U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-N-A-G- INC.

DATE: AUG. 7, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a company engaged in art sales, film brokerage, and real estate development, seeks to temporarily employ the Beneficiary as president 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 would act in a managerial or executive capacity within one year of an approval of the petition.

On appeal, the Petitioner asserts that it has submitted detailed duties for the Beneficiary demonstrating that he would oversee a multi-tiered organizational structure within one year. The Petitioner contends that the Director overemphasized the proposed number of the company's employees and whether the Beneficiary would oversee managerial subordinates.

Upon *de novo* review, 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 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.*

[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.

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

We will first analyze whether the Petitioner established that it would employ the Beneficiary in a managerial or executive capacity within one year of the petition's approval. The Petitioner does not claim that the Beneficiary would be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary would be employed in an executive capacity.

The statute defines an "executive capacity" 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 order to determine whether the Petitioner established that its new office will support an executive position within one year, we will review the Beneficiary's proposed job duties, along with the Petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the Beneficiary in the intended executive capacity. The totality of the evidence must be considered in analyzing whether the proposed 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 stated that it was created by its foreign parent to "become a market leader in the sale of Chinese contemporary and modern art in the [redacted] area." The Petitioner submitted evidence indicating that it had established an art gallery in the Seattle area with "rotating exhibitions on contemporary Chinese artists." The Petitioner also detailed plans to expand into the movie business, stating that it intended to provide a training program for Chinese movie directors, to cooperate with the U.S. film industry on "cross-culture films," and to export Chinese films to the United States. Further, the Petitioner projected it would expand into the real estate business, namely "the development of single family, multi-family, and commercial real estate properties."

In the Beneficiary's duty description, the Petitioner stated that the Beneficiary would spend 60% of his time formulating and implementing the company's "domestic and international short-term, mid-term, and long-term business development, [as well as] financial, and operating goals, strategies, policies, and initiatives." The Petitioner indicated that this 60% would also include overseeing the "broad business and operational strategies" of the company's modern art gallery and film industry

business, overseeing and directing market research related to its proposed real estate acquisition and development, and "establishing business relationships with well-known Chinese artists and authorizing the selection, marketing, and disposition of their artwork." The Petitioner explained that the Beneficiary would devote another 20% of his time to "overseeing effective communication between its foreign parent company and the Petitioner," consisting of responsibility for the "growth and overall direction of [the Petitioner]" and frequent communication with the senior executives of the foreign parent. Lastly, the Petitioner stated that the Beneficiary would devote 20% of his time to overseeing "the performance of the subordinate employees of [the Petitioner] in carrying out [its] business endeavors."

The Beneficiary's duties are overly vague as they do not effectively convey the Beneficiary's day-to-day executive duties. The Beneficiary's job description includes several general duties that could apply to any executive acting in any business or industry; such duties do not provide insight into the actual nature of his role. The Petitioner provided few specifics related to how the Beneficiary's day-to-day duties fit specifically within the company's first year business plans. For instance, the Petitioner provides few examples of the actions the Beneficiary would take during its first year of operation to assure that the business develops as necessary to support him in an executive capacity within one year. For instance, the Petitioner only vaguely references "broad business and operational strategies," marketing research, "real estate development," "growth and overall direction," and "long term and short-term operating strategies, policies, and initiatives," but does not effectively convey how the Beneficiary's focus on these items would translate into day-to-day executive-level tasks. 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).

In fact, to the extent that the Petitioner provides detail regarding the Beneficiary's day-to-day duties these specifics are indicative of his involvement with day-to-day non-qualifying matters related to the operation of the company's art gallery, such as building relationships with artists, selecting their work, marketing it, and approving its acquisition and sale. Beyond this, the Petitioner provides few examples of the day-to-day executive-level duties the Beneficiary would perform within one year.

The fact that the Beneficiary would manage the business does not necessarily establish eligibility for classification as an intracompany transferee in an executive 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" executive in nature. Section 101(A)(44)(B) of the Act. Even though the Beneficiary would exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, these elements are not sufficient to establish that the actual duties the Beneficiary would perform within one year of the petition's approval would be primarily executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. 1103, 1108. Here, the Petitioner provided a vague job description that does not adequately convey the Beneficiary's actual proposed

day-to-day tasks or establish that he would devote his time primarily to executive duties within one year.

B. Business Plan and Projected Staffing

In the case of a new office petition, we review the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended 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 executive in nature within one year of the petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed executive position is plausible based on 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).

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. 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.*

The Petitioner stated that it had already hired a vice president subordinate to the Beneficiary who would oversee an office manager, a gallery manager, a business manager of the real estate division, and a director of the film division. The Petitioner also indicated that the gallery manager would oversee two sales associates. However, the Petitioner provides no hiring timeline for when it will hire these subordinates during the first year.

As noted, in the case of a new office petition, we review the petitioner's business plans to determine whether it will likely grow sufficiently to support the Beneficiary in the intended executive capacity within one year. The Petitioner provided inconsistent and vague business plans that do not sufficiently demonstrate that the company is likely to support the Beneficiary in an executive capacity within one year. For instance, the Petitioner submitted financial projections reflecting that it would earn $500,000 in revenue during the first year and pay $435,000 in salaries to its eight projected employees during the first year. The Petitioner stated that its art gallery would sell the works of a renowned Chinese modern artist for $200,000 per work. However, it does not support this assertion with sufficient supporting evidence, such as evidence of the sale of this artist's work at these amounts in the past. The Petitioner also states that it plans on investing $2 million during the first year on the purchase of artwork, but it does not document this projected investment on the part

of the foreign parent. In addition, the Petitioner states in its first year financial projections that it would generate $100,000 in "revenue" from art sales during the first year, while elsewhere indicates that this would be $100,000 in "profit." It is noteworthy that the projected $100,000 in revenue from art sales does not correlate with the Petitioner's projection that it would sell its art for $200,000 per work. The Petitioner must resolve discrepancies 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).

