U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-D-M- LLC

DATE: MAR. 16, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a provider of digital marketing hardware and software, seeks to temporarily employ the Beneficiary as general manager of its new office 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, Vermont Service Center, denied the petition. The Director concluded that the evidence of record did not establish that: (1) the new office would support a managerial or executive position within one year after approval of the petition, and (2) the Petitioner had secured sufficient physical premises for the new office. The Director then granted a motion by the Petitioner to reconsider the decision, and affirmed both prior grounds for denial of the petition.

The matter is now before us on appeal. On appeal, the Petitioner submits copies of previous exhibits and argues that the Director misapplied the law and misinterpreted the facts of the case.

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. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based, in part, on a finding that the Petitioner did not establish that it will employ the Beneficiary within a year in a managerial or executive capacity. Specifically, the Director found that the Petitioner had not established "the beneficiary's actual line of authority" or shown that the Beneficiary would supervise and control the work of supervisory, professional, or managerial employees within one year. On appeal, the Petitioner asserts that all of the Beneficiary's proposed responsibilities would be managerial, specifically those of a personnel manager. The Petitioner states that the organizational chart established the line of authority, and the Petitioner's intent to employ professionals and managers.

The law defines the term "managerial capacity" 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.*

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

A. Duties

When examining the managerial capacity of the Beneficiary, we will look first to the Petitioner's description of the job duties. The Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). The Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that, within one year, the Beneficiary will be *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner filed Form I-129 on March 23, 2015. The Petitioner intends to provide tablet computers to hotels and other businesses. Customers can use the tablets for tasks such as booking appointments, ordering meals, or posting on social media. The Petitioner's revenue would come from advertisements on the devices.

In an introductory statement, the Petitioner stated that the Beneficiary "will not spend time on day-to-day functions." The Petitioner listed the Beneficiary's intended responsibilities:

- Oversee and set direction for company activities concerned with acquisition of equipment and software development and acquisition for use in digital advertising on [the Petitioner's] platforms;
- Oversee the negotiations with potential customers . . . ;
- Oversee and set strategy for compliance with copyright laws and regulations in developing and providing digital advertising platforms;
- Oversee financial activities and budget preparation . . . ;
- Select managerial staff. Appoint sales managers and agents working independently on behalf of [the Petitioner] with potential customers. Assign or delegate areas of responsibility, including operations, marketing, logistics, finance, and legal;
- Set company goals and objectives and ensure appropriate resources are devoted to meeting goals and objectives;
- Oversee negotiations and approval of agreements with suppliers, distributors, vendors, and other entities;
- Serve as a key liaison between [the Petitioner] and its affiliate company. . . .

The Petitioner states that this job description provided enough details about the Beneficiary's intended tasks. For the most part, however, this description listed lower-level functions and stated that the Beneficiary would oversee those functions. General assertions of this type do not tell us who would perform the operational tasks so that the Beneficiary would not have to perform them himself.

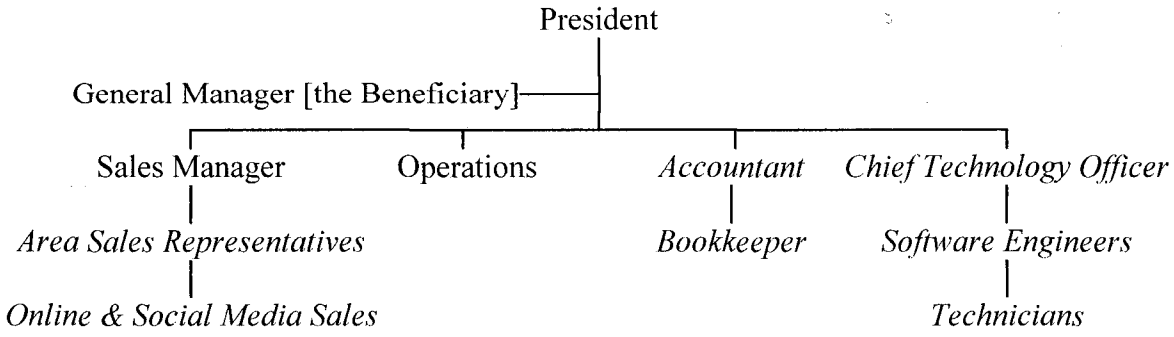
The Petitioner stated, for instance, that the Beneficiary would "[o]versee and set direction for company activities concerned with acquisition of equipment and software development and acquisition," but none of his proposed subordinates' job descriptions mention this responsibility. Therefore, the Petitioner has not shown who would actually perform the acquisitions. The same is true of the Beneficiary's responsibility to "[o]versee the negotiations with potential customers." The Petitioner has not identified any current or planned employee who would actually conduct those negotiations.

Other duties are very broad (such as "[s]et company goals and objectives") or else short-term, one-time responsibilities that would not make continued demands on the Beneficiary's time (such as hiring managers and "delegat[ing] areas of responsibility"). The Petitioner has not indicated how much time the Beneficiary would need to devote to individual responsibilities, and therefore the Petitioner has not shown that the Beneficiary's duties would be *primarily* managerial.

