U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-C-F- LLC

DATE: DEC. 22, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an ice cream store,[1] seeks to temporarily employ the Beneficiary as general manager of its new office 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 Vermont Service Center Director denied the petition, concluding that the record did not establish, as required, that: (1) the Petitioner will employ the Beneficiary in a managerial or executive capacity within one year of approval of the petition; and (2) a qualifying relationship exists between the Petitioner and the Beneficiary's foreign employer.

On appeal, the Petitioner asserts that the record includes sufficient evidence to establish that it has a qualifying relationship with the foreign entity and that the Beneficiary's duties are the qualifying activities that an L-1A manager performs.

The record on appeal includes sufficient evidence to establish that a qualifying relationship exists between the Petitioner and the foreign entity. The Director's decision will be withdrawn on this issue.[2] However, the record does not establish that the Petitioner will employ the Beneficiary in a qualifying managerial or executive capacity within one year as required by the "new office" regulations. We also find an additional issue that precludes approval of the petition.

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

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[1] An Internet search for the Petitioner's ice cream store revealed that the store had been reported "closed." *See* https://www (last visited Dec. 20, 2017). In any future proceedings, the Petitioner must establish that it is conducting business.

[2] The record includes evidence that the foreign entity in this matter owns and controls a majority interest in the limited liability company. Although the Petitioner's 2014 federal tax return identified a different ownership arrangement, the Petitioner has offered an explanation for the discrepancy on appeal. The record is sufficient to establish by a preponderance of the evidence that a qualifying relationship exists between the Petitioner and the foreign entity.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. 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 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). If the Form I-129, Petition for a Nonimmigrant Worker, 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. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Petitioner was organized in May 2014[3] to open an ice cream shop in the United States. The Petitioner noted that it intended to expand and eventually open additional shops and to franchise its brand.

The Director determined that the record did not demonstrate a realistic expectation that the reasonable needs of the planned operation will justify an L-1A executive or manager who primarily performs qualifying activities. The Director noted, for example, that the Petitioner planned to hire an accountant, a market representative, four clerks, and two dishwashers, but found that the record did not indicate when the Petitioner expected to fill these positions. The Director concluded that the record did not establish that the Petitioner would grow to a point in its first year where the Beneficiary will be involved in activities that are primarily managerial or executive in nature.

The term "managerial capacity" is defined as an assignment within an organization in which the employee primarily manages the organization or a department, subdivision, function, or component; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function; if the employee directly supervises other employees, has the authority to take personnel actions, or if no other employee is directly supervised, functions at a senior-level within the organization or with respect to the function managed; and exercises discretion over the

[3] Although the Petitioner was organized in May 2014 and took possession of leased premises for its initial shop in June 2014, the Petitioner did not obtain licenses and open the ice cream store until the April-May 2015 time frame. It did not start doing business in the United States until April-May 2015, and thus qualifies as a new office under the regulations. 8 C.F.R. § 214.2(l)(1)(ii)(F).

day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

The Act defines the term "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 thereof; 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.

We will address both the Petitioner's description of the Beneficiary's intended duties as well as the Petitioner's business plan and proposed staffing to determine whether the Petitioner has established this eligibility requirement.

A. Duties

When a new business is first established and commences operations, the 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 or executive responsibility cannot be performed in that first year. The "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of a beneficiary in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. This evidence should demonstrate a realistic expectation that the enterprise will succeed 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. *See generally* 8 C.F.R. § 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure, and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

When examining the managerial capacity of a beneficiary, we review a petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Second, the petitioner must prove that the beneficiary will be *primarily* engaged in executive or managerial duties, as opposed to ordinary operational activities alongside the petitioner's other employees. *See, e.g., Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

In a letter in support of the petition, the Petitioner asserted that the Beneficiary will perform managerial and executive duties during the first year of operation, noting that those duties often overlap during the initial year of operations. The Petitioner stated that the Beneficiary "will be responsible for the overall launching, supervision and direction of [the Petitioner's] management and operations" and described her duties as including:

> [C]onducting general administration affairs of the company, acting as a liaison and representative for the company, engaging in long-range planning, identifying business opportunities, analyz[ing] the market conditions to set strategic planning goals, setting quotas, expenses, development of advertising and promoting the store and franchise opportunities as well as outlining how franchises opportunities should be offered, products and services to be presented to the public to attract potential clients and franchises. She will also be in charge of negotiating contracts on behalf of the company.

