U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF G-P-G- CO.

DATE: APR. 11, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which intends to invest in and provide educational services, seeks to temporarily employ the Beneficiary as the president/chief executive officer (CEO 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 Beneficiary will be employed in the United States in a managerial or executive capacity within one year, or that she has been employed abroad in a managerial or executive capacity.

On appeal, the Petitioner contends that the Director did not consider all of the submitted evidence and failed to apply the preponderance of the evidence standard to the facts presented. The Petitioner asserts that the Beneficiary has been employed abroad in an executive capacity, and maintains that its new office would support the Beneficiary in an executive capacity within one year of approval of the petition.

Upon *de novo* review, we will dismiss the appeal as the Petitioner has not established that the new office would support an executive position within one year. As this is a fundamental element of eligibility and the Petitioner has not satisfied this element, we will reserve the remaining issue.

## 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

[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.

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 AN EXECUTIVE CAPACITY

The primary issue to be addressed is whether the Petitioner established that the new office would support an executive position within one year. The Petitioner does not claim that the Beneficiary would be employed in the United States in a managerial capacity.

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.

In the case of a new office petition, we review a beneficiary's proposed job duties as well as 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).

### A. Duties

The Petitioner indicates that it plans "to cooperate with" an existing U.S. entity [redacted] doing business as [redacted] "to operate an education center to provide after school services."

The Petitioner stated that the Beneficiary, as president/CEO of the new office, will perform the following duties:

- Report to the Board of Directors; establish U.S. company's policies, goals, and objectives; implement the strategic goals and objectives of the organization;
- Give direction and leadership toward the organization's achievement in philosophy, mission, strategy, and objectives;

- Exercise discretionary decisions on business strategies and overall direction of U.S. company;
- Carry out the strategic plans and policies as approved by the board of directors;
- Review reports, representation and financial statements from vice president and department managers to determine progress and status in attaining objectives;
- Formulate planning recommendations to the board of directors;
- Oversee budgets, investments, and operations of organization; recommend yearly budget for board approval.

This description is overly broad, as it focuses on the Beneficiary's authority over policy, strategy, and "overall direction" of the business without explaining the specific tasks she would be performing on a day-to-day basis to carry out these responsibilities by the end of the Petitioner's initial year of operations. It also refers to a "vice president" position that does not appear on the Petitioner's proposed organizational chart, and does not contain any specific references to the company's intended business activities.

The Petitioner also submitted a separate table with a lengthy description of the Beneficiary's proposed position; specifically, it listed a total of approximately 60 duties and arranged them into groups, with each group of duties requiring 10% of her time. However, despite its length, the description is very general, repetitive (with some duties listed two or three times), and does not provide any meaningful insight into what the Beneficiary would be doing as the president/CEO of a center providing after school educational services. For example, more than half of the listed duties are related to the company's financial affairs, and include: establishing "overall financial accounting and financial management systems"; reviewing and approving financial business plans and forecast; establishing financial and accounting policies and goals; establishing financial procedures and standards; overseeing finance strategies and activities; utilizing activity-based financial analysis; monitoring financial performance; reviewing financial information; reviewing financial statements; directing the preparation of financial statements; reviewing and implementing "finance, accounting, billing and auditing procedures"; coordinating fiscal activity reporting activities; supervising the implementation of the financial plan; developing systems to safeguard the company's financial assets; overseeing budgeting and budget implementation; and overseeing "financial management." While the Petitioner has conveyed the Beneficiary's authority over the company's financial matters, it is unclear how these represent discrete tasks that the Beneficiary would perform on a day-to-day basis, or how she would spend more than half of her time on such duties given the intended nature and scope of the business.

Many of the remaining duties resemble those in the shorter description quoted above and resemble elements of the statutory definition of "executive capacity." For instance, the Petitioner indicated that the Beneficiary will "establish and adjust" the company's policies, objectives, strategies, development objectives and the "whole organization"; "give direction and leadership toward the organization's achievement"; report to the board of directors; "oversee the implement[ation] of the strategic goals and objectives of the organization"; and direct the management of the organization. The Petitioner did not specify the types of strategies and policies she would be expected to establish and implement within the context of its business in support of its claim that such tasks would require a significant portion of her time within one year. Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy

the Petitioner's burden of proof. *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); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Here, the Petitioner has not provided the necessary detail or an adequate explanation of the Beneficiary's proposed activities in the course of her daily routine.

