U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-T- CORP.

DATE: JUNE 19, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a seller of woman's apparel, seeks to temporarily employ the Beneficiary as chief executive officer (CEO) and 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 California Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary would act in a managerial or executive capacity within one year of an approval of the petition.

On appeal, the Petitioner contends the Director did not request additional evidence regarding the Beneficiary's proposed executive position and ignored evidence demonstrating that the Beneficiary would act in an executive capacity within one year.

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.*

[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 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. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner has established that the Beneficiary would act in an executive capacity within one year of an approval of the petition. The Petitioner does not claim that the Beneficiary would be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary would be employed in an executive capacity.

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 an executive position within one year, we will review the Beneficiary's proposed job duties, along with its business and hiring plans and evidence that the business will grow sufficiently to support the Beneficiary in the intended executive capacity. The totality of the evidence must be considered in analyzing whether the proposed 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 its foreign parent company is a manufacturer and distributor of women's apparel and that it was established to launch a retail store in California to sell the foreign parent's goods. The Petitioner indicated that as president and CEO, the Beneficiary would be "responsible for overseeing all U.S. operations with the task of increasing sales, profitability, and brand recognition" and the "distribution, marketing, and promotion of [the foreign entity's] product line."

The Petitioner stated that the Beneficiary would spend 25% of his time on "human resources management," including developing "human resources planning," communicating "values, strategies, and objectives," and developing "incentives for employees." The Petitioner also indicated that the Beneficiary would devote 20% of his time to "financial management" and another 15% to "sales strategy implementation," consisting of delivering monthly sales reports to the foreign entity. In addition, the Petitioner explained that the Beneficiary would be responsible 15% of the time for "logistics management," including maintaining "standard operating procedures and operating guidelines." Further, it stated that the Beneficiary would spend 10% on "brand recognition" by collaborating with "customers, government, community organizations, and employees." It also

indicated that the Beneficiary would devote 10% of his time to "chain store development" focusing on the development of additional store locations in Texas and Florida by conducting market research and identifying strategic locations. Lastly, the Petitioner explained that the Beneficiary would be responsible 5% of the time for acting as "company representative" communicating with the parent company while only receiving general direction.

In denying the petition, the Director concluded that the Beneficiary's position would likely be focused on performing non-qualifying operational level tasks after one year. On appeal, the Petitioner asserts that the Director did not request additional evidence related to the Beneficiary's proposed U.S. position in the request for evidence (RFE) and provides a new duty description for the Beneficiary.

The updated duty description submitted on appeal states that the Beneficiary would spend 35% of his time on "organizational growth and strategy," including serving as a liaison between it and foreign management, responding to "parent company directives," implementing "decisions to solve organizational issues," and creating and overseeing "the implementation of guidelines, policies, and procedures." It also indicates that the Beneficiary would devote 45% of his time to "business development," consisting of developing additional store locations, establishing "qualitative and quantitative goals in accordance with the [Petitioner's] long-term business objectives," maintaining "operating procedures and guidelines," identifying "areas of potential cost reduction," and changing, when needed, the [Petitioner's] policies and procedures." The Petitioner further explains that "business development" entails designing "effective sales and brand development strategies," negotiating contracts with distributors and key business partners, and establishing "organizational growth strategies." Lastly, the Petitioner states that the Beneficiary is responsible 20% of the time for "financial planning," including accomplishing financial objectives, reviewing financial reports and budgets, and reporting finances to the foreign parent.

The Petitioner provides a duty description on appeal that does not expand on the Beneficiary's duties or provide more detail as to his day-to-day activities, but which questionably rearranges his previously submitted duties. For instance, the duty description provided on appeal reflects that the Beneficiary would devote 45% of his time to "business development," whereas the previous duty description indicated that the Beneficiary would devote most of his time, or 25%, to "human resources management." It is noteworthy that the Beneficiary's new duty description barely references human resources related functions, while the former description indicated that he would spend 25% on this duty, or the most time out of any other task. As such, the Petitioner has not submitted a duty description on appeal that sheds additional light on his actual day-to-day tasks, but which is only more generic. This complete reformation of the Beneficiary's duties on appeal leaves only further question as to his actual day-to-day tasks during the first year and under the extended petition. The Petitioner must resolve this discrepancies and 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 addition, the Beneficiary's job descriptions include several generic duties that could apply to any executive acting in any business or industry and they 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. In fact, the Beneficiary's duty descriptions include few references to the company's intended business, the sale of clothing. The Petitioner submits few specific examples of the duties he will perform during the first year, such as organizational decisions he will make, hiring he will perform, guidelines, policies and procedures he will implement, qualitative and quantitative goals he will establish, areas of cost reduction on which he will focus, sales and brand development strategies he will design, contracts he will negotiate with distributors or partners, organizational growth strategies he will put in place, or financial planning he will guide. For instance, the Petitioner states that it will exclusively import the foreign employer's clothing; as such, it is not clear what distributors or partners he would be negotiating contracts with.

