U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-N-A- CORP.

DATE: JAN. 9, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a designer and manufacturer of security doors, seeks to temporarily employ the Beneficiary as "vice president of sales and export manager" in 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. The Director also concluded that the Petitioner did not demonstrate that it had secured sufficient physical premises to house the new office.

On appeal, the Petitioner submits additional evidence relevant to the Beneficiary's proposed U.S. employment, asserting that he will oversee a recently hired subordinate and other independent contractors. Further, the Petitioner submits a new commercial lease on appeal and contends that this evidence establishes sufficient premises for its first year of operation.

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 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

[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.

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).

II. NEW OFFICE

We will first determine whether the Petitioner has established that the Beneficiary will act in a managerial or executive capacity in the United States within one year. The Petitioner does not claim that the Beneficiary would be employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary would be employed in a managerial capacity within one year.

"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.

When examining the managerial capacity of a given beneficiary, we will review the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary. *See* 8 C.F.R. § 214.2(l)(3)(ii). In the case of a new office petition, we also 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. 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).

A. Duties

The Petitioner indicated that the Beneficiary's foreign employer is a designer and manufacturer of high performance safety doors in Italy. The Petitioner stated that the Beneficiary will be transferred to the United States due to "the increasing request of its products in the U.S." and "to develop a commercial structure able to attend to the U.S. market." The Petitioner explained that the Beneficiary would develop new positions in the United States and train new employees, including employees devoted to "accounting, sales, marketing and office support."

In a supporting letter, the Petitioner provided the following proposed duties for the Beneficiary:

- Promoting the Company's products through dealers and assist them on their sales
- Selecting dealers for the Company
- Selecting technical partners for installations
- Instructing new hire [*sic*] on proper sales and post-sales techniques
- Training and supervising local personnel
- Providing detailed and accurate sales forecasting
- Compiling information and data related to customers
- Developing plans and strategies for developing business and achieving the company's sales goals
- Managing customer expectations and contribute to a high level of customer satisfaction
- Monitoring customer, market and competitor activity and provide feedback to [the foreign employer] leadership team and other company functions
- Managing key customer relationships and participate in closing strategic opportunities
- Traveling for in-person meetings with customers and partners to develop key relationships

In response to the Director's request for evidence (RFE), the Petitioner further stated that the Beneficiary would be responsible for promoting the company's products and developing key relationships with "customers and partners." The Petitioner indicated that the Beneficiary would "promptly start interviewing local U.S. consultants to provide accounting, legal and fiscal services . . . within due time." The Petitioner explained that the Beneficiary would guide the "U.S. consultants" and make sure that they are aware of the "Company's procedures, results or any other necessary information."

The Petitioner also submitted a letter from the chief executive officer (CEO) of the foreign employer explaining the Beneficiary's proposed role in the United States. He stated that the Beneficiary would "coordinate with the consultants, the freelancers and the agents that will be necessary to use but that will not be employees but just service providers." The CEO also indicated in another support letter that the Beneficiary would be responsible for the "selection of new Dealers and the conclusion of supply contracts" and that he would be tasked with assuring "the distribution and the performance of the guarantees, to give Dealers the commercial and technical assistance, and the training to their employees."

In denying the petition, the Director concluded that the Beneficiary's proposed U.S. duty description was overly vague and did not convey his actual day-to-day tasks. We agree with the Director that the Beneficiary's duty description is too general to establish that he would devote his time primarily to managerial duties within one year. To the extent the Beneficiary's duty description discusses qualifying managerial tasks they are very general and could apply to any manager acting in any business or industry and they do not provide insight into the actual nature of his role. For example,

the Petitioner stated that the Beneficiary would "develop a commercial structure," "select dealers," "hire consultants," develop "plans and strategies," manage "key customer relationships," and "participate in closing strategic opportunities."

