U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-L-&N- INC.

DATE: NOV. 23, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a computer software consulting company, seeks to temporarily employ the Beneficiary as the president and chief executive officer (CEO) 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 the Beneficiary was employed in a managerial or executive capacity abroad. In addition, the Director determined that the Petitioner did not demonstrate that the Beneficiary would be employed in a managerial or executive capacity in the United States within one year of an approval of the petition.

On appeal, the Petitioner contends that the Director did not consider its assertion that the Beneficiary acts in an executive capacity abroad. The Petitioner also asserts that the Director did not review all the submitted evidence specific to the Beneficiary's proposed U.S. employment, improperly required that it have employees in place when the petition was filed, and incorrectly concluded that it did not submit duty descriptions for its proposed U.S. subordinates.

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

[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.

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. 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.

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

We will first analyze whether the Petitioner established that it would employ the Beneficiary in a managerial or executive capacity within one year of the petition's approval.

In order to determine whether the Petitioner established that its new office will support a managerial or executive 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 or executive capacity. 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

In support of the petition, the Petitioner stated that it would "provide end-to-end network solutions from design to implementation on a turn-key basis with a core professional team." The Petitioner provided the following list of the duties for the Beneficiary:

- Develop the marketing plan and negotiate new business for the company in its niche market of End-to-End Network Solutions, Data driven decision making techniques, R&D, Security & Surveillance Solutions, and ITIL compliant managed services.
- Hire VP of Marketing, CFO/COA, and CTO
- Manage the day-to-day operations until new hires can be brought on board

In a request for evidence (RFE), the Director indicated that the Beneficiary's duty description was generic and lacked adequate detail and requested that the Petitioner submit information on what he would "actually do on a day-to-day basis."

In response, the Petitioner did not submit a duty description for the Beneficiary reflecting his daily tasks, but noted that he was being sent to the United States to launch the new venture since "the [United States] has a mature venture capitalist market" and because "over 95% of the products [the foreign employer] sells are from US vendors." The Petitioner also stated that the Beneficiary had met with U.S. information technology vendors in his previous trips to the United States, including among others. It further indicated that its business strategy, led by the Beneficiary, was to "secure authorized dealerships for walkthrough gates and metal detector products, barcode solutions & wireless products, and utilize online social media presence and technical blogs to drive sales in the US market." Likewise, the Petitioner explained that it had the "goal to reach the Gold Partnership level with [and] in 2018 [and] to market and provide such additional services to clients."

In addition, in a provided business plan, the Petitioner also set forth the following duties for the Beneficiary:

> To lead the organization & perform executive role in true professional manner, in accordance with stakeholders, board policies, objectives and goals. To strictly comply with Federal & State Laws while achieving business growth.

The proposed duties submitted for the Beneficiary are overly vague and they do not effectively convey his actual day-to-day managerial or executive tasks. The Beneficiary's job description includes generic duties that could apply to any manager or executive acting in any business or industry; such duties do not provide insight into the actual nature of his 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 detail the specific actions

the Beneficiary would take during its first year of operation to assure that the business would develop as necessary to support him in a managerial or executive capacity within one year.

The Petitioner submits few examples of marketing plans the Beneficiary would put in place, new business he would negotiate, day-to-day operations he would manage, board policies, objectives and goals he would follow, or federal or state laws he would ensure compliance with. In sum, the Petitioner has not sufficiently articulated the Beneficiary's proposed day-to-day duties in the United States and the record requires more detail as to his specific tasks to assess whether he would act primarily in a managerial or executive capacity within one year. Specifics are clearly an important indication of whether a beneficiary's duties are primarily managerial or executive 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 or executive capacity within the meaning of sections 101(a)(44)(A) and (B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial or executive in nature. *Id.* 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 or executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1103, 1108. 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 he would devote his time primarily to managerial or executive 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 would oversee a vice president of sales and marketing to be appointed in the third quarter of 2018, an already hired chief financial officer/certified public accountant (CFO/CPA), a chief technology officer (CTO, who was also listed as acting in this role for the foreign employer), and an executive assistant/secretary to be appointed immediately upon the approval of the petition. The chart also reflected that the vice president of sales and marketing would supervise a "business team" to be

hired during the third quarter of 2018 and that the CTO would oversee a software team lead, "hardware engineers," and a managed services manager all listed as "to be appointed." The chart further showed that the hardware engineers would oversee a "support team" that would be appointed "upon any Project award." In addition, the Petitioner indicated that the business team would consist of a sales team manager who would "develop and incentivize [his or her] own team of four to seven people."