We acknowledge that the Petitioner provided a list of actions it and the Beneficiary would undertake during the first 12 months to launch the new business, but these also provided little insight into the Beneficiary's actual duties during the first year. The timeline vaguely states that the Beneficiary will "implement its strategy and goals" during the second month, "post content on social media" in month four, "evaluate its competitiveness" during the fifth month, and "analyze the conditions of the market" in month ten. Again, these proposed actions during the first year could apply to any executive in any business and provide little insight into the Beneficiary's actual day-to-day tasks during the first 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 an executive capacity. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. Section 101(A)(44)(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 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 executive duties within one year.

B. Business Plan and Projected Staffing

In the case of a new office petition, we review a petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended 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 executive in nature within one year of the

petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed 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).

The Petitioner provided evidence indicating that, as of the date the petition was filed, it was already operating a clothing store in California selling the foreign employer's goods. The Petitioner submitted a proposed organizational chart reflecting that it already employed directors of operations and finance overseen by the Beneficiary. The chart further indicated that the Petitioner would hire a store manager subordinate to the director of operations who would oversee store sales assistants. In support of the petition, the Petitioner stated that it employed two store sales assistants. In response to the RFE and on appeal, the Petitioner asserts that it employed four store sales assistants. The Petitioner also provided proposed plans to open two additional stores during its second and third years of operation in Florida and Texas, for which it would hire store managers and sales assistants.

The Petitioner's assertions leave uncertainty as to whether it will be sufficiently operational to support the Beneficiary in an executive capacity within one year. The Petitioner indicated in the Form I-129 that it was applying as a new office. As noted, the Petitioner must submit evidence to demonstrate that the new office will be able to support an executive position within one year. However, in this matter, the Petitioner requests a three year period of employment under the petition and states that this time period will be required "for the completion of a successful start-up of operations." The request for three years of employment under a new office petition leaves doubt as to whether the Petitioner would be sufficiently operational after one year to support the Beneficiary in an executive capacity. We note that the Petitioner's expansion plans in a second or third year are not relevant to establishing eligibility for a new office+. As such, we must focus on the Petitioner's first year business plans, namely its operation of a clothing store in California.

The Petitioner has submitted vague duty descriptions for the Beneficiary's asserted managerial subordinates that do not demonstrate that they would act in their asserted capacities. For instance, the Petitioner stated that the director of finance would "drive financial planning," "retain constant awareness of the Company's financial position," "oversee the Company's finance IT system," and "oversee all audit and internal control procedures." However, these proposed duties are not credible in light of the Petitioner's first year operations or the operation of one clothing store. The Petitioner indicates that the Beneficiary will also spend a significant amount of time on financial matters. Therefore, it appears unlikely that a retail clothing store would also require a fulltime director of finance devoted strictly financial matters, or that it would have a "finance IT system" or "audit and internal control procedures" for this employee to manage within one year. Further, the Petitioner does not provide credible details as to the duties the director of finance would perform in the context of the company's first year development.

Likewise, the Petitioner sets forth similarly generic duties for the asserted director of operations, indicating that she would be tasked with making decisions and setting strategic goals, supervising "staff from different stores," evaluating "the efficiency of business procedures," managing "procurement processes," coordinating resource allocation, overseeing the "customer support

process," and adjusting operational budgets. Again, the duties of the director of operations appear to overlap significantly with the duties of the Beneficiary, including her setting strategic goals, evaluating business procedures, and adjusting budgets. Further, the duties include few details on what tasks the director of operations would perform to launch the Petitioner's business during the first year. In fact, the duties state that the director of operations would supervise "staff from different stores," but as we have discussed, the record indicates that the Petitioner would not establish more than one store during the first year.

