U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-I-, INC.

DATE: MAY 15, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a distributor of nutritional supplements, seeks to temporarily employ the Beneficiary as president 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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that 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 asserts that the Director erred by mischaracterizing one of the subordinate positions that the Petitioner intends to create.

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

[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.

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. MANAGERIAL OR EXECUTIVE CAPACITY AT THE 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. 8 C.F.R. § 214.2(l)(3)(v)(C). The Petitioner asserts on appeal that the new office will employ the Beneficiary as a manager and as an executive within a year of approval of the petition.

When the Petitioner filed the petition, it claimed one employee in the United States, but did not identify the employee or submit any evidence such as tax or payroll records. It appears that the "employee" in question is the Beneficiary, although his B-1 nonimmigrant status does not permit him to work for a United States employer.

The Petitioner initially stated that it intended to hire three employees during its first year following approval of the petition: a sales and marketing manager; a sales representative; and a manufacturing technician. The Petitioner planned to hire additional staff in later years, but any hiring after the first year would be too late to establish eligibility under a new office petition.

In the denial notice, the Director stated: "The new office currently appears to be making numerous orders from [redacted] You indicate that this is 'feeling out the market share' and establish some customers." The Petitioner devotes a full page of the appellate brief to rebutting these two sentences in the denial notice, but the Director appears to have intended the passage to be background information rather than a basis for denial of the petition. A longer discussion of the Petitioner's sales model would not have changed the outcome of the decision.

More substantively, the Director based the denial of the petition on a finding that none of the three planned subordinates qualifies as a manager, supervisor, or professional. The Petitioner's core argument on appeal is that the sales and marketing manager position is managerial. We will therefore focus on that issue.

In a request for evidence (RFE), the Director advised the Petitioner: "You have not provided sufficient evidence to establish that the Sales and Marketing Manager would be considered a supervisory or managerial level position. It does not seem reasonable that this person would primarily oversee the work of one (1) individual."

In response, the Petitioner stated that "a Sales Manager and Operations Manager . . . have already been hired." The Petitioner hired those two employees in July 2017, a few weeks after the Director issued the RFE in June. Because the Petitioner filled both positions within a year of filing the petition, we will consider both of them here. The Petitioner's business plan included these job descriptions:

Sales and Marketing Manager

Task Name	% Time Allocated
• Assist the Company's President in the supervision of the Company's sales and marketing processes	15%
• Establish and implement sales and marketing strategies	25%
• Conduct and obtain customer and market research reports	25%
• Direct and analyze sales performance evaluations	15%
• Review sales records to create projections for the coming periods	10%
• Direct and oversee the work of the Company's Sales Representatives and Online Marketing Specialist	10%

Operations Manager

Task Name	% Time Allocated
• Oversee production, development, delivery, and other	25%

activities directly related to the Company's products	
• Develop, continuously improve, and implement operations policies, manufacturing and development strategies and objectives, and other procedures	25%
• Coordinate day-to-day operations	20%
• Measure the Company's products delivery and performance data	15%
• Direct and oversee the work of [the Petitioner's] Manufacturing Technicians	15%

In its response to the RFE, the Petitioner did not provide any further information about how the positions qualified as managerial, or would do so within a year. Payroll records showed that the two positions each pay $10 per hour. Although the job descriptions list subordinates under both positions, the Petitioner did not claim to have hired those subordinates.[2]

The positions documented in September 2017, when the Petitioner responded to the RFE, deviated from the hiring schedule originally claimed in the business plan:

Business plan (excerpts):
- Sales and Marketing Manager
  To be hired first year
  $40,000/year
- Operations Manager
  To be hired second year
  $40,000/year
- Sales Representative
  One to be hired first year
  $35,000/year
- Manufacturing technician
  One to be hired first year
  $20,000/year

Payroll records in RFE response:
- Sales and Marketing Manager
  Started work July 9, 2017
  $20,800/year ($10/hr, 40 hrs/wk)
- Operations Manager
  Started work July 9, 2017
  $20,800/year ($10/hr, 40 hrs/wk)
- One unspecified employee
  Started work August 7, 2017
  $13,572/yr ($9/hr, 29 hrs/wk)

Because the Petitioner is no longer following the initial schedule, that schedule is not a reliable indicator of the support personnel that the Petitioner will employ during its first year of operations under the new office petition. The sales and marketing manager and operations manager do not have the subordinates named in their job descriptions. Furthermore, the actual salary payments documented in the RFE response are a little over half of the figures claimed in the business plan.

[2] Payroll records from August 2017 named a third employee, earning $9 per hour part time, but the Petitioner did not explain that person's title or duties, and in an accompanying statement, the Petitioner stated that it had submitted "proof of two employees." Because the Petitioner has not provided any information about the third employee's responsibilities, this August 2017 hiring does not contribute to a finding that the Beneficiary is a manager or executive, or that his subordinates are managers.

