U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-U- LLC

DATE: AUG. 31, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an education cognition training company, seeks to temporarily employ the Beneficiary as managing director 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 California Service Center denied the petition, concluding that the record did not establish, as required, that the new office would support the Beneficiary's proposed managerial or executive position within one year of approval of the petition.

On appeal, the Petitioner asserts that it has submitted sufficient evidence to demonstrate that it will develop sufficiently to support the Beneficiary in an executive capacity within the first year.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. 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. Section 101(a)(15)(L) of the Act.

An individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, must include evidence that the petitioner will employ the beneficiary in an executive or managerial capacity, or in

[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.

a position requiring specialized knowledge, including a detailed description of the services to be performed. 8 C.F.R. § 214.2(l)(3)(ii).

If the Form I-129 indicates that the beneficiary is coming to the United States in L-1A status to open or to be employed in a new office, 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 includes information regarding the new office's physical premises, 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. NEW OFFICE

The Petitioner states that the Beneficiary's foreign employer provides "specialized cognitive training" services in Hong Kong and that it plans to expand these services into the state of Washington through the opening of a new office in the United States. The Petitioner indicated that it would target professionals, students, and corporations. A provided organizational chart reflects that it would hire three "cognitive/brain training instructors" to presumably provide these cognitive services to clients.

The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity within the first year.

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.*

A. Business Plan and Staffing

The Petitioner submitted an organizational chart reflecting that the company would employ an administrative manager and three cognitive/brain training instructors. In a provided business plan, the Petitioner stated the following with respect to its hiring plans during the first year:

> As soon as the actual business does not allow any more for continuous and effective marketing, a first staff member shall be hired. This may happen as early as the beginning of the second half of the first business year. Possibly part-time, in the afternoon first, quickly morphing into a full-time position.

The Petitioner also indicated that it would hire more part-time staff "as the business starts taking off." Further, a provided expense chart for the first year projected that the Petitioner would hire one additional part-time employee in the third quarter of the first year of operation and that the company would earn $72,000 in revenue during the first year. The Petitioner also estimated that it would reach eight to ten employees after five years of operation. On appeal, the Petitioner emphasizes that it will develop sufficiently during the first year to support the Beneficiary in a qualifying executive capacity and asserts that a $50,000 initial investment in the business will cover its expenses during the first year.

The record does not include sufficient probative evidence establishing that the Beneficiary will be relieved from performing non-qualifying duties within one year of approval of the petition. As noted, the Petitioner states that it is launching a cognitive training business. It is reasonable to conclude that the provision of these services would require employees to provide cognitive training to clients; in fact, this is reflected in the Petitioner's proposed organizational chart showing three cognitive/brain training instructors. However, the Petitioner's hiring plans only contemplate that it "may" hire one part-time employee during the second half of the first year "as soon as the actual business does not allow any more for continuous and effective marketing." The Petitioner does not indicate what role this sole employee would fill or explain his or her duties. Indeed, the Petitioner does not provide duty descriptions for any of its proposed employees. Further, the Petitioner has not reconciled its proposed organizational chart with its proposed hiring plans during the first year, explaining when it projects to hire the employees listed in its proposed organizational chart. Therefore, the Petitioner has not explained or provided sufficient supporting documentation to establish that the Beneficiary will be primarily relieved from performing the operational duties of the business during the first year, such as the aforementioned trainings services, selling these services to clients, administering the company's invoicing and payment processes, amongst other administrative tasks.

The Petitioner emphasizes on appeal that the $50,000 investment in the business will cover expenses during the first year. However, this assertion alone does not demonstrate that the new venture will have sufficient staffing within the first year to support the Beneficiary in an executive capacity. The Petitioner offers little support for this requirement on the record and on appeal. 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).

B. Duties

In a letter submitted in support of the petition, the Petitioner provided a duty description reflecting the Beneficiary's performance of several executive level tasks such as "ensuring that the budget, staff and priorities are consistent with [the company's] core mission," "mak[ing] decisions on marketing directions and strategic planning," "setting the overall operational and financial goals," and "evaluating overall strategies and policies." However, given the Petitioner's limited hiring plans during the first year, it is not clear what staff the Beneficiary will oversee and to whom he will dictate operational and financial goals, strategies, and policies.

Further, the duties indicated that the Beneficiary would review and approve company financials, including, "review of company monthly statements," "review and control of company cash flow," "signing or authorizing execution of checks," and "negotiating and entering into contracts as necessary." However, without sufficient supporting staff within the first year, it is not clear how the Beneficiary will perform these higher level tasks without employees to generate cash flow for the business, handle invoicing and payments, or perform sales duties in order to make the execution of contracts with clients necessary.

In fact, the Petitioner states that the Beneficiary will devote 15% of his time to "directing and overseeing employees," but it has not credibly established that it will have sufficient employees to oversee within the first year since it indicates that it "may" hire only one part-time employee during the second half of the first year. In sum, the Beneficiary's asserted executive level duties are not credible in light of the Petitioner's first year staffing plans. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The new office regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. However, a petitioner's evidence in support of a new office petition should demonstrate a realistic expectation that the enterprise is prepared to commence business operations 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. Accordingly, the entire record must be considered to determine whether the proposed duties are 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).

Here, the Petitioner does not support how the Beneficiary will perform his proposed executive level duties within the first year. Further, the Petitioner provides few specifics regarding these proposed tasks, such as the nature of marketing reviews he will perform, strategic plans he will implement, "relationships with College and University career offices" he will pursue, or staff he will oversee. Reciting vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The Petitioner has not

provided sufficient detail or explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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 has not sufficiently delineated the Beneficiary's specific daily tasks or explained how the proposed position would meet the four-prong definition of an executive.

The record does not include sufficient probative evidence establishing that the Beneficiary will be relieved from performing non-qualifying duties within one year of approval of the petition. The Petitioner has not fully developed the record so that we may analyze the viability of its plans to open and operate a new office in the United States.

III. CONCLUSION

The appeal will be dismissed because the record does not include sufficient evidence to establish that the Petitioner will support the Beneficiary in an executive capacity within a one-year period.

ORDER: The appeal is dismissed.

Cite as *Matter of P-U- LLC*, ID# 598355 (AAO AUG. 31, 2017)