U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF HXI- INC.

DATE: DEC. 12, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which intends to operate an import and catering 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 California Service Center denied the petition, concluding that the Petitioner did not establish, as required, that: (1) the new office would support a managerial or executive position within one year of approval of the petition; and (2) it had secured sufficient physical premises to house the new office.

On appeal, the Petitioner submits additional evidence, asserts that it satisfied all evidentiary requirements for a new office petition, and argues that the Director overlooked documentation it submitted in response to a request for evidence (RFE). The Petitioner maintains that the Beneficiary will supervise subordinate managers and would be employed in a managerial or executive capacity within one year.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification for 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. 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.

[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 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).

The statute defines "managerial capacity" as 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.

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

The Director determined that the Petitioner did not establish that its new office would be able to support a managerial or executive position within one year of approval of the petition.

The Director acknowledged the Beneficiary's proposed position description, but found that the Petitioner submitted inconsistent information regarding its anticipated organizational structure and hiring plans which was not supported by adequate financial projections. The Director determined that, since it was unclear how many and what types of positions would be filled during the initial year, the Petitioner did not establish that the company would hire sufficient staff to relieve the Beneficiary from having to perform non-executive and non-managerial tasks.

On appeal, the Petitioner explains that it had modified its initial proposed organizational chart based on the company's development, noting that it had a clearer picture of the required positions at the time it responded to the Director's RFE. The Petitioner maintains that it will hire subordinate managers and have sufficient staffing to support the Beneficiary in a managerial or executive capacity.

In the case of a new office petition, beyond the description of a beneficiary's proposed job duties, 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 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. Projected Staffing and Business Plan

The Petitioner has consistently stated that it intends to import and distribute "building and decoration materials," as well as operate a "hospitality service" or catering business. The Petitioner's initial proposed organizational chart shows the Beneficiary as president supervising a hospitality manager and a purchasing manager. The chart depicts an assistant and a server reporting to the hospitality manager, and a purchasing specialist, "sales" and "logistics," reporting to the purchasing manager, for a total of at least eight employees. The Petitioner indicated that the purchasing manager position was already filled as of January 2017 when it filed the petition.

The business plan submitted at the time of filing mentions the hospitality service line of business only in passing and states that the Petitioner expects to achieve $250,000 in sales of building materials during its first year, with no other anticipated sales. The business plan did not include any other financial projections, an outline of start-up costs and operating expenses for the first year, or the company's personnel and hiring plans.

In the RFE, the Director advised the Petitioner that its business plan did not indicate the company's timeline for hiring staff, the number and types of positions to be hired within the initial year of operations, or the required start-up expenses. The Director also noted that the Petitioner did not describe the duties and requirements for proposed positions and suggested additional evidence the Petitioner could submit to overcome these deficiencies.

The Petitioner's response included a feasibility study and an updated business plan, both dated March 2017. The feasibility study states that the company will require a sales manager, a purchasing manager, a catering service manager, and a quality manager, and that each of these positions will lead subordinate staff in their respective areas. It did not include a timeline for hiring staff. It did include a schedule for business activities, noting that the Petitioner expected to import construction materials from China in April 2017 and sign its first sales contract in August 2017. With respect to the catering service, the Petitioner anticipated a "grand opening" in June 2017.

Finally, the feasibility study included three-year financial projections for sales, staffing, material, shipping, insurance, and storage costs. For the first year, the Petitioner anticipates $250,000 in sales, $200,000 in staffing costs, and $225,000 in other costs. The updated business plan indicated that $100,040 would come from "retailer sales for catering service" and $149,060 from "wholesale for material product."

The new business plan also included a recruitment timeline, but it covered the period only from May 2017 through August 2017. Positions mentioned include a sales manager, catering service manager, quality manager, sales manager, sales support, purchasing specialist, and quality assurance personnel

but did not clarify which positions would be filled within one year. The Petitioner also included a "personnel plan" table listing 12 position titles and a total of 21 to 26 personnel to be hired.[2] The Petitioner provided proposed job duties and requirements for these 12 positions in a separate table.

Finally, the Petitioner provided an updated proposed organizational chart showing the Beneficiary as president overseeing four subordinate managers, including a catering service manager, purchasing manager, sales and marketing manager, and quality manager, each with subordinates, for a total of 21 to 26 employees.

