U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B.M.T-, INC.

DATE: SEPT. 25, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a six-employee grocery business,[1] seeks to continue the Beneficiary's temporary employment as its general manager under the L-1A nonimmigrant classification for intracompany transferees.[2] *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 record did not establish, as required, that (1) the Beneficiary would be employed in the United States in a managerial capacity under the extended petition; and (2) it has a qualifying relationship with the Beneficiary's foreign employer.

On appeal, the Petitioner asserts that it submitted sufficient evidence to establish the above elements and states that it will be submitting additional supporting documentation to demonstrate the petition was approvable when filed. The Petitioner checked the box on the Form I-290B, Notice of Appeal or Motion, indicating that a brief and additional evidence would be submitted within 30 days of filing the appeal. To date, no additional evidence or argument has been submitted. Accordingly, the record is considered complete.

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

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[1] In a letter submitted in support of the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it originally planned to operate a retail and wholesale clothing business in California; however, that business did not perform well and was closed. The Petitioner determined that a specialty grocery store business in the State of Georgia would be more viable and profitable. The Petitioner obtained authorization from the State of Georgia to conduct business in that state in 2015, and entered into a lease for the operation of a grocery store in the same month. The Petitioner asserted that it commenced business operations in the State of Georgia in 2016 and opened the grocery store to the public in 2016.

[2] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period November 1, 2015, until October 31, 2016. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary 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 one year within the date of approval of the petition to support an executive or managerial position.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. 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.*

A petitioner seeking to extend an L-1A new office petition must also submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status, evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director found that the Petitioner submitted a vague and general description of the Beneficiary's proposed duties, submitted two different versions of its organizational structure, and did not submit sufficient evidence of its staffing and financial status to demonstrate that it would employ the Beneficiary in a primarily managerial capacity under the extended petition. The Petitioner asserts on appeal that it submitted sufficient evidence to establish that the Beneficiary will be employed in a managerial capacity.[3]

The Act defines the term "managerial capacity" as an assignment within an organization in which the employee primarily manages the organization or a department, subdivision, function, or component; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function; if the employee directly supervises other employees, has the authority to take personnel actions, or if no other employee is directly supervised, functions at a senior-level within the organization 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.

We will address both the Petitioner's description of the Beneficiary's intended duties as well as the Petitioner's staffing to determine whether the Petitioner has established this eligibility requirement. We note that when reviewing staffing levels as a factor in determining whether an individual is acting in a managerial or executive capacity, we must take 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.

[3] As the Petitioner does not claim that the Beneficiary will perform duties primarily in an executive capacity, we will restrict our analysis to the Beneficiary's claimed managerial capacity.

A. Duties

When examining the executive or managerial capacity of a beneficiary, we look first to a petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definition of managerial capacity has two parts. First, the petitioner must show that the beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Second, the petitioner must prove that the beneficiary will be *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the petitioner's other employees. *See, e.g.*, *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

In the letter of support, the Petitioner stated that the Beneficiary will continue to "control and oversee the management of the company's operations and employees," "be responsible for planning and ensuring the implementation of the strategies of the business operations and expansion," and "oversee the execution of his goals, policies and plans." These vaguely described duties do not convey an understanding of what the Beneficiary will do for the Petitioner on a daily basis.

In response to the Director's request for evidence (RFE), the Petitioner provided a lengthy narrative describing the Beneficiary's duties and allocating the time the Beneficiary would spend on those duties. The Petitioner indicated that the Beneficiary would spend: 10 percent of his time negotiating contracts and establishing protocols; 20 percent of his time hiring, training, and conducting performance evaluations in addition to supervising the sales and assistant managers; and 20 percent of his time determining budgetary needs, preparing budget requests, and reviewing economic forecasts to determine hiring additional personnel and expanding into other markets. This portion of the description does not relate any of the duties specifically to the Petitioner's operation of a grocery store except in the most general way. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. This generic overview is insufficient to establish the Beneficiary's actual role within the petitioning organization.

The Petitioner also stated that the Beneficiary would spend 50 percent of his time establishing procedures for product and supply chain management, including product demand reports, marketing, distribution planning, sales, and advertising. These duties are not sufficiently detailed to determine whether the duties will include managerial duties or will include the non-qualifying tasks necessary to operate the business. The Petitioner further explains this responsibility by stating that the Beneficiary has visited "various markets in the United States, in order to understand the available products and the market gaps, consumer profiles, price positioning space, distribution channels, packaging formats and branding opportunities." It is not clear from the record whether the Petitioner expects the Beneficiary to continue to engage in these activities, but if so, these duties are not managerial in nature. Researching potential markets, pricing, and consumers' profiles and exploring distribution channels, packaging formats, and branding are not managerial duties as defined in the statute, but rather are non-qualifying duties required to operate and expand the Petitioner's business.