The Petitioner also divided the Beneficiary's time into four areas including: management, administrative, and discretionary functions (40%); financial functions (20%); development functions (20%), and marketing functions (20%). The Petitioner submitted a lengthy narrative of the proposed duties under each of these functions re-stating portions of the statutory definitions of managerial and executive capacity. The Petitioner also stated generally that the Beneficiary would oversee financial functions with the accountant, develop the company's retail operations and franchising opportunities, and gather and analyze marketing data.

The Petitioner repeated this job description in response to the Director's request for evidence (RFE). The Petitioner emphasized its plan to develop its ice cream concept into a franchise and stated that "[c]onsidering this is the first store, [the Beneficiary] must ensure that she launches a solid brand to create an incentive for potential franchisees."

The Petitioner describes the Beneficiary's position in general terms which indicates her senior level of authority within the company, but which offers little insight into what she will actually do on a day-to-day basis during the first year of operations and beyond. Merely repeating the language of the statute does not satisfy the Petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at 5 (S.D.N.Y.).

Moreover, the Petitioner has not delineated how the Beneficiary will move beyond daily involvement in non-qualifying tasks related to financial review, marketing, and developing the Petitioner's franchise to primarily performing managerial or executive duties within the one-year time frame. The Petitioner's broad allocation of the Beneficiary's time to various functions which includes managerial, executive, and non-qualifying duties does not provide a sufficient framework to analyze and evaluate what the Beneficiary will be doing within one-year of approval.

The Petitioner does not provide any additional information regarding the Beneficiary's actual proposed duties on appeal, but reiterates that the Beneficiary is the individual who will make all business decisions related to becoming a new franchisor, and that such decisions will impact long-term profitability. The Petitioner repeats that the Beneficiary "will decide, supervise and implement all policy goals with regards to its franchises sales, organization, marketing, training, hiring and firing policies, operations, management, etc." However, the fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or 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 or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that her actual duties will advance to be primarily managerial or executive in nature within the one-year time frame.

B. Business Plan and Staffing

The Petitioner's business plan described four employees' positions, including the Beneficiary as the general manager, an administrative manager, a clerk, and a dishwasher. The business plan also included yearly cost estimates and an organizational chart showing the Beneficiary as general manager, directly supervising an accountant, an administrative manager, and a market analyst. The chart also included four clerks and two dishwashers subordinate to the administrative manager's position. The Petitioner's business plan included a Revenue Expense Forecast for the years 2015 through 2018. With respect to executive, administrative, and sales wages, the Petitioner indicated that it expects to pay $102,000 in salaries and wages in 2015-2016, $169,500 in 2016-2017, and $190,500 in 2017-2018.

Specifically, the business plan forecast allocates $42,000 to executive wages, $30,000 to administrative wages, and $30,000 to sales wages in the 2015-2016 year,[4] identified as the Petitioner's first year of operation. The executive wage figure is inconsistent with the Beneficiary's salary of $50,000 listed on the Form I-129. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner also states that it has hired a full-time administrative manager, and plans to employ an accountant and a market analyst, in addition to four clerks and two dishwashers. It is unclear how the Petitioner intends to employ or contract with three full-time administrative professionals with $30,000 (plus an additional $1200 for accounting services) in total salary projected for all three positions.

We have considered the Petitioner's assertions in response to the Director's RFE and on appeal that the Petitioner will outsource its accounting services and marketing functions. The Petitioner

[4] As separate lines of expense, the forecast allocates $1200 to accounting fees and $600 to legal fees during this same time period.

submitted a contract with an accounting service to provide bookkeeping, payroll, and sales tax services, at a $325 per month rate with an option to pay an additional $500 to prepare annual tax returns. The Petitioner also provided June 2015 invoices for website development and a six-month social media package for a total cost of $7,000. The Petitioner claims that it plans to continue the accounting and advertising services. The Petitioner does not explain how the cost of these plans corresponds to its projected expenses as outlined in its business plan. Further, the record does not include sufficient evidence demonstrating that either of these outside services will perform sufficient work to relieve the Beneficiary from performing financial and marketing tasks or that the Beneficiary will supervise or direct the management of the accounting and advertising firms.[5] The record is deficient in this regard.

