U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-H-USA LLC

DATE: DEC. 18, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a company coordinating the provision of U.S. medical services to Chinese patients, seeks to temporarily employ the Beneficiary as the manager and 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 Vermont Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity within one year of an approval of the petition.

On appeal, the Petitioner points to a submitted expert opinion and asserts that this establishes that the Beneficiary would act in an executive capacity within one year. The Petitioner submits additional payroll documentation and contends that it already has sufficient employees to support the Beneficiary in an executive capacity and to primarily relieve her from performing non-qualifying operational duties.

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 provide "medical payment plan packages and facilitation services to Chinese citizens who wish to come to the U.S. for their healthcare needs." The Petitioner indicated that it planned to develop relationships with large U.S. healthcare providers and hospitals and to coordinate Chinese citizens receiving and paying for medical services provided by these U.S. institutions, including coordinating their immigration visas, travel, and lodging.

In a support letter submitted with the petition, the Petitioner submitted the following duties for the Beneficiary, amongst others:

Executive/Supervisory- 75%

- supervise all subordinate professional management employees,
- set strategies and goals for operation of the Company,
- have responsibility for all decisions,

- authority to hire, evaluate, promote and fire any and all workers,
- direct the implementation of the medical payment model,
- design and ensure that proper processes are in place to source clients from the Chinese parent company's client base,
- assess needs and market the program,
- direct local partners to engage with US hospitals to identify providers who have medical expertise needed to treat complex medical conditions for Chinese patients,
- coordinate the logistics to advance payments,
- direct US staff and our local partners to ensure the Chinese clients are properly attended for their travel to US, lodging, and other ancillary services needed during their medical stay,
- ensure a process for assessing customer satisfaction, and
- report on progress of the program implementation directly to the Board of Directors of the Chinese Parent.

Marketing/PR- 10%

- direct the management of the marketing/PR function,
- act as Company's diplomatic/business representative for high-level business development meetings,
- review recommendations from local partners as to the best practices for marketing the program to US medical providers, and
- implement chosen marketing approach.

Operations- 10%

- direct the management of general business operations through the supervision of professional management employees, and
- constantly monitor and reassess the proper allocation of professional management employees.

Financial- 5%

- direct the management of all financial matters,
- decide how to structure pricing models for volume-based packages with US medical providers,
- direct the logistics of advance payments,
- oversee the financial planning of the company, and
- liaise with outside accountant, tax preparers, and other financial advisors.

Later in response to the Director's request for evidence (RFE), the Petitioner submitted a letter from an economics professor and consultant, who opined on the viability of the Petitioner's first year business plans. In this letter, stated that the Beneficiary would "develop the business in all major negotiations with U.S. medical facilities as the key decision maker of the company." In addition, indicated that the Beneficiary would develop a platform "to

allow payments between countries, which is very complex...due to unique Chinese regulations" and that she would "understand these challenges and is a certified actuary who has the skills to understand and manage the business in this regard."

Upon review, we find that the Beneficiary's duties are overly vague as they do not effectively convey her day-to-day executive duties within one year. 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 her role. The Petitioner provided insufficient 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 her in an executive capacity within one year. We acknowledge that the Petitioner submitted evidence of contracts that the company negotiated with medical institutions in the United States, such as the and the some of which include the Beneficiary's signature; however, it is not clear how these negotiations would account for the Beneficiary's primary performance of executive-level tasks within the first year.

Beyond this, the Petitioner discusses various vague executive tasks such as supervising "professional management employees," setting "strategies and goals," "making all decisions," having the ability to hire and fire employees, directing the marketing and public relations of the company, directing the management of "general business operations," and managing "all financial matters." The Petitioner only vaguely mentions these other general executive-level responsibilities, 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 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 contrast, to the extent that the Petitioner provides specifics regarding the Beneficiary's duties, they appear more focused on non-qualifying operational tasks. For instance, the Petitioner indicated in the Beneficiary's duty description that the Beneficiary would be responsible for sourcing clients from its Chinese parent company, identifying U.S. medical providers who can treat complex medical conditions, coordinating the logistics of advance payments, and ensuring that the Chinese clients "are properly attended for [*sic*] their travel to US, lodging, and other ancillary services." Further, the opinion submitted by indicated that the Beneficiary would develop a platform "to allow payments between countries, which is very complex...due to unique Chinese regulations" and that she would "understand these challenges and is a certified actuary who has the skills to understand and manage the business in this regard." The mention of these apparent non-qualifying operational duties is particularly noteworthy since the Beneficiary's duty description indicates that she would devote 75% of her time to these tasks.

