U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-N-A-, INC.

DATE: MAR. 26, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which intends to sell and service precision machine tools imported from its foreign parent company, seeks to temporarily employ the Beneficiary as general manager of marketing 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: (1) the Beneficiary has been employed abroad in a managerial or executive capacity; and (2) the new office will support a managerial or executive position within one year after approval of the petition.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by issuing a vague decision that did not explain how the Petitioner's documentation was insufficient.

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. DEFINITIONS

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

"Executive capacity" means 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.

Based on the statutory definitions of managerial and executive capacity, the Petitioner must first 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 the Beneficiary will be *primarily* engaged in managerial or executive 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.

III. NEW OFFICE

A petitioner seeking to employ a beneficiary as a manager or executive of a new office must establish that the new office will support an executive or managerial position within one year of approval of the petition. The Petitioner must establish the proposed nature of the office, describing its scope, organizational structure, and financial goals; the size of the United States investment and the foreign entity's financial ability to remunerate the beneficiary and to commence doing business in the United States; and the foreign entity's organizational structure. 8 C.F.R. § 214.2(l)(3)(v)(C).

The Director denied the petition based, in part, on a finding that the Petitioner did not establish that the new office will support a managerial or executive position within one year. The Director based this conclusion primarily on a discussion of the job descriptions of the Beneficiary and his intended subordinates. The Director concluded that the Petitioner did not show that the Beneficiary's position, as described, qualifies as managerial or executive.

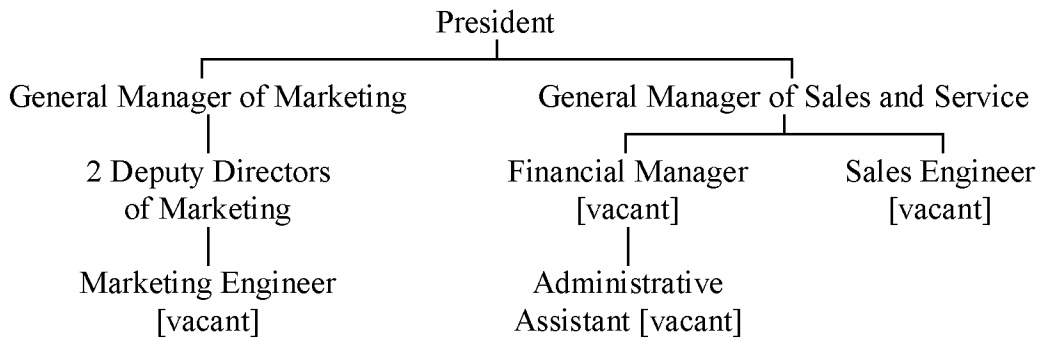
When examining the managerial or executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

The first version of the Beneficiary's job description was more than two pages long; a later supplement expanded that description to about three and a half pages. The Director found that the job description lacked specific details, and therefore "was insufficient to demonstrate what the beneficiary will do on a day-to-day basis." On appeal, the Petitioner repeats the complete job description and states that the Director did not explain how the description was insufficient. We agree with the Petitioner that the job description contains a significant amount of specific information, which the Director simply dismissed as insufficient without further explanation.

The level of detail in the Beneficiary's job description, however, is only part of the issue. Detail is not equivalent to accuracy. Also, we must consider that description in the context of other information in the record. In that respect, the Director also found that many of the Beneficiary's intended duties were similar to those of the company's president. On appeal, the Petitioner contends without evidence that the shared "duties are typical of upper management of any new company," and that, "due to [the company's] newness and need for foundational guidance, [the Beneficiary's] duties include high level responsibilities of not only his department but also the company as a whole."

The distribution of duties raises issues more difficult to rebut. The Petitioner asserted that the Beneficiary "cannot be involved with the routine duties of purchasing goods, negotiating with customers, receiving orders, processing payments, and shipping." The Petitioner also stated that it "will [initially] employ . . . five full time in-house employees." An organizational chart showed those five employees and four vacant positions that the Petitioner intended to fill during the new office's first year of operation:



The Petitioner initially provided the following job descriptions for the Beneficiary's subordinates:

> Deputy Directors of Marketing
> Assist the Director of Marketing with overseeing marketing and sales activities including brand management and marketing communications. Draft market trend reports which are reviewed and discussed with the Director of Marketing for approval of proposed market strategies. Manage and assign tasks to the Marketing Engineer.
>
> Marketing Engineer
> Receive technical training on machines[']mechanical and electronic structure. Harness data and knowledge to drive effective marketing decision[s] making an implementation through a technology-enabled and model-supported decision process.