It is also unclear how the Petitioner plans to staff its business with the four clerks and two dishwashers necessary to actually sell the product to customers, thereby producing the revenue to support the business, with only $30,000 in wages allocated to these positions in the first year. The clerks and dishwashers are essential to the Petitioner's business model and are needed to support the retail establishment and generate revenue. It is not apparent how the Petitioner will staff its business with these positions given that it has allocated at most $5000 in wages for each in the first year. This wage level does not support the assertion that the Petitioner will be fully staffed and able to relieve the Beneficiary from performing the non-qualifying duties associated with running the ice cream store within one year of approval.

The evidence in the record does not establish that the company will be able to support a qualifying managerial or executive position within a twelve-month period. The regulations require the Petitioner to present a credible picture of where the company will stand in one year, and to provide sufficient evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within that time. In this case, the staffing projections and contracts noted above, along with the business plan and the financial projections do not support a finding that the Beneficiary will have a sufficient staff to relieve her from performing the daily tasks of running an ice cream store. It appears more likely that she will perform many of the tasks that she purports to manage.

Based on these deficiencies, we find that the Petitioner has not established that it will be able to support the Beneficiary in a primarily managerial or executive capacity by the end of the first year of operations.

[5] When discussing the use of outside vendors, the Petitioner refers to an unpublished decision in which we determined that a beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. The Petitioner has not established that the facts of this petition are analogous to those in the unpublished decision. Moreover, while 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on U.S. Citizenship and Immigration Services, unpublished decisions are not similarly binding.

III. ONE YEAR OF CONTINUOUS FULL-TIME EMPLOYMENT ABROAD

Although the Director did not address the issue of the Beneficiary's one-year of continuous full-time employment with the foreign entity, we find that the Petitioner has also not established this essential element of eligibility for this visa classification. In order to qualify for the classification requested, the Petitioner must establish that the Beneficiary has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition. *See* 8 C.F.R. § 214.2(l)(3)(iii). In this case, the petition was filed on October 8, 2015; therefore, three years preceding the filing of the petition would be October 8, 2012. This is the date from which the one year of full-time continuous employment with the qualifying organization must be measured.

The Petitioner initially stated on the Form I-129 L Classification Supplement that the Beneficiary was employed by [redacted] in Venezuela from March 1, 2012, until September 2, 2015. The Petitioner stated in a letter in support of the petition, that the Beneficiary "exercised her duties as a general manager in a ***full-time basis*** from March 1, 2012 through June 23, 2013, and then from June 23, 2013 through the present on a part-time/reduced basis." The Petitioner acknowledged that the Beneficiary entered the United States on June 24, 2013, and then remained in the United States until the time of filing. The record does not include the Beneficiary's employment records, pay statements, or other objective evidence of her actual employment with the foreign entity.

Notwithstanding the lack of evidence to corroborate the Beneficiary's claimed employment, even if we were persuaded that the Beneficiary was employed abroad for the time periods claimed, the record does not indicate that the Beneficiary would have the required one year of continuous employment abroad, as the Beneficiary spent a significant period of time in the United States during her claimed foreign employment. The one year of continuous employment must take place outside of the United States. *See* 8 C.F.R. § 214.2(l)(3)(iii). While periods of time spent in the United States for business or pleasure will not interrupt the one year of continuous employment abroad, such time cannot be counted toward fulfillment of the one-year requirement. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A). Even if the Petitioner established that the Beneficiary was employed by the foreign entity on a full-time basis from October 8, 2012 (the beginning of the three-year period), until June 23, 2013, the Beneficiary would have been employed by the foreign entity for approximately 258 days, or less than one year, in the three years preceding the filing of the petition.[6]

The Petitioner has not established that the Beneficiary had one continuous year of full-time employment abroad with the foreign entity within the three years preceding the filing of the petition. *See* 8 C.F.R. § 214.2(l)(3)(iii). For this additional reason, the petition cannot be approved.

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[6] Furthermore, although not disclosed by the Petitioner, government records indicate that the Beneficiary was in the United States from October 11, 2012, until October 25, 2012, and from December 21, 2012, until April 11, 2013, in B2 status. This evidence raises further questions regarding how much time the Beneficiary spent in the United States during the time period that the Petitioner claims she was employed by the foreign entity.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary will be employed in a managerial or executive position for the Petitioner within one year, and that she had been employed for one continuous year of full-time employment with the foreign entity within the three years preceding the filing of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of N-C-F- LLC*, ID# 839636 (AAO Dec. 22, 2017)