The Petitioner provided little explanation of how the Beneficiary will develop the business during the first year, such as "commercial structures" he will establish, dealers he will work with, consultants he will hire, plans and strategies he will implement, key customer relationships he will manage, and strategic opportunities he will pursue. 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 capacity within one year. 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 contrast, the Petitioner submits several specific examples of non-qualifying operational tasks he will perform during the first year, including assisting dealers in selling and promoting the company's products, selecting technical contractors for installations, training personnel on sales techniques, providing sales forecasting, and compiling customer information. In fact, the foreign employer's CEO indicated that the Beneficiary would be used to "assure distribution and the performance of the guarantees," "give to Dealers the commercial and technical assistance," and train dealer employees. As such, it appears that the Beneficiary will act as a sales and service agent for the foreign employer and his duties will consist largely of non-qualifying operational duties. Although we acknowledge that in launching a new office the Beneficiary would likely be involved in non-qualifying tasks during the first year, the Petitioner must also establish that he will move away from these tasks and be primarily devoted to managerial level tasks within the first year. However, the Petitioner has not provided sufficient detail as to the Beneficiary's managerial tasks within the first year and how he will be relieved from performing the non-qualifying operational tasks detailed on the record.

The fact that the Beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial 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 in nature. Section 101(A)(44)(A) of the Act. While the Beneficiary would likely 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 in nature within one year.

B. Business Plan and Staffing

As stated, the Petitioner indicated in support of the petition that the Beneficiary would hire a "U.S. team," including staff devoted to "accounting, sales, marketing and office support." The Petitioner

further clarified that accounting, legal, and fiscal matters would be "guaranteed through U.S. consultants" during the first year, noting that "in due time" it would hire and train its own "local and in house specialized staff." A "financial plan" included in the Petitioner's business plan indicates that it would spend $70,000 on salaries and wages and $25,000 on "consulting costs" during the first year. This financial plan further reflected that the Petitioner would spend $100,000 on salaries and wages and $30,000 on consulting costs during the second year. In a support letter, the foreign employer CEO clarified that the Beneficiary would "coordinate the consultants, freelancers and the agents . . . that will not be employees but just service providers."

In denying the petition, the Director pointed to the Petitioner's lack of timelines for hiring staff and its vague references to unidentified consultants. The Director determined that the Petitioner had not provided a sufficiently specific and determinative business plan for its first year of operation. The Director concluded that the Petitioner did not establish that the Beneficiary would be relieved from primarily performing non-qualifying operational tasks within one year. On appeal, the Petitioner again notes the Beneficiary's supervision of independent contractors and asserts that the company has hired a vice president of logistics subordinate to the Beneficiary.

The new office regulations recognize that a designated manager responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the managerial 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 who will primarily perform qualifying duties.

The Petitioner has not submitted sufficient detail regarding its first year hiring and business plans. For instance, the Petitioner regularly refers to consultants the Beneficiary will engage to perform various operational roles such as accounting, legal, marketing, or financial functions. However, the Petitioner does provide specific details regarding these contractors, what positions they will fill, their duties, how much they will be paid, or how regularly they will be engaged. We acknowledge that the Petitioner provides some evidence on appeal indicating that it is in the initial stages of engaging a payroll contractor and an accountant. However, the submitted evidence does not establish that these proposed U.S. contractors could be considered subordinates of the Beneficiary or that they would significantly relieve him from non-qualifying operational tasks within the first year.

This lack of detail and evidence is particularly notable since the Beneficiary's duty description appears to indicate that he will be substantially involved in operational tasks during the first year, likely acting as a sales and installation agent for the foreign employer in the United States. However, the Petitioner does not articulate plans to hire any staff during the first year to relieve the Beneficiary from performing these non-qualifying tasks; in fact, its projected organizational chart indicates that it has no hiring plans during the first year. Further, the Petitioner provides no indication when it plans on hiring the projected "in-house" employees, including the accountant and tax specialist, marketing consultant, administrative assistant, and marketing consultant, stating only

that these positions would be filled "after the expansion." The Petitioner also provides no detail on the proposed duties or requirements for these positions or how they will relieve the Beneficiary from performing non-qualifying tasks within the first year.

The Petitioner's first year financial projections indicate that it anticipates spending $70,000 on salary and wage expenses, a sum equivalent to the Beneficiary's offered salary. Although this same projection indicates that the Petitioner will also spend $25,000 on "consultants," it does not detail these consultants, their duties, or articulate how they will relieve the Beneficiary from primarily performing non-qualifying operational tasks during the first year. We further note that the Petitioner projects only modest increases in salary and consulting expenses during the second year, indicating that its potential hiring will take several years to develop. Indeed, the Petitioner states throughout the record that it will hire staff subordinate to the Beneficiary "in due time," a vague statement that provides little confidence he will be relieved from non-qualifying duties during the first year. The Petitioner also stated in support of the petition that the Beneficiary's original assignment would be for two years, corroborating the Petitioner's extended hiring timeline.

