U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-C-I- INC.

DATE: MAY 7, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which intends to import and distribute herbal tea, seeks to temporarily employ the Beneficiary as chief executive officer (CEO) 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 California Service Center denied the petition, concluding that the Petitioner did not establish, as required, that it would be able to support a managerial or executive position within one year of approval of the petition.

On appeal, the Petitioner asserts that the Director did not consider all of the submitted evidence and failed to apply the preponderance of the evidence standard to the facts presented.

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.*

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

[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.

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.

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.

Based on the 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 at 1533.

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

The sole issue to be addressed is whether the Petitioner established that the new office would support a managerial or executive position within one year of approval of the petition.

In the case of a new office petition, we review a beneficiary's proposed job duties as well as 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. Duties

The Petitioner states that it will import and distribute herbal teas produced by its Chinese affiliate. It described the Beneficiary's proposed duties as CEO as follows:

- Managing and directing the day-to-day operations of the company (60%);
- Reviewing the VP-marketing's proposals concerning (i) the strategy and plans for market development; (ii) the management of significant accounts; (iii) the negotiation with significant distributors . . .; and (iv) the reviewing and signing [of] contracts (15%);
- Developing strategy and policies to cooperate with the affiliated Beijing company and other suppliers in China (15%);
- Hiring and firing departmental managers, sales leads, import professionals; reviewing their performances, and review the managers' proposals for hiring and terminating office clerks, assistants or independent contractors (5%);
- Review the reports from the manager in charge of finance, HR, bookkeeping and personnel training (5%).

This description is overly broad as it does not list the specific tasks the Beneficiary would perform in "managing and directing the day-to-day operations of the company." Because the Petitioner indicates that that this responsibility will require the majority of her time, it did not provide sufficient information to establish how her tasks would be primarily managerial or executive in nature. The listed responsibilities also appear to project beyond the duties the Beneficiary would perform by the end of the first year of operations, as the record does not indicate that the Petitioner would be hiring sales leads, import professionals, clerks, or assistants during that initial year.

The Petitioner's business plan included a lengthier description of the Beneficiary's proposed duties, but did not include the approximate percentage of time she would allocate to the listed responsibilities on a daily basis. Further, although the description lists 26 duties, many of them are general, repetitive, and appear to simply paraphrase the statutory definitions of managerial and executive capacity. For example, the description indicates that the Beneficiary will ensure the business is running smoothly, set and implement the company's strategic direction, develop its goals and policies, plan and implement policies and objectives, develop annual business objectives, "strategically lead the company," implement company policies and procedures, "oversee operational aspects of the business," oversee all departments, "ensure business is operating smoothly," and "develop innovative and strategic business strategies." Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *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); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Here, the Petitioner has not provided the necessary detail or an adequate explanation of the Beneficiary's proposed activities in the course of her daily routine.

We acknowledge that the Beneficiary, as the Petitioner's senior employee, would have authority to establish plans, policies, and objectives for the company, supervise any employees hired, and make major decisions regarding its finances and overall direction. However, the Petitioner has not established that these types of responsibilities would primarily occupy the Beneficiary's time within one year. 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.

On appeal, the Petitioner contends that the Director did not give sufficient weight to the Beneficiary's listed job duties and emphasizes that the provided job descriptions do not include clearly non-qualifying duties. However, the Director's decision reflects that she properly considered the totality of the evidence to determine whether the Petitioner met its burden to show that it would have a reasonable need for the Beneficiary to primarily perform the claimed managerial or executive duties. For the additional reasons discussed below, the Petitioner has not met this burden.

B. Projected Staffing and Business Plan

If staffing levels are used as a factor in determining whether an individual will be acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) takes 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.

