U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B&KH-T-, INC.

DATE: OCT. 4, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which intends to sell heat exchangers manufactured by its foreign parent company, seeks to temporarily employ the Beneficiary as president and chief executive officer 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: (1) the Petitioner had secured sufficient physical premises to house the new office, and (2) the new office would support a managerial or executive position within one year after approval of the petition.

The matter is now before us on appeal. On appeal, the Petitioner asserts that it meets all applicable requirements, and that its use of on-demand office space is sufficient for the company's early stages of operations.

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.*

[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.

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. SUFFICIENT PHYSICAL PREMISES

The Petitioner must establish that it has secured sufficient physical premises to house the new office. 8 C.F.R. § 214.2(l)(3)(v)(A). The Director found that the Petitioner had not met this requirement. The Petitioner asserts, on appeal, that the existing arrangement will suffice for the company's initial operations. We find that the Petitioner has not met the regulatory requirements.

We note that, throughout this proceeding and continuing through the appeal, whenever the Petitioner has been instructed to provide its own mailing address, it has instead provided the address of its attorney of record. Asked to specify where the Beneficiary would work, the Petitioner left that part of the petition form blank.

We further note that the Petitioner must meet all eligibility requirements at the time of filing. 8 C.F.R. § 103.2(b)(1). While the new office provisions of 8 C.F.R. § 214.2(l)(3)(v) make some allowances for future developments, the Petitioner must have already secured sufficient physical premises at the time of filing the petition.

The Petitioner stated that the company "is planning on hiring one to two employees in 2018 to start building up our client base." Therefore, the Petitioner needs to have secured sufficient physical premises for two or three workers (including the Beneficiary). The Petitioner stated: "The U.S. worksite is located inside a coworking space, [redacted] for startup companies," which "has conference rooms and phone booths set up that [the Petitioner] will be able to use to conduct private calls, video conferences, and meet their prospective and current clients." The Petitioner asserted: "This worksite is sufficient for our current operations as we are just starting out and want to become more attuned to the local market before settling down into a long-term lease for our permanent work-site in the future." The Petitioner did not provide the dimensions or location of any work space already secured by the company.

The Petitioner submitted invoices showing that the Petitioner paid for a [redacted] in [redacted] The Petitioner did not submit any documentation to show what the Petitioner got in exchange for the membership fee. The invoices did not show that the monthly membership fee alone entitled the Petitioner to use any dedicated office space for a full month, and the monthly amounts ($42.10 for January 2018 and $45 for February 2018) appear to be far too low to secure a month's guaranteed access to office space. Instead, the membership appears to be a means by which members can, for an additional fee, reserve and use work spaces. The Petitioner acknowledged that the membership was valid at "different [redacted] buildings around the world," rather than securing a

specified work area. The Petitioner stated that it will begin operations in the [redacted] but the invoices show only [redacted] corporate address in New York.

The Director found that the Petitioner had not established that it had secured any identifiable work space to house the new office.

On appeal, the Petitioner maintains that "[t]he [redacted] location is a sufficient office for the company in the first year as the location is used to develop potential clients and does not need a storage warehouse for inventory nor a large space for business operations." The Petitioner asserts that the Beneficiary's first subordinates "will be on the road the majority of the time" and therefore will not require any fixed work space.

While some businesses require less space, and more flexible arrangements, than others, the Petitioner must still have secured sufficient space to run its business operation. The Petitioner claims that "[t]he [redacted] office location was secured at the time of filing." But the Petitioner has not identified what, exactly, it secured with its membership fee. The invoices do not show that the Petitioner had full-time access to office facilities at the time of filing, or where those facilities are. The Petitioner has not established that it secured adequate physical premises; at best, it has simply identified the business from which it has the option to secure occasional access to those premises.

III. MANAGERIAL POSITION WITHIN ONE YEAR

The Petitioner must establish that the intended United States operation will support an executive or managerial position within one year of the approval of the petition. 8 C.F.R. § 214.2(l)(3)(v)(C). We agree with the Director's finding that the Petitioner has not met this requirement.

When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. The "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of a beneficiary in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally* 8 C.F.R. § 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

The Petitioner specified that it seeks to employ the Beneficiary 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.

The Petitioner filed its articles of incorporation in early December 2017, about five weeks before the filing date in January 2018. As noted above, the Petitioner stated that the company "is planning on hiring one to two employees in 2018." The Petitioner specified that one of those two would be a business development representative, but did not say what other position would be filled in 2018. The Petitioner also stated that it would hire a finance manager, technical director, and human resources manager in 2019; these hires would fall outside the first year of operations covered by this petition. At an unspecified later time, the Petitioner would eventually employ an accountant, sales representatives, and technical and information technology support staff.

In the denial notice, the Director found that the Petitioner had not shown that any of the Beneficiary's subordinates would be managers, supervisors, or professionals during the company's first year of operations. The Director concluded that the Beneficiary would essentially be a first-line supervisor of one or two sales representatives.

On appeal, the Petitioner asserts that several "[p]rojected subordinate positions will be managerial, supervisory, or professional in nature." The Petitioner repeats its prior assertion that the Beneficiary will hire "a Business Development Representative in the first year, then a Finance Manager, Human Resources Manager, and Technical Director in the second year to relieve herself of first-line supervisory work." The only position to be filled during the critical first year is that of the business development representative.

The Petitioner does not claim that the business development representative will be a manager or supervisor. To show that the position is professional, the Petitioner must establish that it requires 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."

The Petitioner submits a job description for the business development representative position, claiming that the position requires a bachelor's degree in marketing, business administration, or a related field. The job description makes no reference to the Petitioner's intended product line, and

appears to be a generic template. The job description refers to "working in a team environment" and does not mention travel except for a reference to "cold calls, emails, and company visits." This contrasts significantly with the Petitioner's letter, which indicated that the business development representative would, at first, be the Beneficiary's only subordinate rather than part of a team. The Petitioner also asserted that the subordinate would travel so frequently that he or she would not need a dedicated office space. Because this job description bears so little resemblance to the Petitioner's other statements elsewhere in the record, it has minimal evidentiary weight. The Petitioner has not established that its particular position of business development representative requires at least a bachelor's degree. Therefore, the Petitioner has not shown that the position qualifies as a profession.

The Petitioner has only vaguely described what the Beneficiary would do when the business development representative would be her only subordinate, before the company makes its second-year hires. The Petitioner stated that it "will first establish [a] US corporate website," which is not a managerial task, nor is it one of the business development representative's stated duties. The Petitioner also asserted that its "first three years . . . [will be] to mainly establish . . . sales, and after-sales service." Sales and service are likewise not managerial tasks, and the Petitioner has not shown that the supervision of one or two sales-oriented workers would take up a significant amount of the Beneficiary's time.

The timetable that the Petitioner has presented does not establish that the company would support a primarily managerial position for the Beneficiary within one year after approval of the petition.

IV. CONCLUSION

The Petitioner did not establish that it had secured sufficient physical premises to house the new office, or that it would support a managerial position for the Beneficiary within one year after approval of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of B&KH-T-, Inc.*, ID# 1599313 (AAO Oct. 4, 2018)