U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-T-L- INC.

DATE: OCT. 16, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a wholesale and retail trading company, seeks to temporarily employ the Beneficiary as the president and director 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 Petitioner had secured sufficient physical premises to house its proposed new office. Further, the Director determined that the Petitioner did not establish that the Beneficiary would act in a managerial or executive capacity within one year of an approval of the petition.

On appeal, the Petitioner states that it has secured a warehouse for the sale of its products and asserts that this is sufficient for it to commence business within the first year. In addition, the Petitioner asserts that the Beneficiary will act in a managerial capacity and contends that submitted letters demonstrate that he would have the ability to hire and fire professional subordinates within the first year.

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. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

We will first analyze whether the Petitioner established that it would employ the Beneficiary in a managerial capacity within one year of the petition's approval. The Petitioner does not claim that the Beneficiary would be employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary would be employed 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.

In order to determine whether the Petitioner established that its new office will support a managerial 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 capacity. The totality of the evidence must be considered in analyzing whether the proposed managerial 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 a submitted business plan, the Petitioner stated that it would "provide high quality and the lowest price for Hydraulic Cranes and Lifts." It also noted that it planned to sell "clothes, furniture and arts." The Petitioner submitted photographs of a warehouse space reflecting a sign indicating that the company was engaged in the "import, export, wholesale and retail of: used clothes [and] shoes, used hang bags, new furniture [and] arts." Further, the provided photographs showed used clothes and shoes in bundles, furniture, and framed posters stored in the warehouse.

In response to the Director's request for evidence (RFE), the Petitioner listed the following duties for the Beneficiary in his proposed position of president and director:

- Facility Set Up: Finding a strategic location in California and setting up distribution, sorting & grading, storage and sales departments. – 20% of his time
- Investment planning: Formulating and implementing investment plans from the startup of the company to the level of sales. – 20% of his time.
- Business development planning: Formulating and implementing the Sales & Marketing strategies such as designing dealer policies, pricing structure etc. Prepare and implement comprehensive business plans to facilitate achievement by planning cost-effective operations and marketing development activities. – 20% of his time.
- Production Planning: Formulating and implementing the flow of production, selection of production machinery. Sourcing the suppliers of raw material. – 20% of his time.
- Hiring New Employees: Hiring a dedicated team of American employees in all the departments. – 20% of his time.

In denying the petition, the Director concluded that the Beneficiary's duties were insufficient to demonstrate the managerial tasks he would perform on daily a daily basis. On appeal, the Petitioner provides some of the following additional duties for the Beneficiary:

- establish the company's "goals and strategies,"
- oversee "budgets and ensures resources are properly allocated,"
- oversee "all other executives and staff," including performance, schedules, and trainings,
- communicate with the "board of directors and other executives to determine if company is in accordance with goals and policies and the business plan,"
- "oversee budgets and prepare research,"
- "hiring first line employees, supervisors, executives, or managers,"
- "encourage business investment,"
- "promote economic development,"
- "implement the organization's guidelines,"
- "preside over quality control,"
- "oversee the investment of funds" and "execute capital-raising strategies,"
- "provide visionary and strategic leadership,"
- "ensure members of the Board of Directors have the information necessary to perform their fiduciary duties,"
- "develop and maintain relationships with other associations, industry [*sic*], and government officials," and
- "provide adequate and timely information to the Board."

The proposed U.S. duties submitted for the Beneficiary are overly vague and they do not effectively convey the Beneficiary's actual day-to-day managerial tasks. The Beneficiary's job description includes several generic duties that could apply to any manager 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 within the company's first year business plans. For instance, the Petitioner did not specify the actions the Beneficiary would take during its first year of operation to demonstrate that the business would develop as necessary to support him in a managerial capacity within one year. In fact, the Beneficiary's duty description includes few references to the company's intended business, the sale of cranes and lifts, used clothes and shoes, furniture, and art.

The Petitioner submits little detail regarding the investment plans the Beneficiary will implement, sales and marketing strategies he will formulate, dealer policies he will design, goals and strategies he will establish, and budgets he will set. Likewise, the Petitioner does not articulate "business investment" the Beneficiary would encourage, economic development he would promote, quality control he will preside over, organizational guidelines he will implement, or relationships with "associations, industry, and government officials" he would maintain. The record requires more detail as to the Beneficiary's specific tasks to assess whether he would primarily act in a managerial capacity within one year. Specifics are clearly an important indication of whether a beneficiary's duties are primarily 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).