The Petitioner further indicates that it intends to launch a Chinese film director's academy during the first year and projects that it will generate $400,000 in profit through charging an expected 20 aspiring directors $100,000 per year for training in the United States. Again, we note that the Petitioner questionably refers to the $400,000 as both profit and projected revenue on the record. Regardless, the Petitioner's statements and evidence do not sufficiently establish that it is likely to operate a film director's academy within the first year and generate this income. As noted, the Petitioner states that it plans on hiring a "director of film division" during the first year and indicated that during the first year this employee would be tasked with "developing relationships with Chinese and American film academies, designing training curriculum, arranging schedule[s], and recruiting film students from China." The Petitioner also stated that department's operations during the first year would be "mainly devoted to developing relationships with the Chinese and American film industries" and "relevant Chinese government agencies." In addition, the Petitioner stated that once these preliminary steps were completed, it would add three additional employees, including a training program coordinator, a film export and import manager, and a filmmaking project manager.

However, the Petitioner does not provide details and a timeline as to how it plans on launching a film director's academy during the first year. None of these employees in the proposed film division, beyond the director of film division, appear in the Petitioner's projected organizational chart for the first year. Therefore, it is not clear how the director of film division would be capable of training 20 aspiring film directors within the first year and generate $400,000 in income/profit, as specified in the Petitioner's financial projections, particularly since his duties do not include responsibility for actually training students.

Otherwise, the Petitioner has not demonstrated that it would generate income during the first year and do business as necessary to support the Beneficiary in an executive capacity. For instance, the Petitioner makes vague statements as to its expansion into the real estate industry, including "the development of single family, multi-family, and commercial real estate properties" in the greater area. It also states that it has "already looked at a few options of land acquisitions within the $6 million USD budget" and estimates that "development cost will be around $15 million USD, and the final profit will be around $2 million USD." However, the Petitioner provides no concrete plans as to how it will launch a real estate business in the United States, develop properties, or generate income and profit from these activities as claimed. In fact, the Petitioner's first year financial projections include no indication that it would generate any revenue from real estate activities during the first year. Further, the Petitioner provides little supporting evidence that the foreign parent has provided, or committed to, investing approximately $21 million on real estate purchase and development during the first year. In sum, the Petitioner's assertion that it would expand into the

real estate market during the first year is not credible and it is not clear how these vague plans would be relevant to supporting the Petitioner operations, and in turn the Beneficiary's proposed executive role, during the first year.

The Petitioner also explains plans to expand into producing Chinese American films and importing films from China to the United States. However, again, there is little indication that these proposed plans would generate income to grow the company and support the Beneficiary in his executive capacity within one year. We acknowledge that the Petitioner submitted evidence indicating that it signed a sponsorship agreement with the to provide a donation of $100,000 and invoices supporting that it paid this donation. Further, we recognize that this donation could likely give the Petitioner and Beneficiary opportunities to network in the U.S. film industry. However, the Petitioner provides few details as to how its donation to, and participation in, this film festival would result in concrete business operations for the company during the first year. Again, the Petitioner's first year financial projections include no revenue from producing films or distributing Chinese films in the United States.

The Petitioner has also not submitted sufficient evidence to demonstrate foreign entity investment in the new venture. The Petitioner submitted bank records indicating that the Beneficiary has made over 40 contributions to the company's bank account totaling nearly $550,000 from March 2013 through August 2017. However, it is not clear how these contributions on the part of the Beneficiary relate to the foreign entity, a real estate company in China. The Petitioner states that the Beneficiary contributed these amounts "on behalf of the foreign company," but there is insufficient detail and supporting evidence to support this assertion. Beyond this, the Petitioner makes statements regarding future investment that are not substantiated, such as a $2 million investment to purchase artwork, $21 million for real estate purchase and development, and other potential investment in the film industry. However, the Petitioner provides little evidence that the foreign entity has allocated these amounts to the company's development during the first year.

Therefore, the Petitioner has not submitted credible evidence that it would operate within the first year as necessary to support the Beneficiary in an executive capacity overseeing a "multi-tiered organizational structure." We acknowledge that the Petitioner submits evidence that the Beneficiary more likely than not committed funds to launch an art gallery in the United States. However, the Petitioner does not credibly establish that this art gallery would be sufficient to support the Beneficiary in an executive capacity during the first year. The Petitioner projects that it would earn $500,000 during the first year and hire seven employees; however as we have discussed, it has not adequately supported how it would earn this revenue and operate as necessary to support its proposed organizational structure within one year. The Petitioner also does not indicate when it will hire the Beneficiary's proposed subordinates during the first year. Furthermore, the Petitioner provides a vague duty description for the Beneficiary that does not adequately set forth his first year executive-level tasks. In fact, to the extent that the Petitioner provides specific duties for the Beneficiary, these indicate that he would be involved in the day-to-day operation of its art gallery and it has not provided sufficient detail and evidence to demonstrate that he would be primarily relieved of these tasks by the end of the first year.

For the above stated reasons, the Petitioner did not establish that the Beneficiary would act in an executive capacity within the first year.

III. CONCLUSION

The appeal will be dismissed because the record does not include sufficient evidence to establish that the Beneficiary would be employed in an executive capacity within one year of an approval of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of W-N-A-G- Inc.*, ID# 1434712 (AAO Aug. 7, 2018)