In addition, the Beneficiary's duty description indicates that she will devote 10% of her time to marketing and public relations functions; however it is not made apparent to whom she would

delegate the operational duties inherent in these functions. We acknowledge that during the first year of the new office the Beneficiary would likely be involved in non-qualifying operational tasks to launch the business, but it has not demonstrated that she would be primarily engaged in executive-level duties within one year. It is not sufficient to only vaguely state that the Beneficiary will direct various operational tasks, such as client sourcing, billing, funding, and travel through subordinates without detailing how she would primarily delegate these tasks to them within the first 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)(B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. *Id.* 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 she 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. The beneficiary must also 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.*

In support of the petition, the Petitioner stated that it had already hired five employees as of the date the petition was filed. An accompanying organizational chart reflected that the Beneficiary oversaw

an already hired operation manager, office manager, and chief medical officer. The chart also indicated that the operation manager would supervise a hired office assistant, the office manager would oversee a hired operation assistant, and that the chief medical officer would manage the [redacted] & other US healthcare providers." Lastly, the chart also showed that the Beneficiary would oversee a subcontractor providing "logistic support."

In response to the Director's RFE, the Petitioner provided a very similar organizational chart; however, it also reflected that the Beneficiary would oversee a medical billing coordinator who would supervise a medical record assistant. Further, the new chart reflected that the chief medical officer would also oversee a medical liaison and that the Beneficiary would supervise another operation manager identified by name.

The Petitioner has submitted duty descriptions for the Beneficiary's proposed subordinates that do not demonstrate she is likely to be employed in a position where she would primarily direct the management or establish the goals and policies of the organization within one year. For instance, the duties of the Beneficiary's asserted subordinates indicate that they would more likely perform operational level duties rather than act within a complex organizational hierarchy as asserted. For instance, the duties of the chief medical officer reflected that he would be tasked with coordinating with medical centers, reviewing and distributing medical records, and facilitating appointments for the company's Chinese clients. Being that the chief medical officer is the only proposed medical professional employed by the company, it appears likely he would be largely involved with daily patient care matters and appointments that would make up the core of the Petitioner's business rather than being employed within a tier of managers as claimed.

Likewise, the duties of the office manager stated that he or she would handle accounting, manage databases of clients, vendors, and medical providers, and handle human resources, contract administration, and invoicing. Again, it appears likely that this proposed subordinate would likely be an operational employee rather than an employee acting within a complex organizational hierarchy. In fact, the Petitioner's proposed organizational structure submitted in response to the RFE includes an executive and five subordinate managers, but only four operational employees, including the office assistant, operation assistant, and the projected medical records assistant and medical liaison. This proposed organizational structure leaves question as to whether there would be sufficient operational level employees to support the Beneficiary in an executive capacity within one year. In short, the Petitioner has not credibly established that the Beneficiary would likely be employed in a complex organizational hierarchy within the first year.

We also note that the Petitioner provided vague duties for the asserted operation managers, indicating that the first would be tasked with generic duties such as "researching new technologies and alternative methods of efficiency in medicine," implementing "effective methods and strategies," and "ensuring that all operations are manufactured in a correct, cost effective and timely manner in alignment with specifications and quality requirements." Meanwhile, the second operations manager listed in response to the RFE was stated to be responsible for ensuring that the company secures appropriate vendors and suppliers, liaising with Chinese clients and U.S. medical

providers, and coordinating "complex financial transactions such as advance medical payments from Chinese clients to medical providers." However, the stated duties for the second operation manager are nearly identical to the Beneficiary's asserted duties. The asserted duties of the proposed operation managers offer little insight into these positions and do not sufficiently demonstrate that they would relieve the Beneficiary from performing non-executive duties within one year.

In addition, although we acknowledge that the Petitioner need not be fully operational as of the date of the new office petition, the Petitioner asserts in this matter that it employed five managers subordinate to the Beneficiary and two operational level employees as of the date of the RFE response in September 2017. The Petitioner also submitted supporting documentation, such as offer letters and IRS Forms W-4, for both operation managers, the chief medical officer, the office manager, office assistant, and the operation assistant dated in June 2016, approximately one year prior to the date the petition was filed. However, the Petitioner only provided internal payroll documentation for one of the operation managers running from February 2017 through August 2017, but no supporting evidence that the other claimed employees had been hired in June 2016 and working for the company up to and through the RFE response as claimed. In fact, the Petitioner submitted an employment offer letter from one of the company operation managers dated in June 2016; however, this operation manager was not listed on the company's organizational chart provided with the petition in June 2017.