Moreover, some of the Beneficiary's duties appear to bear little relation to its proposed business plans during the first year leaving question as to their credibility. For instance, the Petitioner states that the Beneficiary would be tasked with setting up a "sales department"; however, its hiring plans indicate that it projects to hire only one employee devoted to marketing and sales during the first year. Further, the Beneficiary's duties mention him "implementing the flow of production," managing the "selection of production machinery," sourcing "raw materials," and presiding over "quality control." However, the Petitioner submits evidence indicating that it plans to sell cranes and lifts, used clothes and shoes, furniture, and art that have already been produced or used by other individuals or entities. The evidence indicates that these items would be stored at the warehouse rented by the Petitioner and shipped and sold from this location. There is little indication that this warehouse would be a production facility with machinery, that it would be procuring raw materials for production, or that a quality control system related to production would be required.

In addition, the Beneficiary's duty description on appeal discusses his communication and collaboration with a board of directors, but there is little evidence to indicate that such a board exists or would exist during the first year. The duties also mention the Beneficiary raising capital and dealing with mergers and acquisitions, but the Petitioner's business plans do not detail these activities during the first year. In sum, these discrepancies leave question as to the credibility of the Beneficiary's asserted duties and whether they truly reflect his actual day-to-day managerial tasks during the first year.

The fact that the Beneficiary would manage the business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section

101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. Section 101(A)(44)(A) of the Act. 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 in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. 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 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 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 in nature within one year of the petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed managerial 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 projected organizational chart reflecting that the Beneficiary would oversee a "director finance," a director, and a marketing and sales employee. The chart further indicated that the director would supervise an installation employee, a separation employee, and a grading and storage employee.

The Petitioner has not submitted sufficient evidence to establish that the Beneficiary would act as a personnel manager during the first year. 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. We note that the Petitioner does not contend that the Beneficiary would act as a function manager within one year; as such, we will only analyze whether he would act as a personnel manager. 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." Section 101(a)(44)(A) 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*).

In the request for evidence (RFE), the Director requested that the Petitioner submit a more detailed organizational chart listing all its proposed positions, the duties of these positions, and their expected educational levels. The Petitioner largely ignored this request, but it did identify three individuals by

name whom it projected would fill the positions directly subordinate to the Beneficiary. In denying the petition, the Director pointed to this lack of requested evidence.

On appeal, the Petitioner submits no information on the duties and expected education levels of the Beneficiary's proposed subordinates during the first year. For this reason, it has not established that the Beneficiary would oversee the "work of other supervisory, professional, or managerial employees" within one year as necessary to qualify him as a personnel manager. Section 101(a)(44)(A) of the Act; 8 C.F.R. § 214.2(l)(3)(v)(C). For instance, the Petitioner's projected organizational chart reflects that the Beneficiary's sole subordinate manager, the director, would oversee an employee devoted to "installation" and another focused on "grading and storage." However, without a clear description of duties of the employees listed in the projected organizational chart, it is not clear what installation and grading the Petitioner refers to in these proposed position titles. Further, given this ambiguity, it is not clear that the Beneficiary's lone asserted managerial subordinate, the director, would act in a supervisory capacity within one year.

The Petitioner also appears to indicate on appeal that the Beneficiary would oversee professional subordinates; however, we cannot determine that the positions subordinate to him would likely be professional without a detailed explanation of the duties and educational requirements of these positions and a clear indication as to why they would require a bachelor's degree.[2]

The Petitioner also submitted vague and inconsistent business plans and milestones that are insufficient to demonstrate that it would likely develop adequately during the first year to support the Beneficiary in a managerial capacity. In the RFE, the Director requested that the Petitioner submit a business plan including timetables for proposed actions to launch the business during the first year. However, the stated actions items submitted by the Petitioner were generic and offered little insight into how it would successfully launch its proposed business during the first year. For instance, the Petitioner stated that it would "implement the marketing strategy" within two months, set "up a dealership network in CA, AZ, NM, [and] TX within 4 months," and set up "company owned sales & storage facilities in AZ, NM, & TX." However, it did not describe the referenced marketing strategy, what actions it would take to launch a dealership network in four states in only four months, what it would specifically sell in this proposed network, or what actions it would take to set up storage facilities in three different States.

