organizational chart indicated that the administrative manager would oversee the warehouse assistant and that the sales and marketing manager would supervise the sales representative. In response to the Director's request for evidence (RFE), the Petitioner clarified that it had already hired the administrative manager and the warehouse assistant and that the sales and marketing manager and the sales representative would be hired within six months of the approval of the petition. It also indicated that it would, but elsewhere that on the record it "may," hire a logistics manager subordinate to the Beneficiary within one year. The logistics manager is consistently identified as a second-year hire throughout the initial business plan.

On appeal, the Petitioner emphasizes the Beneficiary's supervision of managerial and professional subordinates, indicating that it asserts he qualifies as a personnel manager. 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. 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."[2] Section 101(a)(44)(A)(iv) 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 has not provided sufficient evidence to establish that the Beneficiary will act as a personnel manager within one year. The Petitioner has not supported its claim that the Beneficiary will supervise managerial and professional employees. The duties provided for the Beneficiary's proposed subordinates are vague and do not convey their day-to-day tasks in the context of the company's first year of development. The Petitioner provided a list of non-specific duties for the proposed administrative and sales and marketing managers. It broadly states that the administrative manager will be tasked with overseeing "all functional activities of the Company's administration area," "formulating plans and strategy," streamlining "the processes for all other departments," facilitating "our business operations," being in "charge of all inventory supplies," overseeing "all activities of our facility and maintenance activities." The duties of this employee provide little insight into the duties he or she will actually perform on a daily basis and how this employee will assist with the development of the business during the first year. In fact, these duties appear to overlap greatly with the Beneficiary's responsibilities and they make little reference to the Petitioner's specific business. The Petitioner provides few examples of plans or strategies this employee will formulate, processes he or she will streamline, specific business operations he or she will oversee, and inventory and maintenance activities he or she will manage.

Likewise, the duties of the claimed sales and marketing manager are similarly vague, indicating that this employee would be responsible for the company's "sales and marketing process," recommending plans, strategies, guidelines, and corrective measures, developing marketing strategies, coordinating marketing campaigns, determining prices schedules and discount rates, overseeing the marketing budget, and formulating and planning promotional campaigns. Again, these duties appear to overlap significantly with those of the Beneficiary, whose duties include a substantial component related to setting the direction of the company with respect to marketing. In addition, the duties of the sales and marketing manager are to general and do not provide specifics on this employees actions in the context of launching the business, such as sales and marketing plans, strategies, or guidelines he or she will implement, marketing campaigns he or she will coordinate, pricing he or she will set, marketing budgets he or she will manage, or promotional campaigns she will supervise.

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[2] 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 subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity.

Further, the Petitioner did not consistently document its plans to hire a logistics manager during the first year. For example, in support of the petition, the Petitioner did not assert that it would hire the logistics manager during the first year and later stated in response to the RFE that it "might" hire this manager. However, the initial business plan clearly indicated this position would be filled during year two, where elsewhere on the record it indicates that it will definitely hire this manager during the first year. The Petitioner's shifting assertions as to this proposed employee do not establish that it intends to fill this key position within the first year. This uncertainty is particularly noteworthy since the Beneficiary's duties include, as discussed, a significant component of non-qualifying tasks devoted to the logistics of arranging delivery for clients.

The Beneficiary's duties also state that he will be responsible for *all* personnel matters, including the hiring, training, and management of all subordinates. This responsibility suggests that the Beneficiary will not delegate supervisory responsibilities to subordinate managers. In fact, the Petitioner contended in response to the RFE that it already employs the administrative manager and a subordinate warehouse assistant. However, it did not submit evidence to substantiate that the warehouse assistant has been hired, or that he or she is supervised by the administrative manager as asserted. The Petitioner must resolve these ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In sum, the Petitioner has not credibly established that the Beneficiary is likely to oversee subordinate managers and supervisors within one year.