The Director concluded that the subordinates' job descriptions raised a number of questions. The Petitioner indicated that the marketing engineer would "[r]eceive technical training" and that the Beneficiary would "[o]versee[] the proper training of the newly hired staff," but the Petitioner did not specify who would provide that training. It is not among the listed duties of the deputy directors, which are the only intermediate employees between the Beneficiary and the marketing engineer.

The Director also noted that the marketing engineer's job description mentioned "decision making" and a "decision process," but the Petitioner did not provide enough information about this process.

There are other issues as well. The subordinates' job descriptions indicated that the deputy directors would assist the Beneficiary with "sales activities," but the Beneficiary's own job description did not refer to oversight of sales activities. Also, the company has a separate general manager of sales and service, outside of the Beneficiary's chain of authority, who presumably would control "sales activities." The assertion that the Beneficiary would initially share responsibility for the entire startup company does not resolve this issue.

The Petitioner also stated: "The Deputy Directors . . . delegate[] the day-to-day lower level tasks (i.e. clerical work, production lists, inventory maintenance and logistics) to their subordinates." Their only listed subordinate, however, is the marketing engineer, whose own job description does not include any of those functions. The Petitioner states that it will require the services of a director and two deputy directors to "oversee marketing . . . activities," but the record does not reveal who would actually perform the marketing activities. There would only be one subordinate below the director and deputy directors — the marketing engineer — and that position's two-sentence job description indicated that the marketing engineer would "[r]eceive technical training" and "[h]arness data and knowledge."

The Petitioner submits a longer job description for the marketing engineer on appeal. This longer description was not in the record at the time of the denial decision, and therefore the Director could not have erred by failing to consider it. Even then, this longer description, like the earlier version, does not refer to "clerical work, production lists, inventory maintenance and logistics."

The Petitioner protests that the Director did not pay sufficient attention to supporting documents in the record. Examination of those documents, however, raises further questions.

The Petitioner's business plan indicated that the company intends "[t]o sell 3 sets of high precision CNC machines in the first operating year, and 5 sets for the second year, 8 to 10 sets for the third year." The low sales volume is understandable considering the cost and narrowly tailored market for the products, but the Petitioner did not explain why such infrequent sales would require a four-person marketing department (which would exist in parallel with a separate sales department).

Of greater concern is the following language from the "Promotion" section of the business plan:

> Retailers and contractors are the primary customers [for the Petitioner's] product. . . .
>
> Partnerships and solid relationships with wholesalers will widen [the Petitioner's] product distribution. . . .
>
> Although retailers and contractors are [the Petitioner's] primary customers, other individual customers will create market awareness for [the Petitioner's] product. High-end residential homes and country clubs' contractors will be direct end users for [the Petitioner's] products. Advertisements in local interior design magazines will also promote [the Petitioner's] product to targeted markets.
>
> . . . Tradeshows and home shows are another industry-wide marketing channel of which [the Petitioner] will take advantage. . . . They will also provide new opportunities for [the Petitioner] to introduce and promote laminate flooring.
>
> Show rooms are another cost-effective, mass promotional method. Show rooms will be set up by the sales and service department across North America.

Although the Petitioner's products are precision machine tools, the entire "Promotion" section of the business plan centers on the marketing of laminate flooring. This is especially significant because the Beneficiary would work in the marketing department. Although the initials of the petitioning company appear 10 times in the "Promotion" section, that section has no relevance to the Petitioner's stated plan to sell a small number of expensive precision machine equipment to a handful of customers. Instead, the plan as a whole includes several other references to the retail sales of flooring through a network of showrooms, raising significant questions regarding the circumstances of the plan's preparation.

The business plan also includes inconsistent figures for the company's first-year expenses:

Expense	Page 10	Page 11
Labor Costs	$588,000	$480,000
Marketing	10,000	8000
Total	1,659,962	1,297,700

These discrepancies in the Petitioner's business plan call into question the extent of the Petitioner's actual planning for its business activity. This shortcoming is especially significant the context of a new office petition, in which a petitioner must provide details about its planned first year of operations.

The Petitioner has shown that the foreign entity manufactures complex machinery, and that professionals are involved in its manufacture and service. However, the inconsistencies in the job descriptions and business plan cast doubt on the extent to which the Petitioner has made *bona fide* plans and preparations for its new U.S. office. Based on these inconsistencies, the Petitioner has not established that its new office could support a managerial or executive position within one year after approval of the petition.

IV. EMPLOYMENT ABROAD

The Director also found that the Petitioner had not established that the foreign entity employed the Beneficiary in a managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3)(iv). However, because the issues regarding the Beneficiary's intended U.S. employment in the new office are dispositive in this case, we need not reach the issue of employment abroad, and therefore reserve it.

V. CONCLUSION

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of J-N-A-, Inc.*, ID# 2480879 (AAO Mar. 26, 2019)