Finally, in response to a request for evidence (RFE), the Petitioner submitted another statement of the Beneficiary's proposed duties, which was, like the previous description, lengthy but lacking in probative details regarding the Beneficiary's actual proposed day-to-day tasks. The Petitioner grouped the duties into five undefined areas of responsibility. Many of the duties were repeated from the earlier description, but most of the finance-related tasks that comprised nearly half of the initial description were absent from the description submitted in response to the RFE. Overall, the description did not add additional specificity to those provided previously.

The Petitioner has conveyed that the Beneficiary, as the company's senior employee, would have authority to establish plans, policies, and objectives for the company, supervise any employees hired, and make major decisions regarding its finances and overall direction. However, the Petitioner must also establish that these types of responsibilities would primarily occupy the Beneficiary's time within one year, and to make this determination, we review the totality of the evidence. The Beneficiary's discretionary authority is only one of several factors we consider in determining whether the Petitioner would employ her in a qualifying capacity at the end of the one-year new office period.

B. Business Plan and Project Staffing

In order to qualify for L-1A nonimmigrant classification during the first year of operations, the regulations require a petitioner to disclose the proposed nature of the business and the size of the U.S. investment, and establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). 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.

As noted, the Petitioner indicates that it intends to "cooperate with" [redacted] to operate an educational after-school services facility. The Petitioner submitted a signed memorandum of understanding (MOU) between it and [redacted] which states the following:

> [The Petitioner] desires to own and invest in a new afterschool education and extra-curricular program business run by [redacted] located and limited to [redacted] Texas, USA. . . . [redacted] shall manage and operate the facility programs, to include, but not limited to staffing, budget, accounting, HR, Marketing, Brand, Product Management, Education, Curriculum, and all other business activities, except for investment. [The Petitioner] is solely responsible for all investment funding and shall provide appropriate timely financial resources to support such efforts as build a new company within the USA.

Under the MOU's terms, the Petitioner agreed to invest $10,000 per month towards operating expenditures, $2500 per month for capital expenditures, and $5000 per month for marketing and advertising costs, and, in exchange, would receive 70% of the net profits of the business with the remaining 30% going to [redacted] The Petitioner submitted a copy of a check for $15,000 paid to [redacted] in April 2018.

Based on this evidence, it appears that the Petitioner will not be operating the [redacted] after-school services location and will merely own and fund the business. If the Petitioner does not intend to manage, operate, or staff the location, or handle its human resources functions, market its services, provide its services, or be responsible for any of its business activities, then it is unclear how it would require the services of an executive in the United States to oversee the operation of the business. The Petitioner has not identified any additional investments or activities to be undertaken in the first year or thereafter.

The Petitioner submitted its business plan at the time of filing and a revised/updated business plan in response to the Director's RFE. The initial business plan contained references that did not appear to apply to the operation of an after-school educational services business. For example, the initial business plan states that the Petitioner "will offer clients a reliable and efficient solution for more efficiency in production and cost control," noted that one of the trends in its industry is "rising domestic raw material prices" in the United States, and observed that "clients in the logistics and internal trade industry tend to be loyal." There are also references to "local manufacturers and wholesalers" who would serve as competition to the new business. The Petitioner removed some of these anomalous references (after the Director noted them in the RFE) and submitted a revised business plan, but it did not explain why such references were included in its business plan in the first place.

Other aspects of the business plan, including a sales forecast, timetable for proposed actions, and financial projections are the same or similar in both version of the business plan. However, the Petitioner made changes to the personnel plan when it revised the business plan in response to the RFE.

In the initial plan, dated May 2018, the Petitioner indicated that it would hire a marketing manager, two sales and marketing clerks, a finance manager, an accountant, an education manager, and four teachers, with all employees to be hired by December 2018. The business plan contains a passing reference to the Petitioner's "plan to cooperate with" [redacted] but does not explain the terms of its agreement with [redacted] or the fact that the Petitioner's role in the new [redacted] Texas location appears to be that of an owner and investor, rather than the operator or manager of the business.