On appeal, the Petitioner states that it has hired a vice president of logistics. However, it does not describe this employee's duties or educational qualifications, nor does it explain how this claimed employee will relieve the Beneficiary from performing the non-qualifying operational duties prominently referenced on the record. The Petitioner also does not provide sufficient evidence to substantiate this individual's employment, providing only one internal paystub document indicating the payment of one bi-weekly pay check in June 2017. Further, there was no vice president of logistics position included on the Petitioner's projected organizational chart and it has not explained why this was the first position filled. Likewise, the Petitioner does not properly describe and document the regular engagement of independent contractors and consultants or articulate how they will relieve the Beneficiary from performing non-qualifying tasks during the first year.

Moreover, the Petitioner submits little detail regarding its first year business plans to substantiate that it will develop sufficiently during the first year to support the Beneficiary in a qualifying managerial capacity. The Petitioner does not articulate specific actions it will take during the first year or provide a timeline of these plans to substantiate that it will more likely than not develop sufficiently to support a managerial employee. For instance, the foreign employer states that it "could open an Office and a Warehouse for goods and a Show Room," but provides no definitive commitment to these plans, explain how this would be accomplished, or provide a timetable on when it would likely happen. In sum, the Petitioner has not sufficiently described and documented its first year business plans and corroborated that it is likely to commence business operations immediately and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager who would primarily perform qualifying duties.

Lastly, the Petitioner indicates several times on the record that the Beneficiary will manage an essential function of the organization. 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. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

Based on our previous discussion of the evidence, the Petitioner has not demonstrated that the Beneficiary will act as a function manager within one year. As we have noted, the Beneficiary's duty descriptions and the other supporting evidence indicate that he will perform substantial non-managerial tasks, including coordinating the foreign employer's door installations, servicing doors installed in the United States, training distributors of the foreign entity's products, amongst other non-qualifying duties. However, the Petitioner has not demonstrated how the Beneficiary will be relieved from performing these duties during the first year, only vaguely indicating that he will add staff in "due time" and rely on unidentified "U.S. consultants." Otherwise, the Petitioner has not clearly detailed the qualifying managerial tasks the Beneficiary will perform within the year. Further, it has not properly supported its business plans and investment to substantiate that it is likely to support the Beneficiary as a function manager within one year.

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. SUFFICIENT PHYSICAL PREMISES

The Director also denied the petition concluding that the Petitioner did not establish that it had secured sufficient physical premises to house its new office during the first year. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). In the denial decision, the Director pointed to a lease submitted by the Petitioner and noted that it was a residential lease that specifically prohibited its use for commercial purposes.

At the time of filing, the Petitioner submitted a residential lease indicating that the leased premises were to be used "for only residential, non-business, private housing purposes." On the Form I-129, the Petitioner indicated that the residential location would serve as the Beneficiary's worksite.

On appeal, the Petitioner submits another lease for 460 square feet of "office-warehouse" space in Florida, valid until May 31, 2018, and asserts that this new evidence demonstrates that it has secured sufficient premises to house the new office.

The regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office. The phrase "sufficient physical premises" is broad and somewhat subjective,

leaving U.S. Citizenship and Immigration Services great flexibility in adjudicating this legal requirement. There may be cases in which a residential premises or home office would satisfy the regulatory requirements. However, a petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). To do so, it must clearly identify the nature of its business, the specific amount and type of space required to operate the business, and its proposed staffing levels, and document that the space can accommodate a petitioner's growth during the first year of operations.

We note that the Petitioner does not dispute the Director's previous conclusion that the residential lease previously provided was inadequate to establish that it had secured sufficient premises to launch the business during the first year. Indeed, we concur with the Director's conclusion, as this lease explicitly prohibits the use of these premises for commercial purposes. The Petitioner does not address this issue on appeal, but submits a new lease.

However, discrepancies in this newly-provided lease leave question as to whether the Petitioner has obtained sufficient premises as asserted. First, the lease is dated January 12, 2016, significantly predating the filing of the petition in February 2017. Therefore, it is questionable that the Petitioner only now submits this commercial lease in support of the appeal. Further, the lease names the law firm of the Petitioner's counsel as the tenant, despite the agreement being signed by the Beneficiary on behalf of the Petitioner. These inconsistencies are not resolved by the Petitioner on appeal. The Petitioner must resolve inconsistencies 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).

