U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-V- CORP

DATE: APR. 30, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, which intends to operate a real estate business, seeks to temporarily employ the Beneficiary as president 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 Vermont Service Center denied the petition, concluding that the Petitioner did not establish, as required, that it has secured sufficient physical premises to house the new office and that it would be able to support a managerial or executive position within one year of approval of the petition.

On appeal, the Petitioner submits additional evidence pertaining to its leased office premises and asserts that the Director's finding that it did not meet its burden to show that the Beneficiary would be employed in a managerial or executive capacity is inconsistent with the evidence presented.

Upon *de novo* review, we will withdraw the Director's determination that the Petitioner did not establish that it had secured sufficient physical premises to house its new office.[2] However, as the Petitioner has not overcome the remaining ground for denial, 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] 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.

[2] The Director found that the Petitioner did not meet the physical premises requirement at 8 C.F.R. § 214.2(l)(3)(v)(A) because its leased space appeared to be in a residential building. On appeal, the Petitioner provides additional evidence which shows that the building in question is a commercial condominium and has thus overcome the Director's determination.

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. DEFINITIONS

"Managerial capacity" means 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.

Based on the definitions of managerial and 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). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or 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 at 1533.

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

The sole issue to be addressed is whether the Petitioner established that the new office would support a managerial or executive position within one year of approval of the petition.

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 will operate a real estate and property management business. Specifically, the Petitioner states it will purchase/remodel single family residences and commercial properties, as well as provide property management and consulting services to investors.

The Petitioner provided a description of the Beneficiary's proposed duties as president, stating that he would allocate 25% of his time to "planning" responsibilities, 30% to "management" responsibilities, 25% to "financial management" responsibilities, 15% to "human resources management," and 5% to "marketing and public relations."

Many of the Beneficiary's associated duties were described in broad terms and did not provide sufficient detail regarding the day-to-day duties the Beneficiary would perform by the end of the first year of operations as one of only two planned employees. For example, the Petitioner stated that the Beneficiary will be "developing a strategic plan to advance the company's mission objectives and policies," "planning, developing and establishing all policies for the company," "overseeing company operations," "overseeing the treasury function," and "managing activity reports and financial statements." These duties are so general they could describe virtually any executive or senior management position with any company. 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).

The Petitioner also included duties that are not supported by the Petitioner's first-year business plans, noting that the Beneficiary will be hiring and overseeing a management team, which will be responsible for daily communications with contractors. As discussed further below, the Petitioner's personnel plan indicates that the Beneficiary will be supported by only an administrative assistant at the end of the first year of operations, so it is reasonable to believe that he will be responsible for daily oversight of contractors and will not be delegating this first-line supervisory function. Similarly, although the Petitioner indicates that the Beneficiary will "oversee the marketing and promotion strategy of the property management division," there is insufficient information indicating who will carry out the marketing strategy and promote the company's services, as the Petitioner does not have firm plans to hire a marketing employee or contractors.

Finally, some of the duties attributed to the Beneficiary, such as negotiating and reviewing purchase and lease contracts, defining requirements for project milestones, selecting contractors and service providers, and analyzing the real estate market, while necessary for the operation of the business, are non-managerial tasks necessary for the Petitioner to provide its services and will likely be assigned to lower level staff who will be hired in later years.

We acknowledge that the Beneficiary, as the Petitioner's senior employee, 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. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (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 is insufficient to establish that his actual duties would be primarily managerial or executive.

In addition, as discussed further below, the Petitioner has demonstrated that it intends to employ only one subordinate employee by the end of the first year of operations. As such, the Petitioner's claim on appeal that the Beneficiary would be removed from any significant involvement in the business' day-to-day operations within one year is not supported in the record.

B. Projected Staffing and Business Plan

If staffing levels are used as a factor in determining whether an individual will be acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) takes 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.

The Petitioner's business plan indicates that its operating goals for the first year of operations include: (1) purchasing, remodeling, and selling one residential property ($100,000 budgeted for purchase); (2) purchasing one commercial property to be divided into smaller spaces to generate rental income ($0 budgeted for purchase); (3) providing real estate consulting services to investors for a flat fee of $20,000 per consulting project; and (4) providing "absentee care property management" services (two contracts projected).

The Petitioner provided an organizational chart showing its staffing projections for the first five years of operations. The chart indicates that the Beneficiary and an administrative assistant would be the only employees throughout year one, with the Beneficiary also indirectly overseeing contractors such as an attorney, real estate broker, CPA, banks, and financial institutions. The Petitioner provided evidence that it had already retained an accounting firm and a real estate broker. The Petitioner's first year expenses include $5700 for independent contractors, $3600 for professional fees, and $6855 for commissions, suggesting that the company expects to make limited use of these outside staff during the first year.

The Petitioner's second year hires, according to the proposed organizational chart and personnel plan, include a development assistant who would be responsible for overseeing remodeling contractors, and an operations manager who would report to the Beneficiary and oversee the administrative assistant, development assistant, and property management and maintenance assistants (to be hired in years three and four, respectively).

In a letter submitted in response to a request for evidence (RFE), the Petitioner stated that it may hire the operations manager before the end of year one and that this employee "will be responsible for the day-to[-]day operations of the office which will allow [the Beneficiary] to focus more on executive type responsibilities such as, lining up investors, researching properties, and overseeing the other employees and outside contractors." However, the Petitioner did not provide a revised business plan, personnel plan, or financial projections supporting its new claim that it is likely to hire an operations manager within one year. Moreover, the Petitioner did not explain how allowing the Beneficiary more time to locate investors, research properties and oversee outside contractors establishes that he would be performing primarily executive duties.

Therefore, we find that it is more likely than not that the Petitioner expects to employ the Beneficiary and one administrative assistant at the end of the first year of operations, and will use outside contractors on an as needed basis. Based on this limited staffing plan, the Petitioner has not demonstrated that the Beneficiary will primarily supervise a subordinate staff of professional, managerial, or supervisory personnel within one year. *See* section 101(a)(44)(A)(ii) of the Act.

Furthermore, the Petitioner has not established that it would employ sufficient staff who would relieve the Beneficiary from performing non-qualifying duties associated with the day-to-day operations of the business. As noted, the Petitioner intends to purchase, remodel and re-sell a residential property, purchase and remodel a commercial rental property, provide consulting services, and provide property management services. While the actual remodeling and property maintenance services can be contracted out, there are a number of non-managerial and non-executive duties associated with the operation of these different aspects of the business that have not been accounted for, such as provision of consulting services. As one of two proposed employees, it is reasonable to believe that the Beneficiary will be significantly involved in first-line supervision of contractors, and other operational, and administrative duties through the end of the first year of operations.

Further, the business plan did not show how the company would grow during the first year of operations to the point where it would require the Beneficiary to perform primarily managerial or executive job duties. The Petitioner provided evidence that it has received $200,000 in funding and indicates that it would spend $100,000 on property acquisition and expects to sell the property for $180,000. The Petitioner did not provide evidence that it had begun the process of researching investment properties and there is little information to indicate what type of property the Petitioner is likely to acquire for $100,000. The Petitioner also indicates that it will acquire, remodel and rent a commercial property, but did not appear to include expenses related to the acquisition of a second property in its business plan.

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.

Here, the Petitioner has not shown that it will have the staff or scope of operations needed to support the Beneficiary in a role in which he would reasonably be required to focus on the broad goals and policies of the company within 12 months. 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.

IV. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of F-V- Corp*, ID# 1181736 (AAO Apr. 30, 2018)