On appeal, the Petitioner only vaguely indicates that it has submitted sufficient evidence to demonstrate that the Beneficiary would act in a managerial or executive capacity within one year. We note that the Petitioner must demonstrate that the Beneficiary's responsibilities will meet the requirements of one or the other capacity.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) 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." *Id.* 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*).

Further, 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. 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.*

The Petitioner has not submitted sufficient hiring plans and duty descriptions for the Beneficiary's proposed subordinates in the United States to establish that he would likely oversee subordinate managers or supervisors within one year of an approval of the petition. For instance, the Petitioner only expressly indicated that it will hire or engage five employees subordinate to the Beneficiary during the first year, the vice president of sales and marketing, a subordinate sales team manager, a CFO/CPA, the foreign employer CTO, and an executive assistant. Only one of these employees was reflected as having a subordinate within one year, the vice president of sales and marketing, who was

shown to oversee the "business team" consisting of a sales team manager who would appoint several sales representatives.

However, the Petitioner submitted vague duty descriptions for the Beneficiary's only asserted subordinate manager to be hired within the first year. For instance, the Petitioner indicated that the vice president of sales and marketing would perform the following generic tasks: "dealing with vendors," "principles tasks," "reporting to [the CEO]," organizing "sale[s] & marketing initiatives...strategic moves & alliance[s]...and business plans." This duty description does not sufficiently demonstrate that the vice president of sales and marketing would act in a supervisory position subordinate to the Beneficiary; for instance, the description does not detail how this proposed manager fits within the company's first year business plans including indicating the vendors he would deal with, "principal tasks" he would perform, sales, marketing, or business plans he would implement, or alliances and strategic moves he would direct.

Likewise, the Petitioner vaguely indicated that the claimed supervisor subordinate to the vice president of sales and marketing, the sales team manager, would lead "a well-established business plan," "develop and incentivize [his] own team of four to seven people," "create [a] sales funnel," and be "actively involved in revenue generation [and] client visits." Again, the Petitioner does credibly articulate the business plans this asserted manager would be responsible for, the nature and number of subordinates he or she would hire during the first year, when these claimed sales representatives would be hired, or the likely revenue generation he or she would be responsible for.

Beyond this, the Petitioner's hiring plans only vaguely state that the asserted subordinates to the CTO, such as the software team lead, hardware engineers, and managed services manager were "to be appointed," leaving it unclear whether they would be hired during the first year. In fact, the Petitioner does not submit projected salaries for the proposed members of its U.S. organizational chart, evidence that would be probative when compared to its financial projections. Without this detail, the Petitioner's first year hiring plans are not entirely clear, nor has it demonstrated that its projected payroll amounts would be sufficient to support the Petitioner's proposed first year organizational chart.[2] Therefore, the Petitioner has not credibly demonstrated that the Beneficiary would oversee managers or supervisors within one year. As such, it has not established that the Beneficiary would qualify as a personnel manager based on his supervision of subordinate managers or that he would act as an executive in an elevated position within a complex organizational hierarchy overseeing a subordinate level of managers.

In the alternative, the Petitioner has not established that the Beneficiary would supervise professional subordinates within one year as necessary to demonstrate he qualifies as a personnel manager.[3] We

[2] A financial projection included in a submitted business plan indicated the Petitioner would spend the following vaguely assigned amounts on payroll: officer ($95,000), business team ($83,200), and support team ($57,200).