Therefore, the Petitioner has not submitted sufficient evidence to establish that it secured sufficient premises to house its new office during the first year.

IV. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

Though not addressed by the Director, we also conclude that the Petitioner has not demonstrated that the Beneficiary has been employed abroad in a managerial or executive capacity.

In its initial support letter, the Petitioner stated that the Beneficiary acted as its general export manager since 2010, noting that his duties included "creating sales strategies, developing and deepening existing business, providing high quality information on the local market, [and] supervising personnel in day-to-day export activities and assignments." The Petitioner noted that the Beneficiary had "supervised" projects all over the world and that he held invaluable knowledge of the company's "products, operations, procedures, and marketing strategies." Further, the Petitioner listed the following duties for the Beneficiary:

a) Approximately 30% of his time was spent directly managing, reviewing and evaluating the work product of employees under his supervision;

b) Approximately 20% of his time was spent creating sales strategies by analyzing the market and recognizing sales opportunities;

c) Approximately 15% of his time was spent developing and deepening existing business relations by maintaining regular contact with clients and participating in meetings;

d) Approximately 15% of his time was spent with visits with local projects to provide technical support to the clients;

e) Approximately 10% of his time was spent training other employees and interns;

f) Approximately 5% of his time was spent researching about the local market trends and preparing accurate sales forecasting;

g) Approximately 5% of his time was spent working with the marketing team to further publicize the company and achieve sales goals.

In response to the RFE, the Petitioner submitted a support letter from the foreign employer's CEO detailing the Beneficiary's activities abroad, indicating that he had been responsible for contacting customers, taking measurements at "various sites," selecting products, concluding sales, supervising the assembly of doors, providing technical training to customer personnel, selecting products for display, and promoting foreign employer products at industry events. Further, the Petitioner's RFE response letter stated that the Beneficiary "took care of the final supervision of each product installation and prepared a yearly detailed evaluation report about their performance and future potential."

The Petitioner appears to have submitted conflicting duty descriptions for the Beneficiary's foreign position. For instance, the former description emphasizes qualifying managerial or executive level tasks such as supervising subordinates and creating sales strategies, while the latter descriptions provided in response to the RFE detail his substantial involvement with non-qualifying operational tasks, including contacting customers, taking measurements at "various sites," selecting products, concluding sales, supervising the assembly of doors, providing technical training, selecting products for display, and promoting company products at industry events. In fact, the foreign employer's CEO appears to indicate that the Beneficiary took part in each product installation and stresses his "technical" role. This evidence indicates that the Beneficiary is primarily engaged in the performance of non-qualifying operational tasks rather than managerial or executive tasks abroad.

Further, with respect to the Beneficiary's asserted qualifying tasks, the Petitioner has submitted vague descriptions that do not convey his actual day-to-day qualifying tasks or establish that he devotes his time primarily to managerial or executive duties. The Beneficiary's duty description includes several general duties that could apply to any executive or manager acting in any business or industry and they do not provide insight into the actual nature of his role. The Petitioner provided

few examples and little supporting documentation to demonstrate the Beneficiary's performance of qualifying duties, such as sales strategies he created, business relationships he maintained, training he provided to subordinates, research on market trends he conducted, or marketing initiatives he undertook. This lack of detail is especially noteworthy since the Petitioner states that the Beneficiary has been acting in his role as export manager since 2010.

Similar to the Beneficiary's asserted foreign duties, there is other little other evidence establishing his placement within the foreign entity's hierarchy. For instance, the Petitioner submitted two foreign organizational charts in support of the petition, neither detailing the Beneficiary's place therein, despite elsewhere referring to him as a member of the "management team." In fact, the foreign employer's CEO refers to the Beneficiary as a "member of our technical staff." The Petitioner has not provided a complete, consistent description of the Beneficiary's role with the foreign entity.

For these reasons, the Petitioner has not established that the Beneficiary has been employed abroad in a managerial or executive capacity.

V. CONCLUSION

The appeal will be dismissed because Petitioner did not establish that it would be able to support the Beneficiary in a managerial or executive capacity within a one-year period, that it has secured sufficient physical premises to house the new office, and that the Beneficiary has been employed abroad in a managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of O-N-A- Corp.*, ID# 906714 (AAO Jan. 9, 2018)