U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-B-E- INC.

DATE: OCT. 17, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an ice cream shop, seeks to temporarily employ the Beneficiary as the general manager 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 California 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 it satisfied all evidentiary requirements for a new office petition and argues that the Director overemphasized the Petitioner's projected staffing levels. The Petitioner maintains that the Beneficiary will hire professionals and manage the essential function of completing the start-up of the new business.

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. 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.

[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.

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 includes information regarding the new office's physical premises, 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).

The statute defines "managerial capacity" 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.

The term "executive capacity" is defined as 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.

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

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

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.

On appeal, the Petitioner asserts that it satisfied all requirements for a new office and suggests that the Director did not consider the company's reasonable needs when addressing its projecting staffing levels. The Petitioner asserts that the Beneficiary will be managing three professional employees and the overall operations of the new company, as well as managing the essential function of supervising the start-up of the new business.

A. New Office Requirements

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).

1. Projected Staffing and Business Plan

The Petitioner provided evidence that it has leased an 800 square foot retail location and has taken steps to remodel the premises in order to open its Italian gelato shop. The Petitioner's business plan indicates that the shop will be open daily from 2 p.m. until 11 p.m. and will have three employees subordinate to the Beneficiary, including one cashier and two employees to serve and attend to customers. The Petitioner stated it will pay these employees $10.00 per hour.[2] According to the Petitioner's financial and hiring projections, it expected to add one additional employee during its third year of operations.

In a request for evidence, the Director noted that the Petitioner did not provide job descriptions for the proposed subordinates or indicate the educational requirements for the positions. An organizational chart submitted in response lists the positions subordinate to the Beneficiary as "cashier" and "customer service." The Petitioner stated that the cashier will assist the Beneficiary with administrative duties, business operations, manage orders, and collect payments, while the two customer service/server employees will greet and serve the customers. The Petitioner stated it may eventually hire a manager to replace the Beneficiary.

In addition, the Petitioner submitted an organizational chart which also depicts "outsourced independent contractor professionals" – the Petitioner's counsel and an accountant. The Petitioner's financial projections indicate that the company would spend $1200 per month on "professional services and fees," but the Petitioner did not provide supporting evidence outlining the nature and scope of the services these independent contractors will provide.

As noted, the Director concluded that the evidence did now show that the Beneficiary would be supervising a subordinate staff of managers, supervisors, or professionals within one year. Rather, she found that the Beneficiary would be supervising three non-professional employees and that the staffing would not be sufficient to support a managerial or executive position.

On appeal, the Petitioner states that the Beneficiary will hire and manage three "professional" employees, now described as "a cashier, who would also serve and sale Ice Cream to customers; another employee [who] would sale, serve, and attend to customers; and a third employee would serve as the production manager, who will make the Ice Cream in accordance to the company's proprietary formula."

[2] The Petitioner did not state whether it would hire full- or part-time staff. The financial projections in the business plan indicate that the employees would earn $2600 per month or $31,200 per year, significantly higher than the stated $10.00 hourly wage, which equates to an annual salary of $20,800 for a full-time employee.

The Petitioner has referred to the Beneficiary's position as both executive and managerial, and now appears to claim that the Beneficiary will oversee professionals and a "production manager." 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."[3] 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.

The Petitioner did not state the educational requirements for the subordinate positions, and has not supported a claim that a position for a cashier or server in an ice cream shop requires the completion of a bachelor's degree as a minimum requirement. Further, while the Petitioner has now assigned the title "production manager" to one of the proposed positions, it did not describe this as a supervisory or managerial position, specifically claim that a bachelor's degree is required to make ice cream, or submit any explanation for this change in its projected hiring plans. Even though the Beneficiary will have the authority to hire and fire subordinate staff, we agree with the Director's determination that the Petitioner has not demonstrated that he will qualify as a "personnel manager" within one year.

As emphasized by the Petitioner on appeal, 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. S*ee* section 101(a)(44)(C) of the Act. However, it is appropriate for U.S. Citizenship and Immigration Services 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).

The Petitioner plans to hire three people to serve gelato and handle retail transactions in a business that will be open for 63 hours per week. The Petitioner has not shown that the employees will assist the Beneficiary with other non-managerial aspects of the business, such as payroll, banking, purchasing inventory and supplies, marketing and advertising, and routine administrative and

[3] 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."

clerical matters associated with operating the business. 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 or executive duties within one year. Even though the Beneficiary would hold the senior position within the organization, the fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial or executive in nature. Sections 101(A)(44)(B) of the Act.

B. Duties

On appeal, the Petitioner claims that the Beneficiary is an "executive" who will also "manage an essential function."

The Petitioner stated that the Beneficiary will "oversee all aspects of the business operations, such as: control the business finances, hire and fire personnel, business development, promote the business and oversee the customer services." On appeal, the Petitioner adds that the Beneficiary is coming "to establish the new office, hire and manage 3 [professional] employees, teach and oversee the production, sales, and the complete operation of the new U.S. affiliate."

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 brief job description establishes the Beneficiary's authority to oversee the business, but also indicates he would be significantly involved in its day-to-day operations and required to perform first-line supervisory, marketing, administration and financial tasks that are not managerial or executive in nature. The job description does not indicate that he will be primarily focused on the goals and policies of the organization within one year or that he will otherwise be engaged in executive-level duties as the manager of the Petitioner's gelato shop.

The Petitioner also asserts that the Beneficiary will manage an essential function as he "plans to start, hire, train, pay employees, and supervise the complete start-up of the business." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function". *See*

section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. 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, or more specifically, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform duties related to the function. *See Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016).

Although the Beneficiary may have managerial authority over the start-up of the new office, this authority would not be equivalent to managing an essential function, and such start-up activities would not reasonably consume his time after the initial year. Rather, once the start-up phase is over and the business is open, staffed, and operational, the Beneficiary's duties would involve first-line supervision of non-professional personnel, marketing, administrative duties, purchasing inventory and supplies, and other non-managerial tasks that would more likely than not prevent him from performing primarily managerial tasks. For these reasons, the Petitioner has not established that it would support a function manager position within one year of the approval of the petition.

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 or executive duties, or that the new office would support a managerial or executive position, after the initial year of operations.

III. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of M-B-E- Inc.*, ID# 684650 (AAO Oct. 17, 2017)