The business plan indicated that the Petitioner anticipates $500,000 in "products/services" sales with $250,000 in direct costs of sales, $100,000 in "other expenses," and projected net income of $150,000. At the same time, the Petitioner indicated that it anticipates paying $400,000 in salaries and wages alone during the initial year of operations. The financial plan also indicates that the Petitioner would triple its sales in its second year and achieve sales of $2.5 million in its third year. However, the business plan does not mention any intended activities beyond investing in one 1000 square foot [redacted] location and it is unclear how the company would grow at the stated rate. Although the business plan refers to "monthly pro-forma tables . . . included in the appendix," no

appendix or detailed financial information was provided. Further, as noted, under the terms of the above-referenced MOU, the Petitioner is to provide [redacted] with $17,500 per month in funding, and in exchange receive 70% of the net profits of the business managed and operated by [redacted] This financial arrangement is not reflected in the Petitioner's financial projections.

The revised business plan submitted in response to the RFE reflected positions for an operations director and an assistant in place of the marketing manager and two sales and marketing assistants, and the Petitioner indicated that all positions (including five teachers) would be filled by October 2018. The Petitioner indicated that it had filled the positions of operations director, accountant, and education manager and provided evidence of wages paid to three individuals. However, as already noted, the Petitioner's MOU with [redacted] indicates that [redacted] would be responsible for all of the activities the Petitioner attributed to these new employees and every other activity "except for investment."

Absent some explanation for the inconsistency between the terms of the Petitioner's MOU with [redacted] and the staffing plans outlined in the Petitioner's business plan, we cannot determine how the Petitioner will be staffed and structured within one year, and cannot determine whether the Petitioner would be able to support an executive position. The Petitioner must resolve this ambiguity 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). Neither business plan sufficiently reflects the terms of the MOU or explains the departure from those terms.

In the case of a new office petition, it is reasonable to expect a petitioner to submit a detailed and credible business plan that satisfies the evidentiary requirements for new offices and is consistent with other evidence in the record and with the petitioner's own statements regarding its anticipated development during the first year. Here, the submitted business plan did not contain sufficient relevant information, particularly since the Petitioner submitted evidence (specifically, the MOU) that conflicted the limited information that the business plan did provide.

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, 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.*

As noted, the Petitioner submitted a broad description of the Beneficiary's position that does not defined her actual proposed duties in sufficient detail. While the Petitioner submitted a business plan identifying personnel to be hired in the first year, it is lacking sufficient detail regarding its start-up costs, financial projections, operating expenses and other critical information necessary to evaluating the feasibility of the plan. Further, we cannot overlook the fact that the Petitioner submitted a signed

MOU indicating that its role with respect to the intended afterschool educational services business would be limited to that of an investor. Therefore, although the projected organizational chart does show the Beneficiary at the head of the organizational hierarchy, the Petitioner's assertions regarding the Beneficiary's employment capacity and the nature and scope of the business are not adequately supported by the evidence in its totality.

Finally, the Petitioner contends that the Director did not consider the congressional intent in creating the L-1 visa category and also points to the current U.S. policy to "Buy American Hire American." We note, however, that an immigration benefit cannot be granted to a petitioner that has not established that it meets the eligibility requirements for the benefit being sought.

For the foregoing reasons, the Petitioner did not demonstrate that the Beneficiary would primarily engage in executive duties, or that the new office would support an executive position, after the initial year of operations.

## III. RESERVED ISSUE

As the Petitioner has not overcome the Director's adverse determination regarding the Beneficiary's proposed U.S. employment, and this issue is dispositive of the appeal, we will reserve the remaining issue of whether the Petitioner established that the Beneficiary was employed in a managerial or executive capacity abroad.

However, we will briefly inform the Petitioner of potentially derogatory information regarding the Beneficiary's foreign employment which should be addressed in future proceedings. The Petitioner claims that its foreign affiliate has employed the Beneficiary as its deputy general manager since August 2013. The Beneficiary applied for B1/B2 and F-1 nonimmigrant visas at the U.S. Consulate in Beijing in October 2015 and May 2017. Although she indicated her employment with the Petitioner's foreign affiliate on her visa applications, she stated that her position was that of an "office worker" on two occasions, and a "financial cashier" on the most recent application. This information, if not explained, would tend to undermine the Petitioner's claims that she served as "one of the top executives" of the foreign affiliate.

## IV. CONCLUSION

The appeal will be dismissed for the above stated reasons. 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 G-P-G- Co.*, ID# 2941451 (AAO Apr. 11, 2019)