U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M- INC.

DATE: AUG. 30, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, which intends to engage "in management and marketing of subsidiary companies,"[1] seeks to temporarily employ the Beneficiary as 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 after approval of the petition.

On appeal,[3] the Petitioner addresses issues that were highlighted in the Director's request for evidence (RFE), asserting that a detailed list of the Beneficiary's job duties was not among the requested items. The Petitioner contends that the Beneficiary meets all requirements for the requested classification.

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

[1] In its 2016 tax return, the Petitioner identified itself as a "management company" and indicated that it would engage in "consulting." However, in response to a request for evidence (RFE) the Petitioner discussed plans to operate a pharmacy and market and explained on appeal that the "subsidiary" purchased in the United States is retail in nature.

[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] Within three days of filing this appeal, the Petitioner filed a motion to reopen and reconsider with the Vermont Service Center. That motion was denied on June 21, 2018, and requires no further action.

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.*

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 A MANAGERIAL OR EXECUTIVE CAPACITY

The Petitioner claims that it will be fully operational and that it will employ the Beneficiary in a qualifying capacity at the end of its first year of operation.[4] 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 a managerial or executive capacity within one year of the petition's approval.

"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.

"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. New Office Requirements

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 managerial or executive capacity. A petitioner has the burden to establish that it would realistically develop to

[4] Although the Petitioner claims that the Beneficiary has been employed abroad in a managerial capacity, it does not specify whether his proposed position in the United States would be in a managerial capacity or in an executive capacity.

the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year of the petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed managerial or 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).

In the present matter, the Petitioner did not claim any employees or income in the petition form. The Petitioner provided an initial cover letter in which it stated that it "plans to hire new employees in the coming year" and that based on the Beneficiary's "extensive experience in skin care and other holistic treatments" it is looking to be the sole U.S. distributor of a line of skincare products that is currently sold by the Beneficiary's employer abroad. It did not submit a business plan for the new office, but provided various supporting documents, including a January 2017 bank statement showing that the Beneficiary wired a total of $39,800 into its bank account and that it was left with a balance of $29,774 after the account was debited for various transactions and fees. However, the Petitioner did not itemize its expenses or establish that the funds it had available at the time of filing would be sufficient to commence operations. The Petitioner also did not clarify who, other than the Beneficiary, it would hire during this initial developmental phase to ensure that its organizational hierarchy would develop and support the Beneficiary in a managerial or executive capacity one year after this petition's approval.

In addition, the Petitioner provided various documents pertaining to a separate entity – – that was claimed to be its affiliate by virtue of the Beneficiary's claimed majority ownership of that separate entity.[5] The Petitioner also provided a purchase agreement indicating that had purchased the assets of a convenience store known as and a lease for the store's premises.

After reviewing the Petitioner's initial submissions, the Director found that the petition lacked sufficient evidence to warrant approval and therefore issued an RFE instructing the Petitioner to provide additional evidence. Namely, the Director asked the Petitioner to provide a feasibility or market study that was used to determine a need for the U.S. business, a business plan complete with timetables for each proposed action during the Petitioner's first year of operation, a copy of a proposed organizational chart listing proposed positions and job duty summaries, and proof of capital contributions to fund the U.S. entity and ensure that it is able to commence doing business in the United States.

[5] The record is inconsistent as to the ownership of In the petition form, the Petitioner stated that the Beneficiary owns 61% of However, the Petitioner provided two different stock certificates, one showing that the Beneficiary owns 500 shares (50%) of stock and another showing that he owns 51% of the stock. The Petitioner did not explain these discrepancies, which cast doubt on the actual ownership of the claimed affiliate. Nevertheless, even if the Petitioner were to establish that it and are commonly owned, documents pertaining to the non-petitioning entity would not be relevant for the purpose of establishing the Petitioner's eligibility in this matter.

In response, the Petitioner provided a letter claiming that it plans to operate out of two different locations. It claimed that it plans to use the space it previously leased to house the "office component" that the Beneficiary "and other management will use," while simultaneously using existing retail store to operate a "pharmacy and neighborhood market," and provide the Petitioner with additional office space. The Petitioner did not explain or clarify how its plan to use a space that is intended for a convenience store operation would further its initial goal of becoming the sole U.S. distributor of a line of Egyptian skincare products. Moreover, the Petitioner did not establish that (or its landlord) agreed to allow the Petitioner to use the retail store that was leased and is operated by or explain how two separate companies would operate out of the same retail space.

