U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF J-M-E- CO., INC.

DATE: MAY 4, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a seller and distributor of medical equipment, 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 on multiple grounds. The Director determined that the Petitioner did not establish, as required, that: 1) it had sufficient premises to launch the new business, 2) the Beneficiary had been employed abroad for one of the previous three years prior to filing the petition, 3) the Beneficiary was employed abroad in a managerial or executive capacity, and 4) the Beneficiary would be employed in a managerial or executive capacity in the United States within one year of the approval of the petition.

On appeal, the Petitioner asserts that the Director abused his discretion and ignored submitted evidence that establishes the Beneficiary's eligibility.

Upon *de novo* review, the appeal will be dismissed as the Petitioner has not demonstrated that it would employ the Beneficiary in a managerial or executive capacity within one year of the petition's approval or that the Beneficiary meets the foreign employment requirements. We will, however, withdraw the Director's finding with respect to the Petitioner having sufficient physical premises to launch its business.[2]

---

[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] We find that the Petitioner has submitted adequate evidence to establish that it has more likely than not acquired sufficient physical premises to launch its business. The evidence submitted on appeal supports the Petitioner's claim that a lease was electronically signed prior to the petition and, at minimum, sufficient to house the Beneficiary and other new employees as necessary to begin operations.

## 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.*

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 A MANAGERIAL CAPACITY

We will first analyze whether the Petitioner established that it will employ the Beneficiary in a managerial or executive capacity within one year of the petition's approval. The Petitioner does not claim that the Beneficiary would be employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary would be employed in a managerial capacity.

"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.

In order to determine whether the Petitioner established that its new office will support a managerial position within one year, we will review the Beneficiary's proposed job duties, along with the Petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the Beneficiary in the intended managerial capacity. The totality of the evidence must be considered in analyzing whether the proposed managerial 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 it was established in the United States to "introduce, sell and distribute various high quality sets of medical equipment and instrument[s]" in the United States. The Petitioner indicated that the Beneficiary would perform the following duties as its president:

- Planning, developing, and implementing strategies for generating resources and revenues for the company;
- Establishing and approving company's rules, policies, operational procedures and standards;
- Directing company operations to ensure production efficiency, quality products and services, and cost-effective management of resources;
- Planning and manages sales and marketing operation budgets;
- Adjusting marketing strategies to meet changing market and competitive conditions;
- Evaluating the performance of her subordinate professionals for compliance with contributions in attaining objectives; directs entire company's HR matters;
- Overseeing and deciding company's annual budgets and financial goals;
- Reviewing and analyzing sales and performance against programs, quotes and plans to determine effectiveness;
- Establishing and carrying out export sales goals, policies, and procedures to ensure the realization of export sales objectives.

The Beneficiary's job description includes several general duties that could apply to any manager acting in any business or industry; such duties do not provide insight into the actual nature of her 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. For instance, the Petitioner did not specify the actions the Beneficiary will take during its first year of operation to assure that the business develops as necessary to support her in a managerial capacity within one year. In fact, the Beneficiary's duty description includes no references to the company's intended business, the sale of medical devices and equipment. The Petitioner also submits few examples of strategies that the Beneficiary will implement; rules, policies, operational procedures and standards she will establish; sales and marketing budgets she will set or adjust; budgets or financial goals she will implement; or export goals and policies she will put in place. The Petitioner also states that the Beneficiary will direct operations that are related to "production efficiency," but does not articulate the tasks that make up this general responsibility. 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 a managerial 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" managerial in nature. Section 101(A)(44)(A) 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 managerial in nature. The actual duties themselves reveal the

true nature of the employment. *Id.* 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 she would devote her time primarily to managerial duties within one year.

B. Business Plan and Projected Staffing

In the case of a new office petition, 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 of the petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed managerial or 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 submitted a proposed organizational chart indicating that the Beneficiary supervises a vice president. The chart further reflects the Petitioner's plans to hire a sales manager and an office manager – both subordinate to the vice president. The chart also indicated that the sales manager would supervise sales associates and that the office manager would oversee an import-export sales assistant, an office assistant, and a warehouse employee.

The Petitioner has 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. The Petitioner provided a series of vague action plans which could apply to any business in any market. For instance, it states that it plans to "create a high level American style website," utilize social media, fully understand the industry, "establish a strong attractive performance-reward system to solicit local professionals," and "participate in local and nationwide medical industry product exhibitions." The Petitioner also refers to "big customers" it has secured, including large medical centers in the area; however, it does not substantiate its relationships with these entities. Further, the Petitioner points to the "market," its "customers," and "goods and services," but it does not describe these in detail. In fact, the business plan states that the Petitioner has little idea of what to expect from the U.S. market, noting that its main objective is to "better explore, familiarize, and understand the U.S. market." As such, the Petitioner did not adequately describe its business plans or explain how it will develop sufficiently to support the Beneficiary in a managerial capacity within one year of the petition's approval.