[3] To determine 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

note that the Petitioner does not specifically contend on appeal that the Beneficiary would qualify as a personnel manager based on his supervision of professionals; however, it does indicate that his proposed subordinates within the first year would need bachelor's degrees. For instance, the Petitioner indicated that the foreign employer CTO has Master of Science degrees in computer science and physics, that the vice president of sales and marketing "must [have] an MBA," and that the sales team manager "must be a business graduate." However, as discussed, the Petitioner submitted vague duty descriptions for the proposed vice president of sales and marketing and sales team manager positions that do not demonstrate a bachelor's degree is required for minimum entry into these positions. Further, the duty description for the asserted CTO is similarly generic, stating only that he would be tasked with "provid[ing] [a] roadmap for cutting edge technologies, tools and development of own IT products." In each case, the Petitioner has not clearly articulated why bachelor's degrees are required for these positions; and in the case of the asserted CTO, it has not substantiated that this claimed subordinate is employed by the Petitioner or that he holds his asserted Masters degrees. Consequently, the Petitioner has not established that the Beneficiary would oversee professional subordinates within one year.

The Petitioner does not specifically assert on appeal that the Beneficiary would qualify as a function manager after one year. However, even if we were to consider this ground for eligibility, the Petitioner has not submitted a sufficient daily duty description for the Beneficiary; therefore, it has not clearly described his function or demonstrated that he would primarily direct the function rather than perform it. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

In addition, the Petitioner submitted vague business and investment plans that do not demonstrate that it would likely be sufficiently operational within one year to support the Beneficiary in a managerial or executive capacity. For instance, the Petitioner states that it plans on developing authorized dealerships and partnerships with various large information technology and telecommunications vendors such as [redacted] and [redacted] among others. It further indicated that its business strategy was to secure authorized dealerships with large U.S. based companies for the acquisition of [redacted] walkthrough gates and metal detector products." However, the Petitioner provides few details in its business plans as to how it would establish these relationships within the first year.

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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 fact, the Petitioner's business plan largely includes only general observations about the information technology market in the United States and sets forth few credible action items or milestones. For example, the Petitioner vaguely indicated that it would engage itself in "social media" and "technical blogs," but did clearly articulate how it would do this. Likewise, the Petitioner stated that it would establish accounts with several information technology distributors "by the end of April 2018;" however, it provided little explanation or evidence as to how it would establish these relationships approximately only one month after the date the petition was filed in March 2018. Further, the Petitioner references launching [redacted] and receiving a patent for a [redacted] but it does not sufficiently describe these technologies or how it would accomplish launching the aforementioned website and receive a patent on an application. The Petitioner also indicates that it would earn $1 million in revenue in 2018 from "consulting income," "e-commerce," "hardware/network," "software," and "support services," but there is little indication from the business plan what the nature of these products or services would be or how it would develop them. In sum, the Petitioner has not submitted a credible business plan demonstrating that it would develop sufficiently during the first year to support the Beneficiary in a managerial or executive capacity.

Lastly, the Petitioner further provided questionable evidence regarding its investment in the new venture. The Petitioner submitted bank records indicating that the foreign employer had transmitted wires to the Petitioner from February through April 2018 totaling approximately $323,000. However, these same bank records also indicate that most of this investment was promptly credited to unexplained vendors such as [redacted] and [redacted] The Petitioner does not explain the nature of these transactions or detail how they fit into its first year investment and business plans. Without further detail and evidence, the immediate depletion of these funds leaves question as to what investment it would use to successfully launch the new venture during the first year.

For the aforementioned reasons, the Petitioner has not established that the Beneficiary would act in a managerial or executive capacity within one year of an approval of the petition.

IV. FOREIGN EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The next issue we will address is whether the Petitioner established that the Beneficiary is employed in a managerial or executive capacity abroad. Because of the dispositive effect of the above finding of ineligibility; namely, our affirmation of the Director's conclusion with respect to the Beneficiary's proposed U.S. employment, we will only briefly address the remaining issue pertaining to his asserted employment abroad.

In the denial decision, the Director stated that although the Petitioner asserted that the Beneficiary oversaw approximately 14 subordinates abroad it did not submit duty descriptions for these positions or other documentation to sufficiently substantiate them. On appeal, the Petitioner contends that the Beneficiary devotes 65% of his time to acting in an executive capacity and 35% to acting as a

function manager. The Petitioner also asserts that the Director did not consider that the Beneficiary qualifies as an executive.

