U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-E- CORP.

DATE: NOV. 20, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an international freight forwarding and logistics services company, seeks to temporarily employ the Beneficiary as the chief executive officer 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, concluding that the Petitioner did not establish, as required, that the new office would support a managerial or executive position within one year of approval of the petition.

On appeal, the Petitioner asserts that the evidence establishes that the Beneficiary will be employed in a managerial capacity within one year and will supervise subordinate professional employees. The Petitioner maintains that the Director did not give sufficient weight to the company's business plan and the Beneficiary's detailed duty description.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification for 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. Section 101(a)(15)(L) of the Act. The petitioner must also establish that the beneficiary's prior education, training, 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.

employment qualifies him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

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 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).

"Managerial capacity" means as 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.

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) 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.

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director determined that the Petitioner did not establish that its new office would be able to support a managerial position within one year of approval of the petition.[2]

The Director acknowledged the submitted position description, but found that the Petitioner's business and hiring plans indicated that the Beneficiary would be a first-line supervisor of three non-professional employees within one year, and would not be performing primarily managerial duties. The Director also determined that the Beneficiary's subordinates would not be performing managerial or supervisory duties within one year.

On appeal, the Petitioner asserts that it satisfied all requirements for a new office and contends that the Director did not consider the company's reasonable needs when addressing its projecting staffing levels. The Petitioner claims that the Beneficiary will be managing three professional employees and the overall operations of the new company and meets all criteria for employment in a managerial capacity.

[2] The Petitioner claims that the Beneficiary will be employed in a managerial capacity and does not make an alternative claim that the Beneficiary would be employed in an executive capacity.

A. Business Plan and Projected Staffing

In the case of a new office petition, beyond the description of a beneficiary's proposed job duties, 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. 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).

The Petitioner intends to operate an international cargo freight forwarding and logistics business. It states that it will act as a third party logistics company providing integrated supply chain solutions including warehousing, forwarding, packing, consulting, and brokerage and transportation documentation. According to its business plan, the Petitioner's day-to-day operations will entail, in part, the following:

> [B]ooking cargo space with carriers, negotiating rates, arranging insurance, calculating the weight, volume and cost of goods to be moved, preparing quotations, invoices, bills of lading and letters of credit and keeping extensive records of all transported products. We also will be involved in acting as freight consolidators, buying bulk cargo space on trucks, ships and airlines and resell it at a higher rate. Part of our business as customs brokers will be clearing goods through international customs on behalf of an importing or exporting business. Our key responsibilities will including preparing documents; submitting information electronically; paying taxes, duties and excises on behalf of our customers and facilitating communication among the shipper, receiver and government agencies.

The Petitioner stated that it had already hired an administrator with an annual salary of $12,000 and expected to hire a business development manager and an air freight manager before the end of its initial year of operations. The Petitioner contends that the Beneficiary will qualify as a personnel manager as he will perform primarily managerial duties and will allocate 60 percent of his time to recruiting and supervising subordinate professional employees.

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. 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.

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.

The Petitioner initially stated that the business development manager position would require at least a bachelor's degree and would be responsible for business development planning, screening potential business deals, closing new business deals, researching and executing sales leads, and mentoring and directing managers and staff. It described the role as a "senior sales position" that works with the "internal team, marketing staff and other sales positions within the company." In response to a request for evidence (RFE) issued by the Director, the Petitioner added 17 "allied functions" to its initial job description for this position. These functions include "working with logistics engineers in development of Resource Planning," undertaking "regional presentations for the Contract Logistics Division," and maintaining "close working relationships with the Customer Service, Operations and Contract Logistics team."

Overall, the revised job description for this position included multiple references to employees, departments, divisions, and teams that will not exist within the Petitioner's organization during its first year of operations. Therefore, the probative value of the job description for this position is limited. Given the projected three-person support staff expected to be in place by the end of the initial year, it is reasonable to conclude that this employee will be engaged in sales activities and will not be performing supervisory or managerial tasks.[3] The Petitioner has not supported its claim that a bachelor's degree is required to perform sales duties in this field, and therefore has not shown that the business development manager will be a professional position.

With respect to the "administrator" position, the Petitioner stated that it is a full-time position[4] requiring a bachelor's degree. The Petitioner stated that this employee will provide planning assistance, office and facility management, produce and organize correspondence, maintain office supply inventory, arrange meetings and conferences, "provide administrative support to different teams of the company," and generally oversee the "internal/support" operations of the company. In response to the RFE, the Petitioner added approximately 30 "allied functions" to the original job description for this position. As with the additions to the business development manager job description, many of the newly assigned duties appeared to be inconsistent with the nature of the Petitioner's business and its proposed business plans, and therefore, the expanded job description has little probative value. For example, the Petitioner stated that the administrator will "oversee day-to-

[3] The business plan shows no projected subordinates for the business development manager in the Petitioner's first three years of operation.

[4] The Petitioner claims in its letters that it will pay the administrator a $36,000 annual salary, but also indicated it already filled the position with an unidentified worker who earns $12,000 annually. The business plan also indicates a starting salary of $12,000 for this position. Therefore, it appears that this is not actually a full-time position.

day operations of finished goods and raw material warehouse," "manage a staff of approximately 38 with four direct reports," oversee warehousing activities, and coordinate "warehousing execution for divisional strategies." The description provided in response to the RFE appears to describe a warehouse manager position for a large, established company, not an administrative position within the Petitioner's start-up company.

