U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-E-Z- LLC

DATE: APR. 4, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner intends to design, supply, and build escape room games as its "main activity" and to engage in the wholesale of "custom-branded promotional goods" as a secondary business activity. It seeks to temporarily employ the Beneficiary as its chief executive officer ("CEO") 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 Beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner states that it "greatly departed" from its original business plan because of unforeseen setbacks.

Upon *de novo* review, we will dismiss the appeal because the Petitioner has not established that the Beneficiary will be employed in the United States in an executive capacity.

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.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. EXECUTIVE CAPACITY IN THE UNITED STATES

The Petitioner claims that the Beneficiary's proposed U.S. employment will be in an executive capacity. As the Petitioner does not claim that the Beneficiary would be employed in a managerial capacity, we will limit our discussion to addressing the Petitioner's claim and will not consider whether the Beneficiary would be employed in a managerial capacity.

"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.

Based on the statutory definition of executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). The Petitioner must also prove that the Beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in an executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the Beneficiary's actual duties and role in a business. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Supporting Evidence

The petition form was filed in October 2017 and indicates that the Petitioner was established in 2015, had no employees at the time of filing, and would compensate the Beneficiary $50,000 annually in his proposed position as the company's CEO. In a supporting cover letter, the Petitioner stated that the Beneficiary would "oversee a large subordinate staff" upon approval of this visa petition and that he would be responsible for monitoring the company's revenues and profits, developing its business strategies and expansion plans, and overseeing activities, such as importing, storage, distribution, and client communications, which are directly related to the company's "wholesale of branded promotional goods imported from China." The Petitioner also provided a job duty breakdown stating that the Beneficiary would direct, design, and implement "strategic operational plans" and review "operations and activity reports, potential sales, and performance data" to establish a need for "program improvement" and cost reduction measures as well as determine strategies for reducing costs. The job duty breakdown included job duties that could only be carried out provided the Petitioner had an existing subordinate staff to execute the underlying operational duties. For instance,

the Petitioner stated that the Beneficiary would "[m]anage integrated project plans" in a timely and cost-effective manner, oversee new staff training, "monitor management personnel activities and reports of lower level personnel," and oversee and direct promotion activities. As previously noted, however, the Petitioner stated in the petition form that it did not have an existing support staff at the time of filing.

The Petitioner's cover letter also includes a proposed organizational chart for "Year 1 of its operations." The chart shows six positions – the Beneficiary at the top of the hierarchy, a sales manager and a business development manager as his direct subordinates, and two customer service representatives and a sales representative at the bottom of the hierarchy. Only two individuals – the Beneficiary and the business development manager who is claimed to be the Petitioner's owner – were specifically named in the chart, thereby indicating that there were no known candidates to fill the remaining positions at the time this petition was filed. The Petitioner also provided a business plan which indicates that in addition to the Beneficiary and the business development manager who is claimed to be the Petitioner's owner, the Petitioner would hire a sales manager and two part-time customer service representatives within the first year of operation. In contrast with the cover letter, the business plan indicates that a sales representative would not be hired until the Petitioner's third year of operation.

In a request for evidence (RFE), the Director acknowledged the Petitioner's plans for future hires, but observed that only the position of business development manager was filled at the time of filing. The Director instructed the Petitioner to provide clarifying evidence regarding its proposed staffing and the Beneficiary's proposed job duties and to establish that the proposed staffing arrangement would be sufficient to relieve the Beneficiary from having to primarily perform non-executive job duties.

In response, the Petitioner did not address the discrepancy between the business plan and its supporting cover letter and instead provided a second cover letter reiterating the initial claim that the Beneficiary will oversee five subordinates by the end of its first year of operation. The new cover letter includes the same organizational chart as in the original and also contains job descriptions for the positions the Petitioner seeks to fill during its first year of operation. According to the monthly action plan that was included in the latter cover letter, which discusses projected actions over the course of the first 12 months of the Beneficiary's employment, the Petitioner does not plan to hire employees until the Beneficiary arrives to the United States to assume his position as CEO. Namely, the plan states that during his first month of employment the Beneficiary, together with the business development manager, will select candidates to fill the positions of sales manager, sales representative, and two part-time customer service representatives. The new cover letter also reiterated the Beneficiary's original job description and qualifications, but did not explain how the Petitioner would relieve the Beneficiary from having to primarily perform its operational tasks upon his initial arrival. The Petitioner provided a separate letter discussing its current negotiation for the purchase of a "controlling stake" in another entity.

In the denial decision, the Director observed that the Petitioner has not acted on the projected activities discussed in its business plan, noting that a support staff has not been hired and that the Petitioner's 2018 quarterly wage report shows only one employee. The Director also acknowledged the Petitioner's submission of a pay stub for one other individual, but found that the Petitioner had not

submitted evidence demonstrating that this individual works for its organization. The Director determined that the Petitioner did not establish that its organization is adequately staffed to support the Beneficiary in an executive position.

On appeal, the Petitioner describes setbacks it has experienced in acquiring and renovating office space; it claims that the Beneficiary managed the renovations for the new office space and that he will "handle daily operations and staff management" once he assumes his proposed position as CEO.

