U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-V-, LLC

DATE: JUNE 28, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an agricultural commodity export and trading company, seeks to temporarily employ the Beneficiary as its vice president - sales 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 record did not establish, as required, that (1) the Beneficiary had been employed in a managerial or executive capacity for the foreign entity, and (2) the new office would support a managerial or executive position within one year after approval of the petition.

On appeal, the Petitioner submits a statement asserting that the Director: (1) improperly classified the Petitioner as a "new office"; (2) erred when finding that the Petitioner could not support the Beneficiary in a qualifying capacity within one year and further in determining that the Beneficiary's position did not satisfy the statutory definition of managerial capacity; and (3) erred when finding that the Beneficiary's position at the foreign entity did not satisfy the statutory definition of managerial capacity. The Petitioner asserts that it will submit a brief and additional evidence further addressing the Director's errors within 30 days of filing the appeal. To date, however, the record shows the Petitioner has not submitted a brief or additional evidence, and it will be considered complete as currently constituted.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the Beneficiary's application for admission into the United States. 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, executive, or specialized knowledge capacity. Section 101(a)(15)(L) of the Act.

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). 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 includes information regarding the new office's physical premises, 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

The Petitioner initially checked the box on the Form I-129, L Supplement, indicating that the Beneficiary is coming to the United States to open a new office. The Petitioner also stated on the Form I-129 that the intended dates of employment for the Beneficiary under this petition are from May 1, 2016, to May 1, 2021. The Director in a request for evidence (RFE) noted that a beneficiary coming to the United States to open a new office in the United States is limited to one year in L-1 classification.

In response to the Director's RFE, the Petitioner submitted an amended page to the initial petition checking the box to indicate that the Beneficiary is not coming to the United States to open a new office. The Petitioner asserted that the U.S. office has already been opened, staffed, and has been operating since April 2016. The record includes evidence that the Petitioner was issued grain and agricultural dealer licenses in September 2016, and that the Petitioner's unemployment tax account registration was confirmed by the Georgia state agency on August 30, 2016.

Although the record shows that the Petitioner was organized in the State of Georgia on November 17, 2014, the Petitioner began "doing business," no earlier than April 2016. "Doing business," is defined as the regular, systematic, and continuous provision of goods or services. 8 C.F.R. § 214.2(l)(14)(ii)(A) and 8 C.F.R. § 214.2(l)(1)(ii)(H). The petition in this matter was filed on May 19, 2016, and at that time the Petitioner had been doing business for less than one year. Accordingly, we agree with the Director's determination that the Petitioner was a "new office" when the petition was filed. 8 C.F.R. § 214.2(l)(1)(ii)(F).

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

To establish that the new office, within one year of the approval of the petition, will support a managerial or executive position, the Petitioner must submit information regarding the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals; the size of the United States investment and the financial ability of the foreign entity to

remunerate the beneficiary and to commence doing business in the United States; and the organizational structure of the foreign entity. 8 C.F.R. § 214.2(l)(3)(v)(C).

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

In an affidavit submitted by a member of the Petitioner's limited liability company, dated May 16, 2016, the affiant provided a description of the Beneficiary's proposed position as follows:

> [The Beneficiary] will be the Vice-President of sales and expansion of [the Petitioner] in the United States, and South American market, such as Mexico, Argentina and Brazil. Headquarters for the entire operation will be in Albany, Georgia, United States. He will be the manager of 12 sales people. He will be responsible for sales of agro-commodities, specializing in peanuts. Duties include setting up the U.S. headquarters in order to facilitate the transition into these markets. [The Beneficiary] will conduct all hiring and firing of staff in Albany Georgia, and those traveling worldwide for sales purposes. [The Beneficiary] will continue his duties as the Vice-President of [s]ales and expansion for parent company [the parent company].

In response to the Director's RFE, the Petitioner emphasized that the Beneficiary's duties "entail[] managing all sales in the Americas and Europe, as well as managing the General Managers of each location" and that "opening of [the U.S.] office is not his primary purpose for coming to the U.S. under the L-1A visa." The Petitioner noted its intent for the Beneficiary to be based in the United States and stated that the managers of each office in the Americas and Europe will report to and operate under the Beneficiary's direction. The Petitioner requested approval of the petition with a validity period of seven years.

The Director found the record insufficient to demonstrate how the new U.S. entity will grow and expand so that it will support an L-1 manager or executive within one year of approval.

We first note that a nonimmigrant intracompany transferee visa is not an entrepreneurial visa classification allowing a beneficiary a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business or to establish a base of operations. Rather, the regulations allow for a one-year period for the U.S. entity to commence doing business and develop to the point that it will support a beneficiary in a qualifying managerial or executive position.

The record in this matter does not include sufficient evidence that the U.S. company will support the Beneficiary in a managerial or executive position within one year of approval as required by regulation. *See* 8 C.F.R. § 214.2(l)(3)(v). The record does not include a business plan or a proposed hiring plan. The Petitioner did not explain in detail the operations and expectations of the new office, did not describe the U.S. company's proposed positions in detail, did not indicate whether any employees would be employed part-time or full-time, and did not explain how the Beneficiary would be relieved from performing non-qualifying tasks. The Petitioner did not explain how or if the foreign entity and its employees would support the Beneficiary in his managerial or executive capacity.