The Petitioner also provided a letter from the foreign entity's pharmacist/pharmacy manager, who stated that the Petitioner plans to hire an operations manager during its first year of operation, and a business plan containing information about the Petitioner's projected revenue, personnel, and other information about the Petitioner's start-up phase. Section 8.4 of the business plan discusses the Petitioner's staffing projection, which lists an "owner," a "manager," and one "sales" position during the Petitioner's first year of operation. This information is inconsistent with section 8.2 of the plan, which states that the Beneficiary, in his capacity as president/CEO, and a vice president would comprise the Petitioner's "Management Team." Although the Beneficiary presumably occupies the "owner" position, the position of vice president is not included in the first year's staffing projection and the Petitioner provided no information that would lead us to conclude that the "manager" position is synonymous with that of the vice president.

The business plan includes a graph showing the Petitioner's monthly "break-even" points. However, the Petitioner provided no supporting data for the financial projections in the graph; despite indicating that "forecasted revenues," "regular running fixed costs," and "average per unit sales price" are factors that determine the "break-even" point in any given month, the Petitioner did not list its actual business expenses, provide an estimate of the prices it plans to charge for the goods it plans to sell, or discuss how the ratio of costs to expenses might prompt revenue growth and ultimately cause the "break-even" point to change from one month to the next. Although the Petitioner referred to the graph as a "Break Even Analysis," it did not actually specify or analyze any data that would help us to understand and interpret the graph within the context of the Petitioner's retail business.

Lastly, the "Executive Summary" section of the business plan indicates that the Beneficiary plans to invest $160,000 as "the complete amount needed to open and operate this business." However, the Petitioner did not establish that $160,000 would be sufficient to meet its financial needs as it does not itemize its specific expenses and costs of doing business. Furthermore, the source of the capitalization funds is unclear, as only $10,000 of the total amount would be in cash while the remaining $150,000 would come from an "Investment Portfolio," according to the unaudited balance sheet that accompanied the business plan. The record does not contain evidence of any investment accounts or available liquid assets that stem from an "Investment Portfolio," nor did the Petitioner show that it had the $160,000 at the time of filing. Although the Petitioner provided a January 2017

bank statement showing that the Beneficiary wired a total of $39,800 into its bank account, that amount exceeds the $10,000 cash contribution that the business plan references and it is only a fraction – approximately 25% – of the total amount the Petitioner claims it would need to fund the first stage of its operation and start doing business.

The Director acknowledged the Petitioner's submission of a business plan in response to the RFE, but found that an approval of the petition was not warranted because the Petitioner did not establish that it would be able to support the Beneficiary in a managerial or executive position within one year of approval of the petition. Although the Director considered the contents of the business plan, she questioned the Petitioner's staffing plan, noting an inconsistency between its claimed "Management Team" and the projected positions it looks to fill within its first year of operation.

On appeal, the Petitioner provides a detailed review of its RFE response and offers evidence to show that it took steps to hire two employees in July 2017, after this petition was filed. The Petitioner does not, however, disclose the positions that the two new hires would assume, provide an account of their job duties, or state how these employees would ultimately support the Beneficiary in a managerial or executive capacity. Although the Petitioner highlights documents to show that it addressed concerns that were noted in the RFE, it does not point to evidence that specifically addressed the chief basis for the denial, which focused on the Petitioner's deficient business plan and the overall lack of evidence demonstrating the likelihood that the Petitioner would, within one year of the petition's approval, have the ability to support the Beneficiary in a managerial or executive position. As noted, the Petitioner has not provided a clear explanation of how it intends to operate a business at a convenience store that was leased by [redacted] – an entirely separate entity.

Despite indicating that it intends to operate and manage a pharmacy and market, the Petitioner does not claim that it plans to hire a pharmacist. This staffing deficiency leaves open the possibility that the Beneficiary, a degreed pharmacist, would carry out the operational tasks required to operate a pharmacy and would likely be responsible for actually providing some of the services the Petitioner plans to offer its customers. We note that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988). The Petitioner does not explain precisely how it plans to relieve the Beneficiary from having to primarily carry out some of its key operational tasks once it has been operating for one year and no longer qualifies as a new office.

Although staffing and business growth are not prerequisites to establishing eligibility, the new office regulations are premised on the understanding that a new company will progress to a stage of development where it will be able to support a beneficiary in a managerial or executive capacity. Here, the business plan indicates that the Petitioner plans to hire one additional sales person in its second year of operation; however, it does not provide a hiring timeline to show when the projected hiring will take place. As such, it is likely that the Petitioner will enter its second operational year

with the staff it plans to acquire during its first year of operation. The Petitioner has the burden of establishing 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 of the petition's approval. It is unclear how the Petitioner can meet this burden with a proposed three-person staff that does not include a pharmacist to carry out the services provided by a pharmacy. It is unreasonable to claim that the Petitioner will operate as a pharmacy if it does not, at minimum, intend to employ a pharmacist. If we find reason to believe that an assertion stated in the petition is not true, we may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, the Petitioner does not indicate that it plans to hire pharmacy or inventory assistants during its first three years of operation, despite the fact that the foreign entity, which also operates as a pharmacy, has both a pharmacy assistant and an inventory assistant as part of its organizational hierarchy.