B. Analysis

We find that the Petitioner has not established that it had the ability to support the Beneficiary in an executive position based on the circumstances that existed at the time of filing. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

Although the Petitioner provided a job duty breakdown for the Beneficiary and a proposed subordinate staff, we cannot overlook the fact that it claimed "0" employees at the time of filing. Despite providing an inconsistent organizational chart listing the company's claimed owner as the Beneficiary's only subordinate, the Petitioner did not explain how a support staff comprised of only one employee would be sufficient to relieve the Beneficiary from performing primarily non-executive duties in his proposed position. Moreover, the organizational chart is inconsistent with the petition form, which indicates "0" employees at the time of filing. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Despite plans to hire additional staff in the future, the record indicates that the Petitioner had no more than one employee – the Petitioner's claimed owner – at the time this petition was filed; this leads us to question the Petitioner's ability to relieve the Beneficiary from having to carry out the organization's operational tasks. By statute, eligibility for this classification requires that the duties of the proposed position be "primarily" executive in nature. Section 101(A)(44)(B) of the Act. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in an executive capacity. *See, e.g.*, section 101(a)(44)(B) of the Act (requiring that one "primarily" perform the enumerated executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The fact that the Petitioner did not intend to hire a support staff until after the Beneficiary assumes his proposed position indicates that the Petitioner had no means to relieve the Beneficiary from having to perform the critical operational tasks that would ensure the organization's ability to develop and conduct business. The Beneficiary's discretionary authority over the Petitioner's staffing and business matters does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(44)(B) of the Act.

As noted earlier, the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). The Petitioner in this instance provided supporting evidence showing that it would acquire staff gradually during its first year of operation and that it would operate as a new office, even though it did not indicate in the petition form that the Beneficiary is coming to the United States to

open or be employed in a new office.[1] We note, however, that the Petitioner was inconsistent in its hiring plan. Despite providing an organizational chart in two separate cover letters indicating that it planned to hire a sales representative during its first year of operation, the Petitioner provided inconsistent information in its business plan, which states that a sales representative would not be hired until the Petitioner's third year of operation. The Petitioner has not provided evidence to reconcile this inconsistency. *See Ho*, 19 I&N Dec. at 591-92.

In any event, the Petitioner has not provided evidence to show that it was adequately staffed at the time this petition was filed. It is therefore unclear who, other than the Petitioner's claimed owner, was available to assist with the organization's operational job duties at the time of filing or who, other than the Beneficiary and the claimed owner, would be available to carry out those duties if the Beneficiary were to assume his position as CEO. Although we acknowledge the job descriptions the Petitioner submitted in response to the RFE, the fact that the Beneficiary would assume a position with an entity that claimed "0" support staff at the time of filing indicates that those job descriptions were not applicable to the Petitioner at the time of filing, but rather were prospective and would apply only after the Petitioner hires staff to carry out its operational and administrative tasks.

Despite the Petitioner's emphasis on the Beneficiary's position title and discretionary authority, we cannot solely focus on these elements without adequately considering the lack of employees who would relieve the Beneficiary from having to carry out the operational tasks of the organization. The Petitioner neglected to properly consider that this deficient staffing structure would adversely affect the Beneficiary's position, as it would require him to perform primarily non-executive job duties in order to ensure the organization's continued operation. The Petitioner cannot effectively demonstrate that the Beneficiary would be employed in an executive capacity when, at best, the company's claimed owner was the only employee who could support the Beneficiary in his proposed position at the time of filing. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

On appeal, the Petitioner does not address its deficient staffing structure or resolve the previously noted discrepancies; instead it focuses on the added expense and "logistics challenges" that resulted from the untimely termination of its business lease. The Petitioner also continues to focus on its projected future success and anticipated expansion, meanwhile overlooking the regulatory criteria requiring it to demonstrate eligibility based on the facts and circumstances that existed at the time of filing. As discussed above, the record indicates that the Petitioner did not have the capacity to relieve the Beneficiary from having to allocate his time primarily to non-executive job duties at the time of filing.

[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). Although the Director cited regulatory criteria that applies to "new office" petitioners, we note that the Petitioner checked the box "No" when asked if the Beneficiary is coming to the United States to open a "new office" in Section I, No. 12 of the Form I-129 L Classification Supplement. Therefore, even if the facts in this matter indicate that the Petitioner may qualify as a new office under the relevant regulatory provisions, the Petitioner did not seek treatment as a new office at the time of filing and therefore does not warrant treatment under the new office regulations.

III. REMAINING ISSUES

In addition, although not addressed in the Director's decision, we find that the Petitioner has not provided sufficient evidence to establish that it has a qualifying relationship with the Beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, a 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 generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376.

In the present matter, the Petitioner claims that it and the Beneficiary's foreign employer have an affiliate relationship by virtue of being majority owned by the same individual. 8 C.F.R. § 214.2(l)(1)(ii)(L).

Regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities. *See, e.g.*, *Church Scientology Int'l*, 19 I&N Dec. 593; *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). Ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

We find, however, that the record lacks sufficient evidence to establish the Petitioner's ownership. Although the Petitioner repeatedly refers to [redacted] as its sole owner, it does not provide objective evidence, such as stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest, to support its ownership claim. As noted earlier, the Petitioner must provide relevant, probative, and credible evidence to support its assertions. *See Chawathe*, 25 I&N Dec. at 376.

Based on the dispositive effect of our findings regarding the Beneficiary's proposed employment in an executive capacity and the lack of sufficient evidence establishing that a qualifying relationship exists between the Petitioner and the foreign entity, the appeal will be dismissed and we will reserve the issue regarding the Beneficiary's employment abroad in an executive capacity.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of T-E-Z- LLC*, ID# 2878496 (AAO Apr. 4, 2019)