U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-N- INC.

DATE: JULY 9, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a jewelry retailer, seeks to temporarily employ the Beneficiary as president of its new office[1] under the L-1A nonimmigrant classification for intracompany transferees. 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 record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity within one year.

On appeal, the Petitioner contends that the Director ignored a submitted business plan and hiring timeline and it asserts, contrary to the Director's conclusion, that it submitted a detailed and consistent duty description for the Beneficiary.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.*

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

[1] The term "new office" refers to an organization which has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation no more than one year within the date of approval of the petition to support an executive or managerial position.

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

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

We will first analyze whether the Petitioner established that it would employ the Beneficiary in a managerial or executive capacity within one year of the petition's approval.

"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.

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

The Petitioner stated that it was created by its foreign parent "to establish a presence in the ever growing jewelry manufacturing and retail sector" in the United States. In support of the petition, the Petitioner stated that the Beneficiary would provide "strategic leadership" and "long range planning," introduce "new programs/strategies," enforce "policies and procedures," and provide strategic financial input. The Petitioner also indicated that the Beneficiary would be tasked with leading on "decision making issues," evaluating "potential vendor partnerships," developing plans for improvement, and implementing "marketing programs" and "new product rollouts."

In response to the Director's request for evidence (RFE), the Petitioner provided another duty description explaining that the Beneficiary would be tasked with "setting the manufacturing sales strategy," "analyzing sales reports, potential sales, and performance data," and "determining areas of cost reduction and program improvement." The Petitioner also stated that the Beneficiary would be responsible for "allocating capital," "setting up a stock management system," and directing and approving "product strategies, price policies, and discounts." In addition, it indicated that the Beneficiary would manage "integrated project plans," develop "scope of work documents," track achievement of the company's "mission and vision," and make "important investment decisions." It also explained that the Beneficiary would be tasked with establishing "goals and objectives," devising solutions or improvements to financial reports, planning weekly meetings, "analyzing problematic situations and occurrence[s]," "promoting the Company through social media," and "developing new innovative marketing campaigns."

In denying the petition, the Director concluded that the Beneficiary's duties were broad and vague. On appeal, the Petitioner asserts that the Beneficiary's duties are sufficiently detailed and consistent with the duties of president as specified in the U.S. Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) and by the Occupational Information Network (O*NET).

Upon review, we concur with the Director that the Beneficiary's duties are overly vague as they do not effectively convey the Beneficiary's day-to-day managerial or executive duties. The Beneficiary's job description includes several general duties that could apply to any manager or executive acting in any business or industry; such duties do not provide insight into the actual nature of his role. The Petitioner 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, the Petitioner did not specify the actions the Beneficiary will take during its first year of operation to assure that the business develops as necessary to support him in a managerial or executive capacity within one year. In fact, the Beneficiary's duty description includes few references to the company's intended business, the sale of jewelry, beyond a brief reference to him establishing a "stock management plan."

The Petitioner submits few examples of manufacturing and sales strategies the Beneficiary would set, cost reductions or program improvements he would put in place, business strategies he would align, project plans he would manage, or scopes of work he would develop. Further, the Petitioner did not articulate missions and vision the Beneficiary would implement, investment decisions he would make, goals and objectives he would establish, solutions or improvements to financial issues he would devise, or marketing campaigns he would develop. The similarity of the Beneficiary's duties to Handbook and O*NET descriptions of "executives" does not provide additional insight into his actual day-to-day managerial or executive tasks during, or after, one year. The Handbook and O*NET descriptions are not business or position specific, but generic breakdowns of a profession's duties. The record requires more detail as to the Beneficiary's specific tasks to assess whether he would act primarily in a managerial or executive 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).

The fact that the Beneficiary would manage the 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) and (B) 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, these elements are not sufficient to establish that the actual duties the Beneficiary would perform within one year of the petition's approval would be primarily managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. 1103, 1108. Here, the Petitioner provided a vague job description that does not adequately convey the Beneficiary's actual proposed day-to-day tasks or establish that he would devote his time primarily to managerial or executive duties within one year.

B. Business Plan and Projected Staffing

In the case of a new office petition, 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 of the petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed managerial or executive position is plausible based on 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).