The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Here, we find that the Petitioner provided a deficient business plan and did not submit sufficient evidence to show that it would have the funding or the staffing composition necessary to relieve the Beneficiary from having to primarily perform its operational and administrative tasks one year after this petition's approval.

B. Duties

We also reviewed the job descriptions of the Beneficiary and his projected subordinates and we find the duty descriptions to be insufficient to establish that the Beneficiary would perform primarily managerial or executive job duties within one year of the petition's approval.

At section 1, item 7 of the L Classification Supplement, the Petitioner stated that the Beneficiary "will oversee all the business, marketing, sales and impor [*sic*] functions of [*sic*] behalf of the business as well as liaise with outside accountants, consultants, etc." The Petitioner did not distinguish between the Beneficiary's first-year duties and the duties he would perform beyond the "new office" phase of its operation. Although instructed to provide a list of the proposed positions that will comprise its staff along with a summary of each position's proposed job duties, the Petitioner did not comply with this request. Instead, the Petitioner provided a business plan, which broadly discusses the Beneficiary's role as owner and sole investor in the U.S.; it did not, however, provide any further information about the Beneficiary's proposed job duties to explain what actions the Beneficiary will take to ensure that the Petitioner progresses to the next phase of its development and can support a managerial or executive position.

Likewise, the Petitioner's appeal also lacks clarifying information about the Beneficiary's job duties during its initial phase of operation. Although the Petitioner argues that the RFE did not ask for "an exhaustive, detailed list of [the B]eneficiary's duties," as noted above, the RFE did instruct the Petitioner to provide a list of its proposed positions and to include summaries of the job duties to be assigned to those positions. The Petitioner in this matter did not comply with these instructions with

respect to any of the proposed positions it listed in the "Personnel Plan" section of the business plan. We note that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As the Petitioner did not adequately summarize the Beneficiary's proposed job duties or explain how he would ensure that the company progresses to the next phase of development, it has not established that within one year of the petition's approval it would employ the Beneficiary in a managerial or executive capacity where he would be relieved from having to spend his time primarily performing operational and administrative tasks of the organization.

III. QUALIFYING RELATIONSHIP

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 Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

In the present matter, the Petitioner claims to be a subsidiary of the Beneficiary's foreign employer. In order to establish that the foreign entity is the parent in a parent-subsidiary relationship with the Petitioner, the Petitioner would have to provide evidence to show that the foreign entity owns the majority of the U.S. entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(K). Here, the Petitioner does not describe an ownership scheme wherein one entity owns the majority shares of another entity; rather, it repeatedly claims that the Beneficiary is the sole owner of both entities, thereby describing an affiliate relationship, which in this instance would be ownership of two legal entities by the same individual, i.e., the Beneficiary. 8 C.F.R. § 214.2(l)(1)(ii)(L). Despite the incorrect reference to a parent-subsidiary relationship, the Petitioner can still be eligible if it provides sufficient evidence to support its claims about the Beneficiary's ownership of both entities.

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., Matter of 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 Petitioner has not provided sufficient evidence to establish the ownership of either entity. Although the Petitioner repeatedly refers to the Beneficiary as the sole owner of the foreign entity, it relies on its own claims and the claims of third parties, such as the foreign entity's "legal accountant" and its pharmacy manager, to support its ownership claim. The record similarly lacks sufficient evidence of the Petitioner's ownership. While the Petitioner provides similar third party statements and reiterates claims about its ownership in its tax returns, it does not provide objective evidence, such as stock certificates and a stock ledger, to show that the Beneficiary was the recipient of its stock. As noted earlier, the Petitioner must provide relevant, probative, and credible evidence to support its assertions. *See Chawathe*, 25 I&N Dec. at 376.

In light of the above, the Petitioner has not established that it has a qualifying relationship with the foreign entity as claimed.

IV. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that: (1) the Beneficiary will be employed in a managerial or executive capacity within one year of the petition's approval; and (2) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer.

ORDER: The appeal is dismissed.

Cite as *Matter of M- Inc.*, ID# 1090615 (AAO Aug. 30, 2018)