We agree with the Director's finding that the Petitioner did not establish which positions it actually intends to fill within one year. First, there are significant differences between the two different organizational charts which the Petitioner has not adequately explained. The Petitioner filed this petition on January 24, 2017, and its revised organizational chart was created in March 2017. The Petitioner's claim on appeal that the revised chart reflected the "company's business demands, business growth and development," is not persuasive as the record does not establish that the Petitioner has commenced business activities of any type. This explanation is insufficient to account for the doubling of the number of projected departments and tripling the number of projected staff within a two month period. Further, we note that, despite the increase in staffing, the Petitioner included the same projected sales figure in both versions of the business plan and did not explain how it would be feasible to pay three times as many people given the same anticipated sales income.

Further, the Petitioner's business plans and other supporting evidence do not provide a complete timeline for hiring or sufficient financial information to establish that the company could realistically carry out the staffing plan depicted in either one of the submitted organizational charts. The Petitioner provided a "financial projection" chart indicating that the Petitioner would spend $200,000 on staffing costs in year one and $250,000 in year two (while achieving sales of $250,000 in year one and $287,500 in year two). However, without information regarding projected salaries and hiring dates, we cannot determine whether this amount would be sufficient to cover the salaries of the positions identified in the organizational charts. The Beneficiary's salary alone is $60,000 and the Petitioner indicates that many of the other positions would be full-time and require individuals with bachelor's degrees. Given these factors, it is not clear how $200,000 would cover the salary expenses of up to 26 workers.

In addition, the Petitioner's business plan does not include complete and credible financial projections. For example, the Petitioner indicates that in the first year, it will have $425,000 in expenses, but these expenses include only staffing, material, shipping, insurance, storage, and training costs. The business plan does not take into account the cost of rent ($144,000 annually for its office space alone) or other normal business expenses such as purchases and taxes. While the Petitioner indicates that it will have money held in reserve from the parent entity's $510,000 investment, it is unclear that a company with projected sales of $250,000 can sustain the type of staff expansion envisioned with approximately $600,000 in expenses annually. The Petitioner projects

[2] The Petitioner indicated that it would hire two or more people for some positions including chefs, catering assistants, purchasing specialists, sales, and quality assurance support.

only modest increases in sales during its first three years of operation. The investment could pay part of the salaries in the first year, but it is unclear how the Petitioner would pay salaries in future years with costs that far exceed its projected sales.

Finally, the Petitioner's timeline for commencing business operations indicates that it would not sell its imported building materials until August 2017, and, despite its claim that it would open its catering business in June 2017, there is no evidence that it had started looking for a location for this business by the time the Petitioner responded to the RFE in mid-April 2017. These facts tend to undermine the Petitioner's claim that the company would be fully staffed and operating two lines of business within one year.

For the reasons discussed, the record does not sufficiently establish the proposed nature, scope, or staffing of the company within one year. Without this evidence, the Petitioner has not supported a claim that the organization will grow to the point where it can support a managerial or executive position within that timeframe.

B. Duties

The Petitioner submitted two different broad descriptions of the Beneficiary's duties, neither of which provided sufficient insight into the nature of his expected day-to-day tasks by the end of the first year of operations. Further, both descriptions mention his delegation of duties to subordinate managers who, for the reasons discussed above, may not be hired during that initial year.

The initial description of the Beneficiary's duties included a number of very general responsibilities, such as "act as the highest executive of the subsidiary," "setting all of the subsidiary corporate policies and developing long-term and short-term goals," and "making final decisions." At the same time, the description suggested that the Beneficiary would be involved in the day-to-day operations of the import and distribution aspect of the business even after staff is hired. For example, the Petitioner stated he will evaluate vendors and suppliers, examine purchase orders and merchandise, train sales and marketing staff, and represent the company in networking opportunities. The latter version of the position description removed or revised these non-managerial duties, without adding any additional specificity to the original description. 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 has consistently stated that the Beneficiary will occupy the senior position in the new office, but has not submitted a job description or consistent, credible 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.

III. PHYSICAL PREMISES

The Director further found that the Petitioner did not establish that it had secured sufficient physical premises to house its new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). Specifically, the Director noted that the submitted lease agreements did not establish the size of the premises secured.