In a submitted business plan, the Petitioner stated that it planned on hiring seven employees in addition to the Beneficiary during the first year, including a subordinate production manager, a quality control supervisor, and an office manager. The chart further indicated that the production manager would supervise two jewelers to be hired within the first year. The chart also reflected that the Petitioner would hire a sales manager subordinate to the Beneficiary in its second year of operation who would oversee two sales representatives/associates to be hired during the first year. In addition, a first year timeline in the business plan indicated that the Petitioner would hire the production manager during the first month of operation, the two sales representatives/associates in month five, and the office manager during its ninth month of operation. The timeline did not detail when it planned on hiring its two project jewelers or the quality control supervisor.

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. We note that the Petitioner does not contend that the Beneficiary would act as a function manager within one year; as such we will only analyze whether he would act as a personnel manager. 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) 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 did not establish that the Beneficiary would oversee subordinate managers and professionals within one year. The Petitioner's business plan is to operate a retail jewelry location. As such, it is not credible that within one year, it would require four managerial level employees (the Beneficiary, a production supervisor, a quality control supervisor, and an office manager), and only four operational level employees. The projected organizational chart also reflects that the Beneficiary would only supervise one proposed supervisor within one year, the production manager, as this is the only employee shown to have subordinates within the first year.

Despite their titles, it does not appear that the quality control supervisor or office manager would act as subordinate managers within the first year. The duties of these employees appear more operational in nature rather than supervisory. For instance, the Petitioner stated that the quality control supervisor would "develop inspection plans," examine pieces against customer requirements, "maintain quality assurance compliance objectives," and recommend potential changes in the production process. Likewise, it indicated that the office manager would "analyze office processes and recommend procedural or policy improvements," ensure that employees are complying with company rules, prepare invoices, memos, reports and other documents, order supplies and maintain records, and perform basic bookkeeping work. Again, it does not appear credible that one retail jewelry location would require four employees devoted to policy and procedure changes; as such, it is more likely that the quality control supervisor and the office manager would be focused on the operational aspects of their functions, including inspecting goods for consistency and bookkeeping and other office work. The first year hiring plans and organizational chart also do not reflect that these claimed managers would have subordinates within one year. Therefore, the Petitioner has not demonstrated that the quality assurance supervisor or office manager would act as managerial subordinates to the Beneficiary within the first year.

Furthermore, the Petitioner has not demonstrated that the proposed quality assurance supervisor or office manager would act as professionals. The Petitioner has not articulated minimum bachelor's degree requirements for these positions and the duties of these positions to not indicate that bachelor's degrees would be required.[2]

[2] In determining 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."

In addition, the duty description of the production manager does not credibly demonstrate that this employee would act in a managerial capacity subordinate to the Beneficiary within one year. The production manager's duties stated that he or she would be tasked with implementing, controlling, and adjusting "production procedures" and "processes for supplies, shipping, receiving, inputting, manufacturing, jewelry design creation, and assembly." It also indicated that the production manager would be tasked with planning and prioritizing work, analyzing deficiencies, optimizing the production staff, and establishing vendor agreements. However, the Petitioner submitted little detail regarding the production procedures this employee would control and adjust, shipping and receiving processes he or she would implement, or vendor agreements he or she would establish. Further, these duties appear to overlap significantly with those of the Beneficiary; for instance, the Beneficiary's focus on setting manufacturing strategy, determining areas of "program improvement," setting up a stock management system, "managing integrated project plans," and "developing scope of work documents." The Petitioner also submitted a hiring timeline during the first year that did not indicate when it planned on hiring the production manager's only two asserted subordinates, two jewelers. In short, the Petitioner has not credibly established that the Beneficiary and the proposed production manager would both be required to act in managerial capacities during the first year and not primarily focused on the day-to-day operational level duties of the business.

The Petitioner has also not demonstrated that the projected production manager position would be a professional position. Again, the Petitioner did not submit minimum education requirements for the proposed production manager position and the duties of the position do not indicate that it would require a bachelor's degree to act in this role.