The Petitioner also contends that the Beneficiary will oversee subordinate professionals within one year, indicating that the administrative manager position requires a master's degree and that the sales and marketing manager and logistics manager positions require bachelor's degrees. First, it is noteworthy that the Petitioner has not submitted evidence to corroborate that the administrative manager, who it states is already hired, holds a master's degree. Further, the Petitioner did not explain why the Beneficiary's subordinates are required to hold master's and bachelor's degrees. It does not articulate a specific bachelor's degree requirement for these positions and the vague nature of the duties for these positions does not demonstrate that a bachelor's level education is required. In short, the Petitioner provides little support for its assertion that the positions subordinate to the Beneficiary are professional.

Moreover, on appeal, the Petitioner emphasizes that the Beneficiary will also continue to oversee the foreign entity's operations during the first year and will continue to manage its "seven (7) immediate directors." However, it is not clear how this newly claimed responsibility relates to the Beneficiary's claimed managerial or executive role in the United States. The Petitioner does not describe the nature of the Beneficiary's intended activities abroad or state whether or how his claimed foreign subordinates will be integrated into the new office's daily operations. The Petitioner does not indicate what duties, if any, these foreign employees would perform for the Petitioner, or provide supporting evidence establishing what role they play in the U.S. company's operations. As such, the Petitioner does not demonstrate that his former, or continued, supervision of foreign employees supports a conclusion that he will act in a managerial capacity within one year.

The Petitioner also indicates that the Beneficiary will qualify as an executive within the first year. 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 they 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 the 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.*

For similar reasons discussed throughout this decision, the Petitioner has not established that the Beneficiary will act in an executive capacity within one year. As noted, the Beneficiary's duty description does not sufficiently detail his executive level tasks; for instance, providing specifics as to what he will manage and the goals and policies he will establish. In fact, the Beneficiary's duties indicate that he will devote a substantial portion of his duties to non-qualifying operational level tasks, such as generating all the company's scopes of work, formulating cost estimates, and helping customers choose the best products. In contrast, the Petitioner provides little detail as to his executive level duties, including strategic goals he will set, major decisions he will make, or policies he will implement. The Petitioner provided position descriptions for the Beneficiary's proposed managerial subordinates that do not credibly demonstrate that they will act in managerial capacities within the first year. Therefore, the Petitioner has not supported that the company will have a level of management for the Beneficiary to direct within the first year and that he will primarily devote his time to higher level executive tasks.

The Petitioner has also not submitted sufficient business plans to demonstrate that it is likely to sufficiently develop during the first year to support the Beneficiary in a managerial or executive capacity. The Petitioner has only provided general statements as to its first year plans which do not clarify the Beneficiary's proposed actions in developing the company during the first year. For instance, the Petitioner provides statements that could apply to any business in any industry such as planning on shipping products and "other necessary operation activities and projects," "establish[ing] internal policy and process," "oversee[ing], review[ing], and determin[ing] critical new business leads," meeting with department managers periodically, and "review[ing] and adjust[ing] business goals [and] company policies." The Petitioner resubmits these first year plans on appeal and emphasizes them as definitive business plans substantiating its likelihood to develop during the first year. However, these vague statements provide little insight on how the business will launch and they do not show how it will develop sufficiently to support the Beneficiary in a managerial or executive capacity within one year.

In addition, in order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require a petitioner establish the size of the U.S. investment. *See* 8 C.F.R.

§ 214.2(l)(3)(v)(C). However, the Petitioner has not provided sufficient evidence to demonstrate the foreign employer's investment. The Petitioner states that it will invest a rather nominal $10,000 in the new venture. The Petitioner does not provide documentary evidence reflecting this amount being transferred by the foreign employer, nor does it articulate how this amount is sufficient and how it would be used to successfully launch the business.

In sum, the record does not include sufficient probative evidence establishing that the Beneficiary will be relieved from performing non-qualifying duties within one year of approval of the petition. The Petitioner has not fully developed the record so that we may analyze the viability of its plans to open and operate a new office in the United States.

III. CONCLUSION

The appeal will be dismissed because the record does not include sufficient evidence to establish that the Beneficiary would be employed in a managerial or executive capacity within a one-year period.

ORDER: The appeal is dismissed.

Cite as *Matter of W-L- Inc*, ID# 858424 (AAO Feb. 27, 2018)