U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-A- INC

DATE: MAR. 6, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a clothing distribution company, seeks to temporarily employ the Beneficiary as president 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, as required, that: (1) the Beneficiary has at least one year of continuous full-time employment with a qualifying entity abroad in the three years preceding the filing of the petition; (2) the new office would support a managerial or executive position within one year of approval of the petition; and (3) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer.

On appeal, the Petitioner submits additional evidence relating to the Beneficiary's employment abroad and asserts that the Director's decision on the two remaining issues was erroneous based on the evidence submitted.

Upon *de novo* review, we will withdraw the Director's determination that the Petitioner did not show that it has a qualifying relationship with the Beneficiary's last employer abroad.[2] However, as the Petitioner has not overcome the two remaining grounds for denial, we will dismiss the appeal.

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[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.

[2] In support of its claim that it is a subsidiary of the Beneficiary's last foreign employer, the Petitioner has submitted: (1) its articles of incorporation; (2) a stock certificate issuing all authorized shares to the foreign entity; (3) evidence of a wire transfer of $50,620 from the foreign entity to the Petitioner; (4) a resolution from the foreign entity's partners authorizing the establishment of a U.S. office; and (5) the Petitioner's 2016 tax return which identifies the foreign entity as its sole owner and corroborates the $50,620 transfer from a related entity. We find this evidence sufficient to meet the Petitioner's burden of proof.

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

The petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

II. ONE YEAR OF EMPLOYMENT ABROAD

The Director determined that the Petitioner did not establish that the Beneficiary had at least one year of continuous full-time employment with a qualifying entity abroad in the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii).

The Petitioner filed the petition on January 31, 2017, and therefore must establish that his one year of employment occurred between February 1, 2014, and January 31, 2017. The Beneficiary entered the United States as an F-1 nonimmigrant student to attend graduate school on January 22, 2015, and has resided in New York since that time.

The Petitioner initially stated that the Beneficiary worked for the Beneficiary's foreign parent company from February 2014 until January 2015. In the denial decision, the Director observed that the Petitioner submitted payroll registers for the period February 2014 through December 2014 and that the Beneficiary's Indian tax returns appeared to support the payroll evidence. However, the Director concluded that, based on this evidence, the Beneficiary "was paid for only nine months in the previous three years."

On appeal, the Petitioner submits a certificate from the foreign entity's accountant, who states that the company employed the Beneficiary in India from December 2013 until January 2015. The Petitioner also submits the foreign entity's internal payroll registers for the months of December 2013 and January 2014.

The Petitioner has not established with the newly submitted evidence that the Beneficiary has the required one year of employment abroad between February 1, 2014, and January 31, 2017. The Petitioner did in fact submit 12 months of payroll records at the time of filing (not 9 months as noted by the Director). However, the Beneficiary was in the United States for part of January 2015, and in

fact had been in the United States for more than two years during the relevant-three year period. In fact, the Beneficiary's pay register for January 2015 reflected 20 "working days" compared to 26 in previous months, and a lower salary than previous months. Therefore, it appears that Beneficiary's employment between February 2014 and January 2015 was several days short of a full year.

Because the Beneficiary had been residing in the United States for more than two years at the time of filing, the Petitioner cannot establish that he was also employed abroad for at least one year during the relevant three-year period. Further, even if the foreign entity paid the Beneficiary for a full year of employment between February 1, 2014, and January 31, 2015, the period of time he spent in the United States in January 2015 does not count towards the one year of employment abroad requirement. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A). The Beneficiary's period of F-1 status, which exceeded two years, is considered interruptive. *Id.*

The new evidence submitted on appeal, indicating that the Beneficiary actually commenced employment with the foreign entity in December 2013 rather than in February 2014, as previously stated, is not relevant, as this period of claimed employment occurred outside of the relevant three-year period. Further, the Petitioner did not provide an explanation for this change in the Beneficiary's dates of employment with the foreign affiliate.

Finally, we note that, although the Director found that the Beneficiary's Indian tax returns appeared to support the information provided in the foreign entity's payroll registers, the Beneficiary's tax returns for 2013-2014 and 2014-2015 do not show that he received salary income. His source of income is identified as "Profits and Gains from Business and Profession" and includes commissions, profits, and interest. Accordingly, even if the Petitioner had documented a full year of employment abroad during the three-year period, additional evidence would be needed to corroborate the information provided in the internally-generated payroll registers.

For the reasons discussed, the Petitioner has not established that the Beneficiary had at least one year of continuous employment with a qualifying entity abroad in the three years preceding the filing of the petition.

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

The Director also determined that the Petitioner did not establish that its new office would be able to support a managerial or executive position within one year of approval of the petition. The Director observed that the Petitioner provided a vague description of the Beneficiary's proposed duties, did not show that it would have sufficient staffing to relieve the Beneficiary from having to perform non-qualifying duties within one year, and did not provide adequate support for the financial projections stated in its business plan.