As the record does not include sufficient evidence on this issue and no additional evidence or argument was submitted on appeal to overcome the Director's decision, the appeal will be dismissed.

IV. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

The Director denied the petition based, in part, on a finding that the record did not establish that the foreign entity employed the Beneficiary for one continuous year in the three-year period preceding the filing of the petition in an executive or managerial capacity. As the Petitioner does not claim that the Beneficiary is employed in an executive capacity, we limit our analysis to whether the Beneficiary is employed in a managerial capacity for the foreign entity.

The term "managerial capacity" is defined as "an assignment within an organization in which the employee primarily":

> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) 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;
>
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) 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. Further, "[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." *Id.*

In response to the Director's RFE, the Petitioner provided a letter from the foreign entity's president commending the Beneficiary's skills, hard work, and managerial decisions. He also indicated generally that the Beneficiary performs trading and sales staff management, has the authority to hire, fire, and promote his subordinates, and that he also performs trader training and development. The president added that the Beneficiary handles subordinate staff, financial crises, daily performance management, and trading and development of the company. The record also includes a copy of the foreign entity's organizational chart, and one-line descriptions of the duties of the Beneficiary's subordinates. On appeal, the Petitioner asserts that the Beneficiary's position satisfies the definition of a manager.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." 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*).

Although a beneficiary is not required to supervise personnel, if a petitioner claims that a beneficiary's duties involve supervising employees, a petitioner must establish that the subordinate employees are supervisory, professional, or managerial.[1] *See* section 101(a)(44)(A)(ii) of the Act. The record in this matter does not include sufficient information regarding the Beneficiary's duties and those of his subordinates to conclude that he is primarily a personnel manager for the foreign entity. For example, although the foreign entity's president claims that the Beneficiary's duties involve performance management, he does not allocate the Beneficiary's time spent on this activity or otherwise detail the daily duties that will engage the Beneficiary. Additionally, the brief descriptions of duties for the Beneficiary's subordinates do not establish that the positions are primarily managerial, supervisory, or professional.

Similarly, the record does not establish that the Beneficiary is a function manager. Although the Petitioner does not appear to claim that the Beneficiary will manage an essential function, we note that to support such a claim the Petitioner must clearly describe the duties to be performed in managing the essential function, or more specifically, identify the function with specificity,

[1] In evaluating whether a beneficiary manages professional employees, we evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Therefore, we focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity.

articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform duties related to the function. Again, the record does not include sufficient information describing the daily duties the Beneficiary performs in his position at the foreign entity.

Without additional detail we cannot conclude that the Beneficiary's role at the foreign entity is in a managerial capacity. As the Petitioner does not provide additional evidence on appeal to support its claim that the Beneficiary is employed in a managerial capacity for the foreign entity, it has not overcome the Director's decision on this issue. For this additional reason, the appeal will be dismissed.

V. QUALIFYING RELATIONSHIP

In addition, while not addressed by the Director, we find that the record does not establish a qualifying relationship between the Petitioner and the foreign entity. To establish a "qualifying relationship" under the Act and the regulations, a petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The Petitioner stated on the Form I-129 that it is "a 100% owned subsidiary of [the foreign entity] by way of common ownership of substantially all of the stock of both companies by [redacted] and [redacted]." A qualifying subsidiary is defined, in part, as "a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity." 8 C.F.R. § 214.2(l)(1)(ii)(K). In this matter, the foreign entity does not own the Petitioner, so the Petitioner is not the foreign entity's subsidiary.

The record shows [redacted] and [redacted] own the Petitioner, with [redacted] owning 75 percent and [redacted] owning 25 percent. These same two individuals each own 49.95 percent of the foreign entity, with five other individuals each owning .02 percent of the foreign entity. If an individual owns and controls the Petitioner and the foreign entity, then the companies will be deemed to be affiliates under the qualifying organization definition even if the entities have multiple owners. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(*1*)(defining "affiliate"). However, [redacted] the Petitioner's majority owner, does not own a majority interest in the foreign entity, so he does not exercise control of the foreign entity. Nor does the same group of individuals own both the Petitioner and the foreign entity, with each individual owning and controlling approximately the same share or proportion of each entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(*2*). Rather, two individuals own the foreign entity and seven shareholders own the petitioning entity.

While the Petitioner suggests that [redacted] together own 100 percent of the Petitioner and nearly 100 percent of the foreign entity, we do not accept a combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies. The Petitioner has not provided evidence that these two shareholders are legally bound together as a unit. Therefore, the record does not establish that the two entities have an affiliate relationship.

Thus, the record does not demonstrate a qualifying relationship between the two entities as defined in the regulations. For this additional reason, the petition cannot be approved.

VI. CONCLUSION

The appeal is dismissed because the record does not include sufficient evidence to establish that: (1) within one year of the approval of the petition, the U.S. company will support a managerial or executive position; and (2) the foreign entity employed the Beneficiary for one continuous year in the three-year period preceding the filing of the petition in an executive or managerial capacity. In addition, the record does not establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer.

ORDER: The appeal is dismissed.

Cite as *Matter of T-V-, LLC*, ID# 458921 (AAO June 28, 2017)