Further, it also provided other action items vaguely titled "purchase the inventory," "set up the office," and "advertising plan." It also appears that a number of items on the milestone list had already been completed, such as "setting up the entity in California," searching for a "suitable

[2] 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."

location for a warehouse and sales office," and leasing this space. In sum, the Petitioner did not submit sufficiently specific and credible business plans to demonstrate that it would develop sufficiently during the first year to support the Beneficiary in a managerial capacity.

Further, the submitted business plan includes material discrepancies that leave question as to their credibility. For instance, the business plan included a chart titled "financial highlights by year" indicating that the company earned over $750,000 in revenue in 2016 and over $1 million in revenue in 2017; however, there is no indication that the Petitioner earned revenue prior to the date the petition was filed.[3] In addition, the same financial highlights table projected that the Petitioner would earn $1.3 million in 2018, the year generally coinciding with its proposed first year of operation, while a later "projected profit and loss" table indicated that it would earn over $1.87 million in sales and revenue during that same year. It is also noteworthy that the Petitioner provides little support for how it would generate these levels of revenue during its first year. In sum, the Petitioner's conflicting statements as to its first year financial projections leave further question as to whether it would likely develop sufficiently during the first year to support the Beneficiary in a managerial capacity.

The Petitioner has also not sufficiently established the size of the investment in the new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(2). In the submitted business plan, the Petitioner stated that the "initial plan is to invest the money with the existing business, however if and when required we will go for bank loans or investment from the investors." The Petitioner did not clearly articulate the amount of required investment in the new venture or how investment would be allocated to successfully launch the business during the first year. On appeal, the Petitioner states that the Beneficiary's foreign employer invested $45,000 in the new venture and points to bank statements it asserts establishes this investment. We acknowledge that the Petitioner submitted bank statements from August 2017 indicating that over $42,000 was wired into its U.S. account; however, these same records indicate that this amount was spent down to approximately $31,000 by October 2017. Most importantly, the Petitioner does not describe how these amounts would be used during the first year to successfully launch the business as necessary to support the Beneficiary in a managerial capacity.

The Petitioner also submits evidence of the foreign employer's finances which leave doubt as to whether it would have sufficient funds to support the new business. For instance, the most recent foreign employer audited financial statement from 2016 reflected that its revenue was "nil," that it paid only 3,496 Malaysian Ringgits (MR) in "wages & allowances," and that it lost over 73,000 (MR) during that year. Therefore, without further supporting documentation as to the foreign employer's finances, the submitted documentation does not appear to support a conclusion that the foreign employer would be capable of supporting investment in the Petitioner.

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

[3] We note that the petition was filed on December 7, 2017.

III. SUFFICIENT PHYSICAL PREMISES

The Director also denied the petition concluding the Petitioner did not establish that it had secured sufficient physical premises to commence doing business. 8 C.F.R. § 214.2(l)(3)(v)(A). In denying the petition on this ground, the Director pointed to photographs submitted by the Petitioner indicating that its warehouse location was still under construction and included no office equipment The Director concluded that this space did not appear sufficient to house the company's employees. On appeal, the Petitioner states that its warehouse space is sufficient to begin selling products and notes that office equipment is not required to demonstrate sufficient physical premises to commence doing business.

Upon review, we concur with the Director that the Petitioner has not demonstrated that it secured sufficient physical premises to commence doing business. As noted by the Director, the Petitioner appears to have secured a warehouse in which it is storing used clothing and shoes and furniture which it plans to ship and sell. The space also appears to include a few tables for employees to use as work stations. However, as we have discussed, the Petitioner did not submit duty descriptions for the employees it projects it would hire during the first year. Therefore, without this evidence, we are not capable of determining whether the secured space is sufficient for the Petitioner's needs. For this reason, we concur with the Director's conclusion that the Petitioner did not demonstrate that it had secured sufficient physical premises to commence doing business during the first year.

IV. CONCLUSION

The appeal will be dismissed because the record does not include sufficient evidence to establish that the Beneficiary would be employed in a managerial capacity within one year of the petition's approval and it does not demonstrate that the Petitioner secured sufficient physical premises to commence doing business.

ORDER: The appeal is dismissed.

Cite as *Matter of A-T-L- Inc.*, ID# 1699549 (AAO Oct. 16, 2018)