Furthermore, we acknowledge that the Petitioner has submitted documentation indicating that the foreign employer likely has transferred an investment in the new venture. In support of the petition, the Petitioner stated that this amount was $75,000; however, in response to the RFE it indicated that this amount was $90,000 and also suggested that the overall investment could total $250,000. However, regardless of the amount, the Petitioner has not detailed how these amounts would be utilized to successfully launch the business during the first year. The Petitioner also only submitted a vague first year business timeline that does not credibly establish how it would develop sufficiently during the first year. For instance, the Petitioner states that it would perform a number of activities during the first year that could apply to any business in any industry, such as implementing strategy and goals during the first month, creating a website in the second month, discussing jewelry trends in months four and ten, starting "intensive social media communication" in month nine, and analyzing "the sales and marketing results" in month eleven. These action plans do not provide sufficient detail as to what the Petitioner would do to sufficiently launch its retail jewelry business during the first year such that it can support the Beneficiary and three other asserted managers in their positions within one year.

For the above-stated reasons, the Petitioner has not established that the Beneficiary would more likely than not oversee subordinate managers and professionals within the first year.

The Petitioner also contends on appeal that the Beneficiary would act in an executive capacity 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.*

The Petitioner has not demonstrated that the Beneficiary would likely act in an executive capacity within the first year. As we have discussed, it has submitted a vague duty description for the Beneficiary that does not sufficiently detail the executive level duties he would perform within one year. The Petitioner also has not credibly articulated and documented how one retail jewelry location would support the Beneficiary in an executive capacity and three other proposed managerial subordinates. The Petitioner's business plans and timeline do not adequately detail its investment plans and the first year actions it will undertake to successfully launch the business such that it would support the Beneficiary in an executive capacity within one year. The evidence does not demonstrate that the Beneficiary would likely oversee a subordinate level of managerial employees within the first year to allow him to primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise.

In conclusion, the Petitioner has not established that the Beneficiary would act in managerial or executive capacity within one year of an approval of the petition.

III. QUALIFYING RELATIONSHIP

Although not addressed by the Director, we find that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer. *See* section 101(a)(15)(L); *see also* 8 C.F.R. 214.2(l)(1)(ii)(G) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate") and 8 C.F.R. 214.2(l)(14)(ii)(A) (requiring evidence that petitioners and foreign entities are "still qualifying organizations").

The Petitioner stated that the Beneficiary's foreign employer is its "parent" company and that it "is 100% owned by the management of the parent company"; however, the evidence does not demonstrate that the foreign entity and the Petitioner have a parent-subsidiary relationship. In order to be the Petitioner's parent, the foreign employer would have to be the sole owner of the company, which is not reflected in the submitted evidence. The Petitioner submitted stock certificates and a

stock ledger indicating that it issued 110 shares to two individuals, [redacted] (90 shares) and the Beneficiary (20 shares). There is no evidence that the foreign employer owns the Petitioner.

The evidence also shows that the Petitioner does not qualify as a subsidiary as it is owned by two individuals, not by a legal entity. *See* 8 CFR 214.2(l)(1)(ii)(K).

In the alternative, the Petitioner has not demonstrated that it and the foreign employer qualify as affiliates. The regulation at 8 C.F.R. 214.2(l)(1)(ii)(L) defines affiliates as: (1) one of two subsidiaries both of which are owned and controlled by the same parent or individual, or (2) one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. The Petitioner provided a 2015 foreign employer audited financial statement reflecting that the foreign entity's shares were distributed as follows: 30,000 to the Beneficiary and 25,000 to [redacted] The evidence does not demonstrate that the Petitioner and foreign employer are both owned and controlled by the same company or individual or owned by a group of individuals owning and controlling approximately the same share or proportion of each entity. In fact, the evidence reflects that [redacted] holds a controlling interest in the Petitioner, while the Beneficiary holds more shares in the foreign employer than [redacted]

As such, the Petitioner has not demonstrated that it has a qualifying relationship with the foreign employer.

IV. 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 one year of this petition's approval or that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer.

ORDER: The appeal is dismissed.

Cite as *Matter of A-N- Inc.*, ID# 1041429 (AAO July 9, 2018)