U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R- INC.

DATE: APR. 29, 2019

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner operates a gas station/convenience store[1] and seeks to temporarily employ the Beneficiary as "owner & president" of its new office[2] 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 Vermont Service Center denied the petition, concluding that the Petitioner did not establish, as required, that the new office would support the Beneficiary in a managerial or executive position within one year of the petition's approval. The Director expressed concerns about the realistic expectation that the Petitioner will attain an organizational complexity to support the Beneficiary in a managerial or executive position.

On appeal,[3] the Petitioner disputes the denial contending that the Director "did not have a factual understanding of [the Beneficiary]'s business success with several companies he owned overseas."

Upon *de novo* review, we find that the petitioner has not overcome the basis for denial. Therefore, 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

[1] Although the Petitioner identified itself in the petition form as an import-export operation, it did not specify the goods or products it would import and export and offered evidence that it owns and operates a gas station/convenience store.

[2] 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.

[3] Although we questioned the Petitioner's "terminated" business status pursuant to a routine search of state business records, the Petitioner has responded to our intent to dismiss and request for evidence showing that it has satisfied state requirements and is currently in good standing in the Commonwealth of Virginia, where it conducts business.

admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). 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 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 Petitioner claims that it will employ the Beneficiary in an executive capacity. The primary issue to be addressed in this discussion is whether the Petitioner provided sufficient evidence to establish that its operation would support the Beneficiary in an executive capacity within one year of the petition's approval.

"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.

A. Duties

The record shows that the Petitioner owned and operated a gas station/convenience store at the time of filing. Although the petition form indicates that the Petitioner will do business as an import-export operation, the Petitioner did not identify any goods or products it would export and instead provided information that focused exclusively on its purchase and operation of a gas station/convenience store, which came equipped with five store clerks who worked for the previous owner.

In a separate cover letter, the Petitioner provided a job duty breakdown stating that during its first year of operation the Beneficiary will analyze costs and establish budget requirements, review performance data and determine ways to reduce costs, determine staffing requirements, prepare customs documents and financial statements, make financial forecasts, set profit goals and implement "innovative marketing strategies," and approve pricing policies. The Petitioner stated that a store manager would "take over the administrative and day-to-day duties" within its first year of operation and claimed that the Beneficiary will direct and oversee the daily operations and performance of its gas station/convenience stores. The Petitioner did not provide a similar job duty breakdown for the second year of operation. Instead, it broadly stated that the Beneficiary will "direct operations" for two gas station/convenience stores, develop strategies to improve its business model, monitor revenue and profits, track industry trends, develop policies and procedures, and oversee personnel.

The Petitioner also provided a business plan indicating that it intends to expand its business by purchasing a second gas station/convenience store during its second year of its operation. However, it did not define the Beneficiary's role in the expansion process, state the specific tasks he would perform, or indicate the portion of time the Beneficiary would allocate to any non-executive job duties that are associated with the anticipated expansion. Further, the Petitioner stated that its current store is staffed with store clerks and a station manager and that the second operation will be similarly staffed. Despite indicating that the gas station manager would make staffing decisions and ensure that the staff acts in accordance with the company's goals and policies, section 5.1 of the business plan states that the Beneficiary "will personally supervise the work of his employees" to ensure that they provide good customer service; the plan does not indicate the precise portion of time that the Beneficiary would allocate to overseeing the non-managerial and non-professional convenience store staff beyond the Petitioner's first year of operation.

Further, the record shows that a market analysis was conducted to determine the ideal location for a gas station/convenience store and indicates that a similar analysis would be conducted to determine the location for the second operation. The Petitioner did not state who, if not the Beneficiary, would perform the market analysis going forward. Likewise, the Petitioner described various marketing strategies it plans to implement, including the use of social media outlets, to communicate with prospective customers. However, it did not explain the role of "social media presence" within the scope of a gas station/convenience store nor did it state who, if not the Beneficiary, would be responsible for carrying out this marketing-related job duty.

In a request for evidence (RFE), the Director observed that the record lacks sufficient evidence demonstrating that the Petitioner will undergo sufficient growth in its first year of operation so that it would support the Beneficiary in a position that would require the primary portion of his time to be allocated to executive-level job duties. The Director further noted that the Petitioner did not establish that its projected staff would relieve the Beneficiary from having to primarily perform non-executive job duties within one year of the petition's approval.

