U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF USI-E-, INC.

DATE: JAN. 26, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an international shipping company, seeks to temporarily employ the Beneficiary as 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 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 Director did not accept, without explanation, its first year business plans and the Beneficiary's proposed duties. The Petitioner states that it has submitted "overwhelming evidence" that it will hire managers and professionals subordinate to the Beneficiary during the first year.

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 Act. The petitioner must also establish that the beneficiary's prior education, training, and

[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.

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

If the Form I-129, Petition for a Nonimmigrant Worker, indicates that the beneficiary is coming to the United States in L-1A status to open or to be employed in a new office, 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 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.

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director determined that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity within one year. The Petitioner does not claim that the Beneficiary will be employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in a managerial capacity.

In order to determine whether the Petitioner established that its new office will support a managerial 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 capacity. The totality of the evidence must be considered in analyzing whether the proposed managerial 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 it "will function as an international shipping and courier service," and that it would begin operations using a delivery vehicle and warehouse "allowing drivers to pick up packages from clients as well as receive drop-off packages from clients at their offices." The Petitioner indicated that it would act as a liaison between customers and airfreight carriers and offer lower shipping fees than mainstream shipping companies. The Petitioner explained that the Beneficiary would be responsible for the "vision and strategy" of the company and guide its expansion.

The Petitioner provided a duty description for the Beneficiary along with the petition indicating that he would devote 20% of his time to supervising employees and department leaders, meeting with supervisory subordinates, reviewing and recommending approvals and suggestions for change, enforcing company "policies, procedures and productivity standards," and providing "strategic advice." The Petitioner indicated that the Beneficiary would spend another 25% of his time on coordinating "workflow activities," implementing "short term and long term performance targets and strategies for maximizing return on investment," and "providing training and guidance to department manager[s]." The Petitioner further explained that the Beneficiary would be responsible 20% of the time for monitoring and managing the company's financial performance, including creating and managing budgets and assets, and devote another 20% to "monitoring the payroll function," including reviewing tallied work hours, wage calculations and approving and tracking vacation days and time off. Lastly, the Petitioner stated that the Beneficiary would spend 20% of his time making "sure that the new U.S. subsidiary remains at the forefront of the industry," applying "the most cost-effective methods and approaches," negotiating and signing contracts, "supervising material undertakings and activities," and assessing "potential risks of the company."

Later, in response to the Director's request for evidence (RFE), the Petitioner submitted a business plan which includes another description of the Beneficiary's proposed duties, as follows:

FUNCTION	ALLOCATION OF TIME
Hire, train, and review key staff members to manage shipments and import process	15%
Enforce company policies and procedures	15%
Establish sales goals and objectives for the Company	10%
Oversee the financial performance of the Company with the Finance Manager	20%
Create and maintain key relationships with clients	20%
Negotiate contracts with vendors and clients	10%
Supervise marketing activities	10%

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 duties within one year. The Beneficiary's duty description includes several general duties that could apply to any manager 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 capacity within one year. In fact, the Beneficiary's duty description includes few references to the company's projected business. The Petitioner submits few examples of what the Beneficiary will review and approve, policies, procedures, or productivity standards he will set, strategic advice he will provide, investments he will manage, training he will

give, contracts he will negotiate, or "material undertakings" he will supervise. 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 addition, the Petitioner has submitted two conflicting breakdowns of how the Beneficiary would spend his time, yet indicates that both descriptions account for 100% of his time. We cannot determine which description is likely to represent a more accurate account of his intended responsibilities. For instance, in the duty description provided with the petition, the Petitioner indicated that the Beneficiary would devote 25% of his time to supervising the company's different departments and coordinating workflow activities, directing short term and long term performance targets, and providing training and guidance. However, the duty description provided later in the Petitioner's business plan did not indicate that the Beneficiary would spend 25% of his time on any given task, and makes no reference to departments, workflows, or performance targets. Further, the latter duty description noted that the Beneficiary would spend 15% of his time enforcing "company policies and procedures," but this duty was not reflected in the former duty description. Likewise, the Petitioner stated in response to the RFE that the Beneficiary would be responsible 20% of the time for creating and maintaining key relationships with clients, while the duties submitted with the petition do not indicate that he devotes 20% of the time to this task. In sum, the Petitioner provided two overly vague duty descriptions that questionably conflict with each and that provide little detail as to the Beneficiary's actual day-to-day tasks. The Petitioner must resolve discrepancies 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).

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. 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 in nature within one year.

B. Business Plan and Projected Staffing

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. 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).