Likewise, the Petitioner provided insufficient and inconsistent detail regarding its hiring plans. First, the Petitioner submitted an organizational chart indicating that it employs a vice president subordinate to the Beneficiary. In addition, the business plan indicates that the Petitioner formed a sales team, including a sales manager and representatives. However, the Petitioner did not submit supporting evidence to indicate that it already has employees who are subordinate to the Beneficiary.

On appeal, the Petitioner emphasizes that it is not required to have employees to qualify as a new office. We agree; however, the Petitioner has not substantiated its assertion of already existing employees or set forth definitive hiring plans, as necessary to demonstrate that it will likely support the Beneficiary in a managerial capacity within one year. In fact, the Petitioner submitted another organizational chart outside of the business plan indicating that it would hire a vice president, a sales manager, an office manager, sales associates, an import-export sales assistant, an office assistant, and a warehouse employee. However, the submitted business plan indicates that the Petitioner projected hiring a vice president and general manager, an office secretary, one to two employees in an import and purchase department, three to four "sales people," one to two engineers, and one to two translators/interpreters. Further, although the Petitioner indicated that it "will hire employees at different times in the first year," it did not specifically define when it plans to hire subordinates. The Petitioner must resolve 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).

Furthermore, the duties provided for the Beneficiary's proposed subordinates are vague and do not convey their day-to-day tasks in the context of the company's first year of development. The Petitioner provided a list of non-specific duties for the vice president that largely overlap with the Beneficiary's proposed duties. The Petitioner also vaguely stated that the office manager would be tasked with "organizing and coordinating office operations and procedures," "design[ing] and implement[ing] office policies," and "establish[ing] standards and procedures"; it did not, however, detail the projected operations, procedures, policies, standards, or procedures. Likewise, the Petitioner indicated that the sales manager would be "responsible for the development and performing of all sales events and activities, execute plans and strategies to expand the customer base," and "communicate to customers about products and sell products." Again, these duties are vague and do not demonstrate the projected positions that would be subordinate to the Beneficiary. We also note that the duty descriptions for the Beneficiary's proposed subordinates, and in turn their subordinates, make no reference to actions they will take during the first year to launch the business and barely discuss the Petitioner's projected industry and operations.

Lastly, the Petitioner regularly emphasizes the investment made by the foreign employer in the Petitioner, indicating that this amounts to $199,078 as of the date of the petition. However, the Petitioner did not outline in detail the company's start-up costs and initial operating expenses, nor did it articulate how this investment will be used to launch the business. In sum, the Petitioner submitted little evidence to demonstrate that it will grow sufficiently during its first year of operation to support the Beneficiary in a managerial capacity.

In light of the above, we find that the Petitioner has not provided sufficient probative evidence establishing that the Beneficiary will be relieved from performing non-managerial duties within one year of approval of this petition.

## III. FOREIGN EMPLOYMENT

The Director also determined that the Petitioner did not establish that the Beneficiary was employed in a qualifying managerial or executive capacity abroad or that she was employed abroad for the required one year during the three years prior to filing this petition.

In denying the petition, the Director questioned the Beneficiary's continuous employment abroad in a managerial or executive capacity, pointing to her presence in the United States for 189 days during the three years prior to the date of the petition. The Director also determined that the Beneficiary's job description and the foreign entity's organizational chart were insufficient. Specifically, the Director stated that the organizational chart was vague and did not describe how the Beneficiary was relieved from primarily performing operational duties during her employment abroad. Likewise, the Director determined that the job description was also vague and did not adequately convey an understanding of the Beneficiary's managerial duties.

On appeal, the Petitioner asserts that the Beneficiary was in the United States for 189 days during the three years preceding the filing of the petition because she was attending meetings and expositions and taking other actions to set up the proposed new business in the United States. The Petitioner contends that the Beneficiary qualifies as a function manager and that she does not perform operational-level duties.

We concur with the Director's decision that the Petitioner has not established that the Beneficiary was employed abroad in a managerial or executive capacity for one out of the three years prior to the petition. Although we acknowledge the Petitioner's assertion that the Beneficiary was employed as a foreign employer general manager since 2008, we conclude that the Petitioner provided vague duties that lack detail regarding her activities and accomplishments with the foreign employer over the last nine years. The Petitioner did not elaborate on its claim that the Beneficiary implemented "strategic marketing plans and sales plans," managed "sales and marketing budgets," oversaw "advertising and promotion activities," and made "important decisions." Further, the Petitioner provided three vague emails specific to the Beneficiary's foreign role that do not substantiate the claim that she performed managerial-level duties abroad for over nine years.

For the reasons stated, the Petitioner has not established that the Beneficiary had one year of employment in a managerial or executive capacity with a qualifying entity abroad during the relevant three-year time period.

## IV. CONCLUSION

The appeal will be dismissed because the record does not include sufficient evidence establishing that the Beneficiary would be employed in a managerial or executive capacity within one year of this petition's approval or that she was employed abroad in a managerial or executive capacity for one out of the three years preceding the filing of the petition.

**ORDER:** The appeal is dismissed.

Cite as *Matter of J-M-E- Co., Inc.*, ID# 1149266 (AAO May 4, 2018)