B. Business Plan and Proposed Staffing Levels

Further, the position description alone is insufficient to establish that a beneficiary's duties would be primarily in a managerial capacity, particularly in the case of a new office petition where much is dependent on factors such as a 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 in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

An organizational chart in the Petitioner's business plan shows the following planned structure (positions shown in *italics* were still vacant at the time of filing):



The Petitioner did not specify how many sales representatives, software engineers, or technicians it intended to hire, but the use of plural nouns indicates multiple workers under each title. The chart shows only one planned sales manager position, although the job description indicated that the Beneficiary would "appoint sales managers." The Petitioner's initial submission included no job descriptions for the subordinate positions identified on the organizational chart.

The Petitioner did not provide a specific timeline for hiring the employees depicted on the organizational chart and its business plan did not include a personnel or hiring plan, other than stating that it will "hire sales personnel" during the first year of operations and "position itself to recruit additional personnel" during the third year. The business plan includes a simple pro forma profit and loss chart for the first three years of operations, which provides figures for sales, commissions from sales, operating costs, taxes, and net profit. The Petitioner anticipates $650,000 in sales during its first year, from which it subtracted $220,000 in commissions, $100,000 in operating costs, and $158,350 in taxes, interest, and depreciation, to arrive at a projected net profit of $171,650. The Petitioner did not clearly identify anticipated salaries and wages among its projected expenses.

The Director issued a request for evidence (RFE), asking for details about the proposed subordinate employees and an explanation as to how the new office will support a managerial or executive position within a year. The Director acknowledged the submitted business plan and suggested that the Petitioner provide a business plan that includes a timetable for each proposed action during the first year of operations.

In response, the owner and director of the Petitioner's foreign parent company stated: "we plan to hire approximately ten (10) employees, including: General Manager, Sales Manager, Operations Manager, Accountant, Technology Officer/Manager, Area Sales Representative, Online & Social Media Sales, Bookkeeper, Software Engineers, and Hardware Installation Technicians."

The Petitioner also submitted position descriptions for the Beneficiary's intended subordinates. One description conflicts with the organizational chart, stating that the operations manager will "control and supervise activities related to sales and support . . . including supervising installation technicians and vendors," but the chart does not show any subordinates under the operations manager's authority. On the chart, the sales manager oversees all sales personnel, and the chief technology officer oversees the technicians, and neither the sales manager nor the chief technology officer report to the operations manager; all three are on the same level.

The Petitioner claims the Beneficiary would be employed primarily as a personnel manager by the end of the initial year of operations. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*4*).

The position descriptions indicated that some of the proposed subordinate positions are supervisory, and some are professional positions requiring a college degree. To show the Beneficiary's eligibility as a personnel manager, it is not enough for the Petitioner to state its intent to employ supervisory, professional, or managerial employees under the Beneficiary's authority. The Petitioner must also establish that it will employ those workers within a year after approval of the petition, which the Petitioner has not done in this case.

The Petitioner's business plan does not include a full timetable regarding staffing. The plan stated that the Petitioner "will . . . hire sales personnel" "[d]uring the first year of operations," but did not specify any other hiring plans. In addition, we cannot determine, based on the Petitioner's pro forma financial projections, how much it expects to pay in salaries or wages. The organizational chart identified the sales manager and operations manager by name, but the record contains no evidence to show that they are already working for the Petitioner. The Director, in the RFE, had requested a more complete timetable, but the Petitioner did not provide one.

The Director denied the petition, concluding that the Petitioner had not demonstrated that, within a year, the Beneficiary would supervise and control the work of supervisors, professionals, and/or managers. The Director stated that the Beneficiary had not shown who would provide the Petitioner's goods and services to its customers, and that, in the absence of that information, it appeared that the Beneficiary would have to perform those services himself. The Director essentially repeated the same conclusions in the second denial notice.

On motion and again on appeal, the Petitioner stated that, in a new office petition, the Petitioner need not demonstrate that the Beneficiary's duties will immediately be primarily managerial or executive. The Petitioner stated that it had adequately defined the Beneficiary's managerial responsibilities. The Petitioner added that its organizational chart and job descriptions showed that, once the new office is fully operational, the Beneficiary would "supervise the work of professionals and supervisors" who would "relieve the Beneficiary from performing operational and administrative tasks."

The Petitioner has not addressed or resolved the Director's key finding that the Petitioner had not shown that, within the first year, it would employ sufficient staff to warrant a managerial position to oversee managers, supervisors, or professionals. The vaguely stated intention to employ such workers at some undefined point in the future will not suffice to meet the Petitioner's burden of proof. We cannot determine which employees would be hired within the first year and therefore cannot conclude that the employees hired would be professionals, supervisors, or managers. Even if the Petitioner consistently claimed that it would fill every proposed position listed on the organizational chart within the first year, the business plan does not sufficiently support a finding that the company would realistically be able to support the projected number of employees.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it will employ the Beneficiary in a managerial capacity within a year.