On appeal, the Petitioner objects to the Director's conclusion that it provided a vague position description, and emphasizes that it already has a sizeable list of clients in the United States. Further, it asserts that the job descriptions provided for the Beneficiary's subordinates are sufficient to

establish that they will perform the day-to-day operational functions of the business, and can support the Beneficiary in a managerial or executive position.

The statute defines "managerial capacity" as 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 term "executive capacity" is defined 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 the case of a new office petition, beyond the description of a beneficiary's proposed job duties, 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. Accordingly, the totality of the evidence must be considered in analyzing whether the proposed managerial or executive position is plausible considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

A. Projected Staffing and Business Plan

The Petitioner states that it distributes an upscale clothing line for women, and indicates in its business plan that it is also "a designing and manufacturing company."

At the time of filing, the Petitioner indicated that it would commence operations with two employees (the Beneficiary and an office assistant), and would hire both a sales and marketing manager and a sales and marketing representative in approximately six months. Based on the projections included in the Petitioner's business plan, its employee headcount would remain at four employees through at least the 2021 fiscal year.[3]

[3] The Petitioner also provided a separate list of proposed employees which included two "office staff," and stated that these employees would be responsible for customer deliveries, picking up returned merchandise, making bank deposits, and shipping goods. These positions are not mentioned in the business plan or accounted for in the company's financial projections, and did not appear on either version of the Petitioner's proposed organizational chart.

The Petitioner provided evidence that it hired an office assistant in December 2016, and provided a job description indicating that he schedules appointments and greets visitors, handles mail and correspondence, answers the telephone, arranges travel schedules, keeps personnel records, makes copies, and prepares invoices. Based on the payroll records provided, this employee is working approximately 30 hours per week with an hourly wage of $13.00, which is consistent with his stated salary of $18,000 per year.

The Petitioner indicated that the sales and marketing manager position requires a bachelor's degree and will receive a salary of $36,000. The assigned duties include: being in charge of marketing/sales activities (60%); ensuring the smooth running of marketing, sales and the office in general (10%); overseeing purchase and sales transactions through established systems (10%); ensuring "smooth service" (10%); and coordinating with marketing/sales agents in different areas (10%).

Finally, the Petitioner stated that the sales/marketing representative would be responsible for selling the company's products, compiling lists of prospective customers, traveling to call on regular customers and to meet with prospective customers, preparing sales contracts, providing estimated delivery dates, and keeping records of transactions. The Petitioner stated this employee would receive a salary of $18,000 plus commission.

In response to a request for evidence, the Petitioner submitted a revised organizational chart which included six marking and sales agents reporting to the marketing manager, along with an undisclosed number of independent contractors. The Petitioner stated that all of these positions would be staffed within nine months, but it did not provide a revised business plan, personnel plan, or financial projections accounting for the additional staff. As noted, the business plan identified a four-person staff and did not include anticipated commission expenses or payments to contractors. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Therefore, we will review the projected staffing levels as described at the time of filing and supported by the Petitioner's business plan.

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."[4] Section 101(a)(44)(A)(iv) of the Act. If a beneficiary directly supervises other

[4] 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."

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*). Here, although the Beneficiary would have the authority to hire and fire employees, the Petitioner has not shown that he would supervise subordinate managers, supervisors, or professionals.

The Petitioner indicates that the Beneficiary will supervise a sales and marketing manager. However, the evidence must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. Supervisory or managerial job titles are not probative and will not establish that an organization is sufficiently complex to support a managerial position. The Petitioner provided a vague description for the sales and marketing manager position, and generally indicated that the employee would spend most of his or her time being "in charge of day to day marketing/sales activities." This description is insufficient to establish that this employee's duties would be supervisory, managerial, or professional. Further, the evidence does not support a conclusion that the sales and marketing manager would be acting in a managerial or supervisory capacity. Instead, based on the projected staffing levels supported by the Petitioner's business plan, this employee would likely be performing sales duties alongside the sales and marketing representative.

Therefore, the Petitioner has not provided evidence of an organizational structure sufficient to elevate the Beneficiary to a supervisory position higher than a first-line supervisor of non-professional employees, and the Beneficiary would not qualify as a personnel manager by the end of the first year of operations. *See* section 101(a)(44)(A)(iv) of the Act.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual would be acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The Petitioner has not shown how a staff of two sales and marketing employees and a part-time office assistant would be sufficient to relieve the Beneficiary from significant involvement in the day-to-day operations of its clothing distribution business. The Petitioner estimates that it would have over $1.2 million in sales in its first year.[5] Even if we found that two subordinate sales employees would be sufficient to handle that volume of sales, the Petitioner has not indicated who would be responsible for sourcing or purchasing the company's goods, placing orders, receiving inventory, making deliveries, arranging shipments, or performing routine financial tasks. The Petitioner also describes itself as a "manufacturing and design" company at times, but does not claim it will have employees engaged in design or manufacturing. For these reasons, the Petitioner did not

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Therefore, we must 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. The Petitioner has not established that a bachelor's degree or higher is actually necessary to perform the sales and marketing manager's proposed duties, which were not described in detail.