Now, on appeal, the Petitioner provides internal payroll documentation for several employees dating from July through September 2017, more than one year after they were claimed to have been hired in June 2016. However, there is little evidence to support that these employees had been employed since June 2016 as claimed. Again, although the Petitioner need not have its full planned organizational structure in place as of the date the new office petition is filed, the company's hiring plans are largely based on subordinate managers and employees it claims to have already hired. However, the discussed discrepancies, gaps in the supporting evidence from the claimed hire dates through to the appeal, and the lack of objective substantiating documentation to establish that these employees are already employed in their asserted roles leaves question as to the Petitioner's claims regarding its planned organizational structure. The Petitioner must resolve inconsistencies and ambiguities 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).

Furthermore, 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 states that the foreign employer has invested $200,000 in the new venture and indicates that its foreign parent has committed to support the business with upwards of $3 million over the next few years. However, it provides little indication as to how the initial investment would be used to launch the business during the first year. In fact, it appears based on submitted bank records that the initial investment was provided more than one year prior to the date of the petition and this documentation indicates that this investment

has been spent over time, only to be periodically replenished by unexplained deposits by unidentified third parties. The Petitioner does not describe its investment plans clearly and how these amounts would be used to successfully launch the business during the first year.

In fact, the Petitioner's provided business plan projects that it would earn $205,000 in sales during the first year through 180 consultations with clients in China and the provision of medical services to five Chinese clients. First, this level of projected revenue does not appear sufficient to support the Petitioner's claimed organizational structure during the first year. For example, the Petitioner projected in the business plan that it would pay $205,600 in salaries during the first year, an amount more than its projected revenue, this without taking into account the additions it made to the organizational chart in response to the Director's RFE. In addition, the Petitioner provides little indication how it would generate 180 $1,000 medical consultations with Chinese citizens during the first year and only vaguely references an already established network of over 400,000 clients in China, for which it provides little substantiating evidence.

Likewise, the Petitioner indicates in its business plan that it would assist Chinese patients in gaining visas, but provides little indication as to how this would be accomplished. The Petitioner also states that it would coordinate travel and lodging for Chinese patients and vaguely references a proposed subcontractor for these services, but submits little explanation as to how these services would be implemented or provided. In addition, although the Petitioner submits blanket agreements executed with U.S. medical facilities for proposed care to Chinese patients, one of these with the [redacted] indicates in Section 3.1 that it must maintain all required licenses, registrations, and certifications, and that these must be provided upon the request of the medical provider. However, there is no discussion in the business plan or elsewhere on the record about such requirements and it is reasonable to presume, given the referenced contract and industry, that these license and certification requirements would be ubiquitous when handling patient health records and billing information in the United States. The Petitioner provides no indication as to how it plans to deal with these business realities during the first year. Therefore, the Petitioner has not submitted credible business plans that indicate that it is more likely than not to operate sufficiently within the first year to support the Beneficiary within a complex organizational hierarchy.

On appeal, the Petitioner emphasizes the opinion of [redacted] "an independent expert" and asserts that this opinion was not properly considered by the Director. Upon review, we do not find [redacted] opinion persuasive in demonstrating that the Beneficiary would likely act in an executive capacity within one year, as it largely replicates the assertions offered by the Petitioner on the record, which as we have discussed, do not sufficiently demonstrate that the Beneficiary would likely act in an executive capacity within one year. For instance, [redacted] points to the Petitioner's claimed organizational structure and asserts that with several managers and employees already in place, it very much requires a higher level executive such as the Beneficiary to negotiate with hospitals. However, we are given little indication as to what evidence [redacted] reviewed when he concluded that the Petitioner already has several managers and employees in place; and as we have discussed, there are discrepancies and insufficiencies that leave question as to whether the Petitioner already employs this asserted organizational structure and whether it can maintain it within the first year.

In addition, [redacted] also makes unsupported claims regarding the company's operations, stating that after the Petitioner launched in June 2016 it provided consultation services to 160 Chinese clients and arranged medical services for 20 Chinese patients, thereby "exceeding expectations." However, again, [redacted] does not articulate the supporting documentation he reviewed to come to this determination and the Petitioner provides little supporting documentation to substantiate this assertion. In sum, as we have discussed, we find that the statements of [redacted] largely reiterate those of the Petitioner and they offer little additional insight on the likelihood of the Petitioner supporting the Beneficiary in an executive capacity and whether she would primarily perform qualifying tasks within one year. We may, in our discretion, use as advisory opinion statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron Int'l*, 19 I&N Dec. 791 (Comm'r 1988).

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 H-H-USA LLC*, ID# 1184169 (AAO Dec. 18, 2018)