There is little reason to conclude that the business plan is largely accurate in its description of the job duties, because it is demonstrably inaccurate with respect to the hiring schedule, availability of subordinates, and salaries.

On appeal, the Petitioner submits a printout from O*NET, a Department of Labor-sponsored database of employment information. The printout lists the tasks of a "Sales Manager." The Petitioner states that these tasks are clearly managerial in nature, and that its sales and marketing manager is, by definition, a sales manager and therefore a manager. The O*NET listing, however, is a generic guide; the use of the title "sales manager" or something close to it does not prove that a given position actually has the duties shown in the O*NET listing.

The Petitioner has already made some sales, and thus begun doing business. The Petitioner does not, however, claim to have hired sales representatives to sell the products or manufacturing technicians to prepare and ship the products, which means that someone else at the company is doing so. It is possible that the third employee shares some of those duties, but the Petitioner has not shown this to be the case, and that third employee started later, and works shorter hours, than the other two employees.

A manager manages, rather than performs, the operational tasks of the company or a component thereof. The Beneficiary's two fully-identified subordinates have no subordinates of their own and therefore appear to be performing the functions they purport to manage. Given the many inaccuracies in the business plan, the Petitioner has not shown that this situation would change significantly during the company's first year of operations under a new office petition.

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 a beneficiary 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 an owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Concluding that the Petitioner has not shown that the Beneficiary will supervise managers within a year, the Director stated that an executive must supervise "a subordinate level of managerial employees." The Petitioner disputes this assertion on appeal, stating that the Director cited "no statutory or judicial authority for its assertion that the organization must have a subordinate level of managerial employees." The Petitioner added that if such a requirement existed, there would be no difference between a manager and an executive.

A key difference between a manager and an executive, as defined in the Act, is that a manager manages an organization or a subdivision thereof, but an executive "directs the management." This distinction forms the root of the Director's assertion that an executive must have "a subordinate level of managerial employees." The Petitioner is partially correct, insofar as the Act does not specifically define "the management" as managerial employees. It is conceivable that the management could take the form of contractors, for instance, provided that the executive maintained the proper level of oversight and control of those contractors. But whether "the management" is the same as "managerial employees," an executive cannot "direct the management" while at the same time *being* all, or part, of "the management" itself.

The Petitioner has claimed a level of managerial employees, but has not shown that those individuals actually qualify as managers, or will do so within a year of approval of the petition. The Petitioner has not shown that the new office will support an executive position within the required year.

We now turn from executives to managers. 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. If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act.

To determine whether the 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 United States 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."

In this instance, the Director found that the Petitioner has not shown that any of the planned positions subordinate to the Beneficiary are professional positions, requiring at least a bachelor's degree. The Petitioner does not contest this finding on appeal. We agree with the Director's finding; the record does not establish the education requirements of the subordinate positions or the educational credentials of the employees who hold those positions.

The Director found that the Petitioner had "not established that the Sales and Marketing Manager would be . . . a supervisory or managerial level position" within a year of approval, because "[t]he Sales and Marketing Manager is not indicated to have any direct subordinates in the first year." On appeal, the Petitioner states that the "Beneficiary will be performing primarily managerial duties at the end of the initial one-year period of approval," and "will have direct supervision over the initial Sales representative."

As we have shown, the Petitioner initially indicated that the sales and marketing manager would supervise a sales representative before the end of the first year. We have also shown, however, that subsequent developments have not been consistent with the initial business plan. The Petitioner has begun conducting sales work, but has not shown that it employs any sales representatives under the authority of the sales and marketing manager. The lack of demonstrated subordinates, together with the significantly reduced salary, does not tend to support a finding that the sales and marketing manager is primarily a manager or supervisor rather than a front-line sales worker. Because of the doubt and questions concerning exactly what the sales and marketing manager is doing, the Petitioner has not established that the position is supervisory or managerial. The Petitioner also has not shown that the position is professional.

On appeal, the Petitioner does not discuss the operations manager, but the above analyses apply equally to that position. The supervisory or managerial nature of the position is contingent on subordinates whom the Petitioner does not appear to employ, and the assertion that the Petitioner will employ them soon lacks credibility because the business plan is otherwise unreliable and in conflict with demonstrated facts in the record.

The Petitioner has not shown that the Beneficiary's subordinates are professionals, or will be acting as managers or supervisors within a year after approval of the petition. Therefore, the Petitioner has not shown that the Beneficiary will be a manager or executive during that required period.

IV. CONCLUSION

The Petitioner did not establish that its new office will support a managerial or executive position within a year of approval of the new office petition.

ORDER: The appeal is dismissed.

Cite as *Matter of E-I-, Inc.*, ID# 1181130 (AAO May 15, 2018)