[5] The Petitioner submitted a "Sales by Customer Summary" for the period December 2016 through July 2017 which showed total sales of $164,066.78. The company's first sales transactions were completed in December 2016.

establish that it would employ sufficient subordinate staff to perform the actual day-to-day, non-managerial operations of the company, and has not shown that it will have a reasonable need for the Beneficiary to perform primarily managerial or executive duties within one year.

B. Duties

In a supporting letter, the Petitioner indicated that the Beneficiary as president, will hire and supervise employees, negotiate with existing and potential buyers, finalize contracts, define goals and strategies, study market trends, and frequently participate in apparel exhibitions. The Petitioner added that he will direct the professional activities of a marketing and sales manager and take "full responsibility" for the company's inventory. The Petitioner's business plan included the following breakdown of the Beneficiary's proposed role:

1.) Plans, develops and establishes policies and goals of the business organization in accordance with the overall objectives and charter of the company. (15%)
2.) In conjunction with Marketing Manager, would set sales targets, standards in customer service and direct marketing initiative. (10%)
3.) Will approve the budget for various activities and supervise their implementation. Will monitor insurance plans, governmental liabilities and taxes and will be the final authority for major financial decision. (10%)
4.) Would actively engage in analyzing the market for core items and identify priority areas of potential markets in conjunction with Marketing Manager and Sales Staffs. (10%)
5.) Represent the organization at major Garment Trade Shows. (5%)
6.) The President would ensure realization of business of the organization through a well-structured progress review system implemented by the Marketing Manager and would send in report to the principal. (10%)
7.) Plan the general outline of the company's organizational structure. (10%)
8.) Orient new employees, review position, responsibilities. Establish work goals and objectives or standards to be achieved. (10%)
9.) Train, develop[,] and motivate employees to improved current performance and to prepare for higher-level jobs. (10%)
10.) Evaluate the performance, review salaries[,] and take personnel actions such as promotions, performance awards, demotions, etc. (5%)
11.) Would help maintain, discipline, recommend[,] and administer corrective action per policy and procedures. (5%)

On appeal, the Petitioner maintains that this description is sufficiently detailed and includes primarily managerial or executive duties. However, although the description indicates that the Beneficiary will have an elevated level of authority over the Petitioner's business, we agree with the Director that it does not present a detailed, credible account of the duties the Beneficiary would perform on a day-to-day basis by the end of the first year of operations. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The Petitioner indicates the Beneficiary would spend 40 percent of his time on personnel and organizational matters. However, as discussed above, the Petitioner did not establish that the Beneficiary will oversee subordinate managers, supervisors, or professionals within one year, and these personnel-related duties do not qualify as managerial in nature. Further, it appears that some duties, such as planning the organizational structure of the company, are already completed, and would not be performed on a regular and ongoing basis. In addition, the Beneficiary's responsibility for participating in trade shows and analyzing the apparel market, which would require an additional 15 percent of his time are not managerial or executive tasks.

The Petitioner referenced other non-qualifying duties, such as negotiating with existing and potential buyers, finalizing contracts, and inventory responsibilities, but it did not include these tasks in its breakdown of the Beneficiary's proposed duties. Accordingly, we cannot determine what portion of his time would be allocated to these tasks, some of which would be performed alongside the company's sales and marketing staff. The Petitioner suggests the Beneficiary's responsibility for inventory is a managerial task that cannot be delegated to a subordinate. However, it did not elaborate with respect to the specific tasks this responsibility will entail and has not supported its claim that the Beneficiary's inventory-related duties would be qualifying managerial duties. Overall, the job description includes some qualifying duties, such as establishing the company's s policies, internal systems, budgets, and standards for service, but it does not include a full breakdown of all of the Beneficiary's tasks and we cannot determine that his actual duties would be primarily managerial or executive within one year.

The fact that the Beneficiary will manage or direct a 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" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. The Petitioner has consistently stated that the Beneficiary will occupy the senior positon in the new office, but has not submitted a job description or consistent, credible supporting evidence sufficient to demonstrate that he would primarily engage in managerial or executive duties, or that the new office would support a managerial or executive position, after the initial year of operations.

IV. CONCLUSION

The Petitioner has not established that the Beneficiary had at least one year of employment abroad with a qualifying entity in the three years preceding the filing of the petition or that it will employ the Beneficiary in a managerial or executive capacity within one year.

ORDER: The appeal is dismissed.

Cite as *Matter of A-A- Inc*, ID# 965913 (AAO Mar. 6, 2018)