The Petitioner does not provide further evidence on appeal regarding the Beneficiary's daily duties. The fact that the Beneficiary will manage or direct a 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. Sections 101(A)(44)(A) of the Act. While the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial in nature. Without additional detailed information on the Beneficiary's proposed position, the Petitioner has not established the Beneficiary's actual role within the U.S. company and has not established that he will perform in a managerial capacity.

B. Staffing

Beyond the required description of the job duties, we review the totality of the record when examining the claimed managerial capacity of a beneficiary, including the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The Petitioner submitted two different organizational charts. The first chart identifies the Beneficiary at the top of the chart as the general manager, and shows two individuals reporting directly to him. His two direct reports are in the (1) purchasing/imports/inventory department, and (2) in the accounts and financing department. The chart shows three additional individuals reporting to both of the Beneficiary's direct reports. The three individuals on the third tier of the chart are identified as a marketing employee, a sales (store manager), and a second store manager.

The Petitioner offers a revised organizational chart in response to the Director's RFE without explanation. The Beneficiary is again at the top of the chart as the general manager, but now one of his direct reports is identified as an "assistant manager" and the purchasing/imports/inventory department has been eliminated on this organizational tier. Additionally, two of the three departments listed on the third tier of the original chart are shown reporting directly to the Beneficiary with the revised jobs titles of "meat department manager" and "sales/catering." A third department, the warehouse/inventory department, has two vacant positions.

The Petitioner includes brief descriptions for the positions on the revised chart and its Georgia Quarterly Employer's Wage Report for the quarter in which the petition was filed shows that the Petitioner employed six individuals. However, neither the position descriptions nor the record includes evidence of employees who carry out the day-to-day duties of operating a grocery store. The record does not include evidence of stockers or cashiers or other individuals who perform the daily tasks of opening, operating, and closing a grocery store. The Petitioner does not include evidence of individuals currently employed who order and maintain inventory. The record does not include consistent evidence of the positions within the Petitioner's business and evidence of how the

Petitioner has the necessary staff to operate the Petitioner's grocery store and relieve the Beneficiary from performing primarily non-qualifying duties, including the first-line supervisory duties of non-professional employees.[4]

The regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the Petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support a managerial position. If a business does not have the necessary staffing after one year to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible for an extension.

The record does not include sufficient evidence to establish that the Beneficiary will be employed in a managerial capacity as defined in the Act. The Petitioner has not submitted additional evidence or argument on appeal. Accordingly, the Petitioner has not overcome the Director's decision on this issue.

III. QUALIFYING RELATIONSHIP

The record initially did not include sufficient evidence to establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer. To establish a "qualifying relationship," the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See* section 101(a)(15)(L) of the Act; *see also* 8 C.F.R. § 214.2(l)(1)(ii) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate").

The Petitioner's articles of incorporation do not include the filing date the Petitioner was incorporated in the State of California; however, the California corporation database shows that the Petitioner was registered on April 1, 2015. The Petitioner initially submitted an undated stock certificate No. 1 that did not include the number of shares issued to the foreign entity. In response to

[4] When evaluating whether a beneficiary manages professional employees, we 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 focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity. The record here does not include sufficient evidence to establish that any of the positions subordinate to the Beneficiary's require a bachelor's degree to perform them.

the Director's RFE on this issue, the Petitioner submitted stock certificate No. 1 showing that the Petitioner had issued 21 of its authorized 5000 shares to the Beneficiary's foreign employer on August 18, 2015. The Petitioner also submitted stock certificates No. 2 in the amount of 779 shares, dated September 18, 2015, and stock certificate No. 3 in the amount of 540 shares, dated January 5, 2016, both issued to the Beneficiary's foreign employer. The record also includes the Petitioner's stock certificate ledger listing the three stock certificates issued which indicated that the consideration paid for each share was $500. A review of the Petitioner's bank statements shows wire transfers from the foreign entity and deposits made in dollar amounts corresponding to the dates and cost for the issuance of these shares. Although the record included confusing language regarding the type of qualifying relationship claimed and the Petitioner's initial evidence did not meet its burden, the current evidence of record establishes the Petitioner's qualifying relationship with the Beneficiary's foreign employer. The Director's decision with respect to this issue is withdrawn.

IV. DOING BUSINESS

While not addressed in the Director's decision and not a basis for our decision in this matter, we note that the Georgia State corporate records do not show that the Petitioner continues to do business in that state. The Georgia State database shows that the Petitioner's business status was revoked on , 2016. A second company with a similar name was administratively dissolved on the same date. Thus, we question the Petitioner's continued interest in and operation of a grocery store in Georgia. Although the corporate entity appears to be active in California, the record does not include probative evidence that the Petitioner operates a business in California or any other state. The issue of if and where the Petitioner is doing business must be addressed in any future proceeding.

V. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary will be employed in a managerial position for the Petitioner.

ORDER: The appeal is dismissed.

Cite as *Matter of B.M.T-, Inc.*, ID# 666855 (AAO Sept. 25, 2017)