In fact, the record otherwise indicates that the administrator position has no projected subordinates for the first year or beyond and the position appears on the organizational chart as an assistant to the CEO. Therefore, this is not a managerial or supervisory position. Due to the inconsistencies and obvious inaccuracies in the submitted job description, we cannot determine what this employee will actually do and cannot conclude that the administrator would be a professional employee. Further, we note that the Petitioner stated that it already filled the position, but it did not identify the individual hired or provide evidence of his or her educational credentials in support of its claim that a bachelor's degree is required.

Finally, the Petitioner indicates that the airfreight manager position is full-time, requires a Bachelor's degree, and is responsible for "all the export/export airline haul rate management" activities of the company.[5] The Petitioner stated that the position will be publishing and selling day-to-day airfreight rates, maintaining business-to-business clients, drafting agent/airline/GSA contracts, and preparing competitor rate comparisons. In response to the RFE, the Petitioner listed additional "allied functions" which would include training and coaching team members, motivating teams, and a number of other supervisory tasks, despite the fact that this employee will not supervise any employees in the first year of operations. As with the other subordinate positions, the record does not establish that this employee will be a manager or supervisor, nor is there sufficient information to support the Petitioner's claim that the position requires a bachelor's degree.

Therefore, we agree with the Director's conclusion that the Beneficiary's supervisory duties, which would require more than half of his time, would not be those of a personnel manager who oversees a subordinate staff of managerial, supervisory, or professional employees.

We agree with the Petitioner's argument that a company's size alone may not be the determining factor in denying an L-1A visa petition without taking into account the reasonable needs of the organization. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

During its initial year of operations, the Petitioner plans to fill three positions, at least one of which, the administrator, appears to be a part-time position. As noted, the Petitioner's business plan provided a fairly detailed explanation of what its day-to-day operations will entail. Many of the

[5] The Petitioner stated in its support letter that it will pay the airfreight manager a $42,000 annual salary. The Petitioner's business plan indicates that the starting salary will be $30,000 with small, incremental increases.

operational duties related to the provision of logistics, transportation, customs, and other services that have not been assigned to any of the proposed employees. As such, we cannot conclude that the Beneficiary would be relieved from significant involvement in the day-to-day operations within the first year of operations. Further, as discussed, the Petitioner's job descriptions for the subordinate employees, while very lengthy, included information that clearly did not apply to this company, making it difficult for us to discern what the subordinates will actually do within the context of this business. The Petitioner must resolve these incongruities 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).

The Petitioner's response to the RFE included two agency agreements with other freight forwarders. The Petitioner explained that it would "share" warehousing, trucking, air cargo, and ocean freight services with these companies, and stated that these agreements would "ensure clients can request service in different states." The Petitioner did not indicate or establish that these agents would take the place of lower-level employees or wholly provide the services of the company. Moreover, the Petitioner's business plan does not indicate that the company intends to provide its services through a series of agency arrangements. On appeal, the Petitioner does not offer further explanation as to how these agents would assist the company in supporting a managerial position.

Finally, we note that the Petitioner emphasizes on appeal that the Director did not consider the business plan and notes that new employees would be hired in the second year of operations and beyond. As noted, the new office regulations allow the Petitioner no more than one year to grow to the point where it can support a managerial position; any proposed hiring that may occur after that initial year has no bearing on the adjudication of this petition.

As discussed further below, the Petitioner's description of the Beneficiary's duties, considered in light of the staffing and business plans, does not establish that he would perform primarily managerial duties within one year. Even though the Beneficiary would hold a senior position within the organization, the fact that the Beneficiary will manage a business and supervise subordinate employees does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. Sections 101(A)(44)(A) of the Act.

B. Duties

The Petitioner has consistently claimed that the Beneficiary will allocate his time follows: (1) 60% to hiring and supervising a professional team; (2) 20% to day-to-day management and administration; (3) 10% to mission, policy and planning; and (4) 10% to overseeing financial planning.

As discussed, the largest portion of his time would be allocating to overseeing three personnel, but the Petitioner has not established that these employees will be managers, supervisors, or professionals and therefore has not shown that this large portion of his time would be spent performing qualifying managerial duties. If the Beneficiary will be primarily spending his time

overseeing non-professional subordinates, then he will not be primarily performing managerial responsibilities within one year.

The remainder of the job description conveys the Beneficiary's senior position in the company, but describes his proposed role in very general terms that provide little insight into what he would actually do on a day-to-day basis by the end of the initial year of operations. For example, the Petitioner has assigned duties such as "build a program on quality and organizational stability through implementation of standards and controls, systems and procedures"; "developments in human services, management, and governance, philanthropy and fund development"; "develop and evaluate Company's relevancy in the community"; and "communicate the market trend on fund application towards logistic technology and innovation time to time." These types of descriptions do not provide a clear picture of the nature of the Beneficiary's proposed duties. 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 Petitioner has consistently stated that the Beneficiary will occupy the senior position in the new office, but has not submitted a job description or supporting evidence sufficient to demonstrate that he would primarily engage in managerial duties, or that the new office would support a managerial position, after the initial year of operations.

III. CONCLUSION

The Petitioner has not established that it will employ the Beneficiary in a managerial capacity within one year.

ORDER: The appeal is dismissed.

Cite as *Matter of E-E- Corp.*, ID# 756869 (AAO Nov. 20, 2017)