Upon review, we concur with the Director's conclusion that the Petitioner did not establish that the Beneficiary acts in a managerial or executive capacity abroad. First, the Petitioner states that the Beneficiary devotes 65% of his time to executive-level duties and 35% of his time to function manager tasks. A petitioner claiming that a beneficiary will perform as a "hybrid" manager/executive will not meet its burden of proof unless it has demonstrated that the beneficiary will primarily engage in either managerial or executive capacity duties. *See* section 101(a)(44)(A)-(B) of the Act. While in some instances there may be duties that could qualify as both managerial and executive in nature, it is the petitioner's burden to establish that the beneficiary's duties meet each criteria set forth in the statutory definition for either managerial or executive capacity. A petition may not be approved if the evidence of record does not establish that the beneficiary was primarily employed in either a managerial or executive capacity. Here, the Petitioner indicates that the Beneficiary devotes a majority of his time to executive-level duties; as such, we will only analyze whether he qualifies as an executive.

Similar to the Beneficiary's U.S. duty descriptions, the Petitioner provided generic foreign duty descriptions that do not sufficiently describe the Beneficiary's day-to-day executive-level duties abroad or credibly establish that he devotes his time primarily to qualifying tasks. The Beneficiary's duty description includes several generic duties that could apply to any executive acting in any business or industry and they do not provide insight into the actual nature of his role abroad. The Petitioner provided insufficient examples and little supporting documentation to demonstrate the Beneficiary's performance of qualifying executive duties abroad, such as strategic planning, policies, or "leading alliances" he implemented, goals and policies he put in place, new business he drove, or key account management he secured using "Service Level Agreements." Likewise, the Petitioner did not detail or document "selected industry standard practices" the Beneficiary "adopt[ed] for all group initiatives," investments in training programs he directed, executive orders and memos he issued, security or risk management protocols he ordered, or feedback and direction he provided on patents and products. Again, specifics are clearly an important indication of whether a beneficiary's duties are primarily managerial or executive in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1103, 1108.

In fact, the Petitioner questionably provides little supporting documentation to substantiate the foreign employer's claimed operations. For example, it submits no information regarding the current financial status of the foreign employer, its recent revenue or costs, or other evidence to demonstrate the level of operations reflected in the Beneficiary's duties. In contrast, the only evidence of the foreign employer's operations provided are letters submitted by various customers in Pakistan discussing information technology services the foreign employer provided from 2003 to 2006. However, although the Petitioner states that it "currently employs 22+ permanent & 7+ consultants in different countries" it provides no supporting evidence that it has operations in Dubai sufficient to support the Beneficiary in an executive capacity.

The Petitioner also submits vague marketing materials indicating that it performs a wide array of information technology services abroad, such as "IT infrastructure," "project management," "annual maintenance contracts," "data center training," "telecom services," amongst others, but provides almost no evidence to substantiate that it was providing these services abroad as of the date the petition was filed or that it has departments devoted to the provision of these services. Indeed, the Petitioner provided bank statements indicating the Beneficiary's receipt of salary from the foreign employer, but no evidence to substantiate that any of the other asserted members of its foreign organizational structure received salaries. Further, submitted foreign employer bank records include no apparent salary payments to the asserted members of its organizational structure. In total, the Petitioner has not submitted sufficient evidence to demonstrate that the Beneficiary acts abroad in an elevated position within a complex organizational hierarchy overseeing a subordinate level of managers.

For the foregoing reasons, we concur with the Director's conclusion that the Petitioner did not establish that the Beneficiary acts in an executive capacity with the foreign employer.

V. CONCLUSION

The appeal must be dismissed because the Petitioner has not established that the Beneficiary would be employed in a managerial or executive capacity in the United States within one year or that he is employed in an executive capacity abroad.

ORDER: The appeal is dismissed.

Cite as *Matter of D-L-&N- Inc.*, ID# 1841677 (AAO Nov. 23, 2018)