The Petitioner stated on the Form I-129 that it is located in at in California. At the time of filing, the Petitioner submitted a lease agreement for this location dated December 20, 2016, and valid for five years, with a monthly rent of $12,000 and a security deposit of one month's rent. The Petitioner provided photographs of the exterior of an unidentified building, an interior door which has a piece of paper with the Petitioner's name on it attached with tape, and photos of two interior offices which appear to be already occupied and in use based on the presence of computers, files, plants, and various personal items.

The Director requested a lease indicating the total square footage of the premises secured, as well as a statement from the Petitioner explaining why it chose the worksite, the nature of the space secured, and why it is sufficient to conduct the company's business.

In response, the Petitioner submitted a different lease agreement for the same premises, with the same dates. However, this lease indicates that the Petitioner has leased premises at both and for the same monthly rent ($12,000) as indicated on the previously submitted agreement. The second lease indicates that the Petitioner paid the landlord $36,000 at the time of signing (one month's rent and a $24,000 security deposit), and states that the "building square footage" is approximately 6377 square feet. The Petitioner did not explain why the lease was in a completely different format from that previously submitted, why it included premises at two different addresses, or why the security deposit was a different amount.

In the denial decision, the Director pointed out that the new lease did not show the square footage of the Petitioner's leased space, but only the square footage of the building as a whole. The Director also questioned why the "new lease" had not been submitted previously if it was signed in December 2016.

On appeal, the Petitioner explained that the new lease was intended to replace the initial lease as the previous lease did not include the office's square footage. The Petitioner also appears to claim that the office square footage was handwritten on the lease previously provided. Nevertheless, the Petitioner states it has now provided an "updated edition of the lease." This latest and third version of the lease mentions the building square footage of 6337 square feet on page 1 instead of page 6, but is otherwise the same as the one submitted in response to the RFE.

Upon review, the Petitioner has not established that it secured sufficient physical premises to house its new office. First, none of the submitted leases identify the amount of space the Petitioner actually secured. The Petitioner indicated that it is located in ' ' at The Director requested the square footage of the leased premises, not the square footage of the entire building where the claimed premises are located.

Further, there are other issues not addressed by the Director. The Petitioner has not adequately explained why two of the three submitted lease agreements indicate that the Petitioner also leases space at [redacted] or why the lease agreements list different security deposit amounts. The photographs the Petitioner submitted at the time of filing depict three workstations located in one or more offices, but do not appear to depict the Petitioner's actual business as the Petitioner did not claim that it already had multiple employees in place at the time of filing.

The Petitioner's business plan also does not identify its specific space requirements for its import and catering business. The Petitioner stated that it will not have any warehouse needs because its products will be shipped directly to customers, but it also projects $100,000 in annual "storage" costs and indicates that it will have a quality control department with three employee dedicated to inspecting the building materials it intends to sell, which implies the need for a space where these inspections would occur. Therefore, even if there were no problems with the lease agreements, the evidence would be insufficient to establish that an office suite would be sufficient for the operation of this business.

For these reasons, the Petitioner has not established that it has secured sufficient physical premises to house the new business.

IV. ONE YEAR OF EMPLOYMENT ABROAD

Finally, we note that the Petitioner stated that the Beneficiary has been employed as general manager with its Chinese parent company since 2003. However, U.S. Department of State records show that when the Beneficiary applied for a B1/B2 visitor visa in September 2015, he indicated that his current employer was [redacted] and that he had been employed as general manager of the Petitioner's parent company from 2003 until January 1, 2013. Based on the U.S. Department of State records, it appears that the Beneficiary was not employed by the Petitioner within the three years preceding the filing of this petition in January 2017. *See* section 101(a)(15)(L) of the Act; 8 C.F.R § 214.2(l)(3)(v)(B).

While we are not making an adverse determination based on this information obtained from the U.S. Department of State, the Petitioner should address the Beneficiary's statements regarding his employment abroad in any future filing on his behalf.

V. CONCLUSION

The Petitioner has not established that it will employ the Beneficiary in a managerial or executive capacity within one year or that it has secured sufficient physical premises for its new office.

ORDER: The appeal is dismissed.

Cite as *Matter of HXI- Inc.*, ID# 894866 (AAO Dec. 12, 2017)