In response, the Petitioner provided a statement describing the Beneficiary's history and success in other business endeavors, asserting that these past successes will ensure the Petitioner's success and its ability to transition the Beneficiary to an executive position with primarily executive job duties. Although the Petitioner repeated its intended plans for expansion, it acknowledged the possibility that the expansion would not take place within a one-year period. Nevertheless, the Petitioner maintained the claim that the Beneficiary would transition to an executive position within one year asserting that his sole ownership of the entity is indicative of the executive nature of the proposed position, which will include reviewing financials, having discretionary authority over staffing issues "and company decisions," and developing "a practical expansion strategy." The Petitioner stated that the store clerks and store manager will "insulate" the Beneficiary from having to perform non-executive job duties, such as purchasing products and setting schedules for the store clerks. The Petitioner broadly stated that the Beneficiary will be responsible for overseeing the store manager to ensure proper handling of the "logistical tasks," introducing policies and procedures, and ensuring that tasks are completed timely and according to company policies.

The Petitioner also provided a letter from the former owner of the Petitioner's gas station/convenience listing the various job duties performed by the store manager and clerks during the course of his ownership. This information does not, however, impart relevant information about the actual job duties the Beneficiary would carry out as the owner of a gas station/convenience store operation.

We find that the Petitioner provided a deficient job description that is so general that it could describe virtually any executive or senior management position with any company. The job description offers only vague information that focuses on the Beneficiary's discretionary authority, but says little about the actual tasks he would perform once the company is no longer in the "new office" stage of development. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or 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). Although the Beneficiary's duties may change as the company expands, the Petitioner can only speculate as to when the expansion would actually take place and it has provided no specific information as to the Beneficiary's role and job duties in the course of that expansion.

In the denial decision, the Director reiterated concerns about the likelihood that the Petitioner's operational complexity would adequately develop to support the Beneficiary in an executive position within one year of the petition's approval. The Petitioner contends that the Director did not properly focus on the Petitioner's ability to support the Beneficiary in an executive position within one year of this petition's approval.

We find that the Director repeatedly remarked on the lack of evidence that the Petitioner would adequately develop and be able to support the Beneficiary in an executive position *within one year of this petition's approval*. We also find that the Beneficiary's history in successfully running foreign businesses, whose operations did not involve a gas station/convenience store, is not probative in this matter, where the primary focus is on an entirely different business activity and the likelihood that an entity operating as a gas station/convenience store would be able to support the Beneficiary in an executive capacity within one year of the petition's approval.

We acknowledge that the Beneficiary, as the Petitioner's owner, would assume a position as its most senior employee and that as a result, he would have authority to establish plans, policies, and objectives for the company and make major decisions regarding its finances and overall direction. However, the Petitioner has not established that these types of responsibilities would primarily occupy the Beneficiary's time within one year of this petition's approval. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. Section 101(A)(44)(B) of the Act. Therefore, even though the Beneficiary may exercise discretion over the Petitioner's day-to-day operations, a broad overview of his responsibilities in overseeing the operations of a gas station/convenience store is insufficient to establish that his actual duties during the Petitioner's first year of operation would lead to primarily executive duties within one year of this petition's approval.

B. Projected Staffing and Business Plan

Next, we will address the Petitioner's staffing and organizational hierarchy and the Beneficiary's position within that hierarchy. If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we take into account the reasonable needs of the organization, in light of its overall purpose and stage of development. *See* section 101(a)(44)(C) of the Act.

The Petitioner claimed five employees at the time of filing and indicated that they would perform the duties necessary to service the customers of a gas station/convenience store operation. The Petitioner provided evidence showing that it purchased the retail operation with an existing staff. However, it did not clarify how its staffing structure, within the context of a gas station/convenience store retail operation, would elevate the Beneficiary to an executive position.

In the RFE response, the Petitioner reiterated its intent to expand its operation by purchasing a second gas station/convenience store, although it stated that it "cannot guarantee" that its expansion plans would materialize within its first year. Nevertheless, the Petitioner maintained the claim that the Beneficiary would transition to an executive position within its existing retail operation by the end of its first year, pointing to the Beneficiary's position as the company's "sole owner" as a supporting factor. We note, however, that 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. Section 101(a)(44)(B) of the Act. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Although the Petitioner claimed that the store staff would "insulate" the Beneficiary from having to perform non-executive job duties, as noted earlier, it provided only a vague job description and did not specify the actual executive tasks the Beneficiary would perform on a daily or weekly basis within the context of its business operation.

In light of the deficient evidence the Petitioner has submitted to support this petition, we cannot conclude that it would have the staffing composition to elevate the Beneficiary to an executive position within one year where he would primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise.

III. 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 R- Inc.*, ID# 2232517 (AAO Apr. 29, 2019)