The Petitioner's business plan indicates that the company anticipates $375,000 in sales of its herbal tea products during its first year of operations. Its proposed organizational chart shows that the Beneficiary will supervise a chief operating officer (COO), a finance and HR manager, and a vice president - marketing. The COO would eventually supervise customs, logistics, and warehouse staff, the vice president would supervise regional sales leads and independent contractors, and the finance manager would supervise a two-person accounting team and two administrative staff. The Petitioner identified one employee, the finance and HR manager, by name. [2]

The business plan includes a "5-year personnel hiring plan" which shows that the employees to be hired in year one include the Beneficiary, the CEO, and the vice president of marketing. The personnel plan does not mention the finance and HR manager position, and the included pro forma profit and loss statement does not account for any salary expenses during the first year beyond those to be paid to the CEO, the COO and the marketing vice president. This raises questions regarding the Petitioner's intention to employ the finance and HR manager. In fact, the Petitioner provided a slightly revised hiring timeline in response to the RFE, which included the finance and HR manager, but annotated the position title with "when necessary." The Petitioner has not provided a projected salary for this position and based on the information provided, we cannot determine to what extent it would rely on her services during the initial year of operations.

[2] The individual identified as finance and HR manager, [redacted] is also the company secretary, according to the Petitioner's company by-laws and minutes from its organizational meeting.

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."[3] 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*).

The Petitioner does not claim that the Beneficiary would be a function manager, but does indicate that she is authorized to hire and fire employees and that she would supervise subordinates with managerial job titles. However, the record does not support a finding that any of the Beneficiary's subordinates will be supervising their own subordinates by the end of the initial year of operations, such that they could be considered supervisors or managers. Further, although the Petitioner indicates that individuals who have bachelor's degrees will fill the claimed managerial positions, the job descriptions provided do not demonstrate that the positions are professional. For example, the Petitioner indicates that the COO will be answering the telephone, maintaining records, handling incoming and outgoing correspondence, and processing orders and invoices. Further, the Petitioner acknowledges that the vice president of marketing will be performing duties that will later be assigned to sales people, whose positions do not require a degree. For these reasons, the Petitioner has not established that the Beneficiary would act primarily as a personnel manager within one year.

The Petitioner has also claimed that the Beneficiary will be employed in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and they must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee.

As noted, the Petitioner submitted a broad description of the Beneficiary's duties that merely paraphrases the statutory definition of executive capacity. It has neither defined her actual proposed duties in sufficient detail, nor adequately explained how the proposed staff of two to three employees

[3] 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." Therefore, we must focus on the level of education required by the position, rather than the degree held by a subordinate employee.

would allow her to primarily focus on the broad goals and policies of the company within one year. The Director specifically noted that the Petitioner anticipates $375,000 in tea sales during its first year and observed that the company did not appear to anticipate sufficient sales, logistics, or administrative staff to accomplish this level of sales without the Beneficiary's involvement in non-qualifying functions.

On appeal, the Petitioner maintains that the job descriptions for the COO, vice president of marketing, and finance and HR manager indicate that these employees would perform the company's day-to-day to sales, logistics, and administrative tasks. For example, the Petitioner states that the COO's responsibility for handling "incoming and outgoing correspondence," and assisting with "other projects as needed" establishes that that this employee will take care of the company's logistics needs during the first year and until a logistics employee is hired (which, according to the personnel plan, will be in the third year of operations). At the same time, the Petitioner indicates that it will need to lease and operate a warehouse by the third quarter of its first year. The Petitioner has not established that the COO's responsibilities for handling "correspondence" and "other projects" would reasonably include all logistics and warehouse functions. The Petitioner also emphasizes that it will focus on distributing its tea products through large retail customers and that a sales figure of $375,000 represents fairly limited sales activities that can be accomplished without a large sales staff. However, if the vice president of marketing will be solely responsible for all sales, it is unclear how this employee would be free to assist the Beneficiary with other non-executive marketing and business development activities.

Finally as noted, the Petitioner's business plan and pro forma financial projections do not include the finance and HR manager as a salaried employee and it is unclear to what extent this individual will be involved with the company's routine operations. For these reasons, we agree with the Director's conclusion that the record contains insufficient evidence to show that the Beneficiary would be removed from significant involvement in the day-to-day operations of the company by the end of the first year.

The Petitioner has consistently stated that the Beneficiary will occupy the senior position in its new office, but has not submitted a job description or supporting evidence sufficient to demonstrate that she 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 it would employ the Beneficiary in a managerial or executive capacity within one year.

ORDER: The appeal is dismissed.

Cite as *Matter of R-C-I- Inc.*, ID# 1200963 (AAO May 7, 2018)