In sum, the vague duty descriptions provided for the Beneficiary's claimed managerial subordinates do not credibly demonstrate their actual tasks during the first year. Further, given this and the Petitioner's proposed level of operations, it appears unlikely that it would require an executive, two higher level managerial subordinates, and a store manager to oversee one retail clothing store. To illustrate, the Petitioner states that its retail clothing store will sell the foreign parent's clothing and provides shipping and customs documentation reflecting the importation of these goods. The Petitioner also provides foreign employer documentation indicating that it will bear the cost of importing this clothing. However, the Petitioner's organizational chart and the duties of its proposed subordinates do not appear to account for the operational duties inherent in this importation which appears to make up a significant part of its operations. For instance, it only vaguely indicates that the director of operations will manage the "procurement processes" and coordinate "resource allocation," but it does not detail who will perform the day-to-day operational level tasks required to import the goods sold in its store. Indeed, the Petitioner emphasizes the "competitive advantage" it would gain from the Beneficiary's "in-store procedural management" and "customs clearance processing," suggesting that he would likely be substantially involved in the day-to-day non-qualifying operational tasks related to the importation of foreign employer goods.

Moreover, although we acknowledge that a petitioner need not demonstrate current operations to demonstrate eligibility for a new office petition, in this matter, it is the basis upon which the Petitioner mostly relies. The Petitioner's first year business plans are largely based on its already asserted operations. The Petitioner provides evidence indicating that it likely opened a clothing store a few months prior to the date the petition was filed in March 2017. Consistent with the requirements of a new office petition, a petitioner need not establish a beneficiary's eligibility as a qualifying executive as of the date the petition was filed; however here, the Petitioner emphasizes these already existing operations as a basis for the Beneficiary's eligibility within one year. Therefore, evidence of its current operations is relevant in assessing the Beneficiary's eligibility. However, the Petitioner has provided little evidence to substantiate that it employs a director of finance and operations or four sales assistants to operate its clothing store, such as payroll or tax documentation. In addition, the Petitioner emphasizes throughout the record that its new store has "exceeded expectations," asserting this as a basis for approval; yet it submits little documentary evidence to substantiate this claim. The Petitioner also does not clearly outline who is importing the foreign employer's goods for sale. Therefore, it appears likely that this operational task is being performed by the asserted directors of finance and operations and the Beneficiary, and it does not substantiate that they would be relieved of this responsibility within the first year.

The Petitioner has also not submitted sufficient detail regarding its business plans, information that is critical to assessing whether it will likely progress beyond the initial phase of development by the end of its first year of operation. As discussed, the Petitioner provided a series of vague action plans that could apply to any business in any market. For instance, it stated that it plans to "implement its strategy and goals" during the second month, "post content on social media" in month four, "evaluate its competitiveness" during the fifth month, and "analyze the conditions of the market" in month ten. However, these plans provide little insight into its actual business plans during the first year, beyond the operation of one already established clothing store that appears insufficient to support the Beneficiary in an executive capacity.

Beyond this, the Petitioner emphasizes the development of additional stores in Florida and Texas, but as we have discussed, this expansion is not planned until its second and third years of operation. Therefore, these expansion plans are not relevant to demonstrating that its operations would be sufficient to support the Beneficiary in an executive capacity within one year. In fact, the business plan states that the Petitioner has little idea of what to expect from the market, noting that it will "analyze the conditions of the local market" during its tenth month of operation, leaving question as to the viability of its plans. As such, the Petitioner did not adequately describe its business plans or explain how it will develop sufficiently to support the Beneficiary in an executive capacity within one year of an approval of the petition.

As discussed, the Petitioner asserts that the Beneficiary will act in an executive capacity. 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 submitted evidence does not establish that the Beneficiary will act in an executive capacity within one year of an approval of the petition. The Petitioner submits a generic duty description that details few of the Beneficiary's actual duties during the first year. The Petitioner provides evidence that it operates a retail clothing shop in California. However, its business plans indicate that this will be the extent of its operations during the first year and it has not adequately articulated and documented how these operations would be sufficient to support the Beneficiary in an executive capacity within one year. The Petitioner also provides vague duty descriptions for the Beneficiary's proposed managerial subordinates and it does not appear credible that one clothing store would be sufficient to support him and three managerial level subordinates within one year. Therefore, the

Petitioner did not demonstrate that the Beneficiary would have a subordinate level of managerial employees to direct and that he would primarily focus on the broad goals and policies of the organization within one year rather than the day-to-day operations of the company. For these reasons, the Petitioner has not established that the Beneficiary would act in an executive capacity within one year.

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 one year of the petition's approval.

ORDER: The appeal is dismissed.

Cite as *Matter of B-T- Corp.*, ID# 1258717 (AAO June 19, 2018)