III. SUFFICIENT PHYSICAL PREMISES

The Director also found that the Petitioner did not establish that it has secured sufficient physical premises to begin doing business as required by the regulation at 8 C.F.R. § 214.2(l)(3)(v)(A).

The Petitioner submitted interior photographs of an office suite in North Carolina. Two of the photographs show a small office containing a desk and three chairs. According to the terms of its

sublease agreement, the Petitioner does not occupy the entire office suite. Rather, the Petitioner sublets one office within the suite.

In the RFE, the Director asked for evidence to show that the Petitioner had secured sufficient office space to conduct its business operations. The Petitioner's initial submission did not suffice, because it identified the office space but provided no further information.

In response, the Petitioner stated that the sublet "office space is sufficient to house [the Beneficiary] and sales staff," with space for meetings and storage of a small number of tablet computers. The Petitioner did not say where the other employees would work. A floor plan for the office suite shows that the entire suite comprises 498 rentable square feet, with two offices and a common area. The photographs of the Petitioner's office match the layout of the smaller office, which occupies less than a fifth of the suite's square footage.

In the denial notice, the Director stated that the "floor plan depicts an office area of approximately 250 square feet for the 11 employees depicted in [the Petitioner's] organizational chart." The Director cited no source for the "250 square feet" figure. Given the dimensions of the single office relative to the full suite, the area of the office appears to be less than 100 square feet, with one desk and three chairs taking up a substantial amount of the available space.

On motion from that decision, the Petitioner cited an unpublished district court decision, which stated "[t]he regulatory requirement is that there be a sufficient physical premise to house 'the new office,' not to house the new manager or executive." *United States v. Caco*, No. 2:12-CR-91-FTM-29UAM, 2013 WL 6085134, at *3 (M.D. Fla. Nov. 19, 2013).

Counsel for the Petitioner asserted on motion:

> Sales managers and sales representative will not use this office space because their duty includes traveling to client sites and meeting with clients. . . . Software Engineers will likewise . . . work remotely, as their duties do not require physical presence at the office and their work product is deliverable via digital transmissions.

The unsupported assertions of counsel do not constitute evidence. *See, e.g.*, *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). While counsel ostensibly speaks for the Petitioner, the distinction is relevant here because counsel's statement that the sales staff "will not use this office space" contradicts the Petitioner's statement that "[t]he office space is sufficient to house our General Manager and sales staff." No official or employee of the petitioning company has substantiated counsel's claims about remote employment, and the Petitioner cannot avoid the "sufficient physical premises" requirement with the vague assertion that the other employees will work at one or more unspecified locations.

In the second decision, which affirmed the prior denial of the petition, the Director stated that, even if sales staff and engineers worked remotely, the office could not accommodate the remaining employees and also provide space "for work stations, computer screens, network facilities, security practice, document retention release and control, office supply, reception, sales or other related meetings, client outreach and product display and storage."

On appeal, the Petitioner offers no rebuttal, instead repeating the same language from the earlier brief submitted on motion. As a result, the Petitioner does not show how the Director's latest conclusions were in error.

The unpublished *Caco* district court decision has no authority as binding precedent in this administrative proceeding. In contrast to the broad precedential authority of the case law of a U.S. circuit court, we are not bound to follow the published decision of a U.S. district court, even in matters arising within the same district. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719. Even then, the cited decision relates not to any immigration proceeding, but rather to a motion to strike certain allegations in a superseding indictment. The court found that the superseding indictment incorrectly paraphrased certain regulatory provisions. USCIS is under no obligation to defer to *Caco* when interpreting immigration statutes and regulations in administrative proceedings.

Furthermore, the Petitioner cited the *Caco* decision to support the assertion that the Petitioner need not "house the new manager or executive." In response to the RFE, however, the Petitioner specifically stated that "[t]he office space is sufficient to house our General Manager and sales staff." Whether or not the Petitioner is required to house the Beneficiary, the Petitioner is unquestionably obligated to make true assertions, as the Petitioner affirmed under penalty of perjury when an authorized official signed Form I-129. Once the Petitioner has affirmed that it has office space for the Beneficiary, it is no defense to assert that the Petitioner need not provide that space.

The Petitioner has provided an organizational chart that anticipates not 10 or 11, but at least 14 employees (assuming that each plural job title refers to only two employees by that title). The Petitioner stated that the office can hold the Beneficiary and the sales staff, but most of the projected employees do not fall into those categories. The Petitioner has not specified where all of its projected employees would work during the new office's first year of operations, or shown that it had secured sufficient physical premises for all of them. The Petitioner has only documented an office that appears to have space for three people sharing a single desk. The Petitioner has not established that it can operate effectively within those confines.

IV. CONCLUSION

Petitioner has not established that it will employ the Beneficiary in a managerial capacity within a year, or that it had secured sufficient physical premises at the time it filed the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of R-D-M- LLC*, ID# 245828 (AAO Mar. 16, 2017)