The Petitioner asserted that it would hire an operations manager and a finance manager subordinate to the Beneficiary during the first year. Further, a projected organizational chart indicated that the Petitioner would also hire a warehouse manager subordinate to the operations manager who would supervise a shipping and packing employee and a driver. Therefore, the Petitioner has six projected employees, including the Beneficiary, listed on the chart.

The Petitioner asserts on appeal that the Beneficiary will supervise managerial and professional subordinates within the first year. 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." 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 supported its claim that the Beneficiary will supervise managerial and professional employees. The duties provided for the Beneficiary's proposed subordinates are vague and also 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 finance and operations managers. First, it broadly states that the finance manager would be tasked with providing financial reports and interpreting financial information, advising on investment activities, and cost reduction opportunities. Further, it indicated that the operations manager would be tasked with improving operational systems, processes, and policies, participating in short and long term planning, overseeing all problems concerning logistics systems, and integrating logistics with business systems. However, in each case, the Petitioner has provided little detail on the investment the finance manager will oversee, or the operational systems, processes, policies, logistics or business systems the operations manager will coordinate. The duties provided for these proposed managers, much like the Beneficiary's duties, could apply to any such employee in any business.

In addition, the Petitioner states that the finance manager is the chief executive officer of another company, K-I- Inc., with which the Petitioner does business. This assertion leaves significant question as to whether the Petitioner will hire this person as its finance manager and whether this employee would be a subordinate manager to the Beneficiary as asserted. Again, the Petitioner must resolve ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Ho*, 19 I&N Dec. at 582, 591-92.

Moreover, the Beneficiary's submitted duties do not indicate that he will oversee subordinate managers or professionals as necessary to qualify as a personnel manager. For instance, the

Beneficiary's duties in support of the petition indicate that he would be tasked with "monitoring the payroll function," including reviewing "tallied work hours, wage calculation and approving and tracking vacation days and time off." In short, this evidence suggests that the Beneficiary will be acting as first line supervisor and will not delegate personnel management tasks to subordinate supervisors. Further, although the Petitioner contends that the subordinate finance and operations managers are required to have bachelor's degrees, it does not describe why these are professional level positions nor articulate a specific degree requirement for them.[2] As such, the Petitioner has not credibly established that the Beneficiary would like supervise managers or professionals within the first year.

The Petitioner also has not submitted sufficient detail regarding its business plans, information critical to assessing whether it is likely that the business will develop sufficiently during the first year. For example, the Petitioner states that it will hire the Beneficiary's managerial subordinates shortly after the approval of the petition, and the subordinates of these proposed managers soon thereafter. The Petitioner asserts that it will target customers in Florida and take advantage of already existing "business relationships and networks," however, it does not identify these likely customers or the asserted business relationships and networks it already has in place.

The Petitioner asserts that the Beneficiary's foreign employer and its owners will invest over $120,000 in the new venture, but it does not outline in detail how this investment will be used to launch the business nor what specific actions it will take to develop the business during the first year. The Petitioner indicates that it will have a payroll of approximately $234,000 per year by the end of the first year. However, it provides little detail to substantiate how it will pay these salaries or from where it will draw revenue. The Petitioner makes vague references in its business plan to short and long term objectives, and marketing strategies, such as the use of print media, "word of mouth," referral marketing, direct sales calls, email marketing, and the creation of a website, but it submitted very few examples of actions it will take with respect to each one of these vague categories to give a clear picture of its first year business plans. In addition, it has not identified an employee who will perform these mostly non-qualifying operational level tasks. The Petitioner also submits documentation indicating that it has already shipped household goods back to China, suggesting that it will likely act as a freight forwarding entity for the foreign employer in the United States. Beyond providing this service to the foreign employer, the Petitioner has provided few specifics on how it will develop as a business in the United States during the first year.

On appeal, the Petitioner states that we must take into account its reasonable needs. We acknowledge that Section 101(a)(44)(C) of the Act requires that USCIS must take into account the reasonable needs of the organization in light of the overall purpose and stage of development of the

[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."

organization if staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity. To establish that the reasonable needs of the organization justify a beneficiary's job duties, a petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. The Petitioner has not explained how the company will specifically develop during the first year and it has provided insufficient detail regarding its first year business plans to show that it would have a reasonable need for the Beneficiary to perform primarily managerial duties within one year.

Likewise, the Petitioner cites to an unpublished decision in which we determined that a beneficiary met the requirements of serving in a managerial capacity for L-1 classification even though he was the sole employee. The Petitioner has not established that the facts of this petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on USCIS, unpublished decisions are not similarly binding.

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 act in a managerial or executive capacity within a one-year period.

ORDER: The appeal is dismissed.

Cite as *Matter of USI-E-, Inc.*, ID# 929428 (AAO Jan. 26, 2018)