U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-2016, INC.

DATE: DEC. 28, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a restaurant,[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 California Service Center Director denied the petition, concluding that the record did not establish, as required, that: (1) a qualifying relationship exists between the Petitioner and the Beneficiary's foreign employer; (2) the Beneficiary had been employed with the foreign entity for one continuous year within three years preceding the filing of the petition; (3) the Beneficiary was employed in an executive or managerial capacity for the foreign entity; and (4) the Petitioner will employ the Beneficiary in a managerial or executive capacity within one year of approval of the petition.

On appeal, the Petitioner asserts that the record includes sufficient evidence to establish that it has satisfied the eligibility requirements for this visa petition.[3]

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 capacity that is managerial, executive, or involves specialized

---

[1] The Arizona Corporation Commission website indicates that the Petitioner is not in good standing. *See* http://ecorp.azcc.gov/ (last visited Dec. 28, 2017). In any future filings, the Petitioner must provide evidence establishing that it is active and operating in Arizona.

[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] We decline the Petitioner's request for oral argument. 8 C.F.R. § 103.3(b).

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. QUALIFYING RELATIONSHIP

To establish a "qualifying relationship," the 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* section 101(a)(15)(L) of the Act; *see also* 8 C.F.R. § 214.2(l)(1)(ii) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate").

The Director determined that the record did not establish that the Petitioner is a branch office or a subsidiary of the foreign entity.

On appeal, the Petitioner asserts that it is a branch office and resubmits the Arizona corporation commission's approval of its Articles of Incorporation. However, the regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). If a petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See, e.g.*, *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Invs. Ltd.*, 17 I&N Dec. 530 (Comm'r 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Although the Petitioner claimed on the Form I-129 that it is a branch office of the foreign entity, the Petitioner was incorporated in the State of Arizona and thus is a separate entity. Accordingly, it is not a "branch" office of the foreign entity as that term is defined in the regulations.

The Petitioner also asserts on appeal that the evidence establishes that the Beneficiary "holds and maintains ownership and control of the two qualifying entities [the Petitioner and [redacted]."[4] The record regarding ownership and control of the Petitioner is inconsistent

[4] If a beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that their services are to be used for a temporary period and that they will be transferred to an assignment abroad upon the

and incomplete. The Petitioner's November 2016 action in lieu of its first meeting states that the corporation is authorized to issue 100 shares at a par value of $1000 and identifies the Beneficiary as holding 100 shares for a total purchase price of $100,000. The Articles of Incorporation indicates that the Petitioner is authorized to issue 100 shares of common stock for a par value of $1000 per share and is also authorized to issue an additional 100 shares of preferred stock, also at a par value of $1000 per share. The Petitioner's by-laws indicate that each outstanding share, regardless of class, is entitled to one vote. The Petitioner also submitted an unnumbered stock certificate, dated October 27, 2016, showing the Petitioner issued 51 shares of common stock to the foreign entity in this matter. The stock transfer ledger lists only stock certificate No. 2 and shows that the Beneficiary transferred 51 shares to the foreign entity on October 27, 2016, for zero consideration.

The Petitioner does not explain why stock certificate No. 1 is not included on the stock ledger and does not resolve the apparent inconsistency between its Articles of Incorporation and its November 2016 action in lieu of its first meeting regarding the total shares authorized and their class. The Petitioner does not offer any information regarding the authorized 100 shares of preferred stock. The lack of complete information and unresolved inconsistencies in the record regarding the shares authorized, issued, and paid for, preclude a determination that a foreign entity owns and controls the Petitioner with 51 shares of common stock.

The record identifies the Beneficiary as the sole proprietor of in and the company registration shows the business started June 16, 2014. The Petitioner does not provide probative evidence to establish that the Beneficiary owns or that this entity has followed proper procedures to establish as the foreign entity's fictitious name. The current record does not include probative evidence establishing the connection between and the foreign The lack of cogent evidence demonstrating the ownership of and its relationship, if any, to casts further doubt on the actual qualifying relationship between the Petitioner and a specific foreign entity.

The Petitioner asserts on appeal that it provided a summary of seven incoming wire transfers beginning in May 2016 through November 2016. The total funds transferred during this time period is approximately $70,413. The summary does not clearly identify the Petitioner or the Beneficiary as the recipient in each of the seven transfers. The summary does not clearly identify the Beneficiary or or as the transferor for each of the transfers.

Based on the inconsistencies and incomplete evidence discussed above, the Petitioner has not met its burden to establish that it has a qualifying relationship with the foreign entity.

---

completion of the employment in the United States. 8 C.F.R. § 214.2(l)(3)(vii). Here, the Petitioner claims that the Beneficiary is a major stockholder of - the parent organization, and is also the sole proprietor of the foreign However, the Petitioner has not established that the Beneficiary's services would be used temporarily in the United States or that she would be transferred to an assignment abroad upon completion of the position in the United States. The Petitioner must address the temporary nature of the Beneficiary's employment in the United States in any future proceedings.

III. ONE YEAR OF EMPLOYMENT ABROAD

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 March 8, 2017; therefore, three years preceding the filing of the petition would be March 8, 2014. This is the date from which the one year of full-time continuous employment with the qualifying organization must be measured.

The Petitioner initially identified the name of the foreign employer on the Form I-129 L Classification Supplement as " The Petitioner further stated that this entity employed the Beneficiary from February 2009 to present. The Petitioner indicated the foreign employer was located in Denmark. The Petitioner also provided a copy of the Beneficiary's resume which listed her employment as a "pharmaconimist" at a pharmacy from 2004 to 2016. The Beneficiary noted that she also owned "Restaurant California" located on from 2009 to present and owned " located on from 2014 to present.

The Director notified the Petitioner that the Beneficiary did not claim employment with or a restaurant on her DS-160 report submitted to the U.S. government, but rather stated that she was employed at a pharmacy. In response, the Beneficiary provided a statement confirming that she was employed at the pharmacy but also indicating that she owned " The Beneficiary explained that she "thought the application was asking for my employment and as an owner I did not consider myself employed but rather an owner." In a subsequent statement, the Beneficiary claimed that she worked at the pharmacy part-time, only three or four days per week and left the pharmacy at 5:00 PM. The Beneficiary also outlined her duties and allocated her time at the foreign restaurant. The time allocated per week for those duties totaled approximately four hours per day and one extra hour per month. The Petitioner also provided a letter on the letterhead of " stating that the Beneficiary's "salary is comprised of the surplus from company engagements." The Petitioner further provided a translated tax document listing the Beneficiary's employment history as (paraphrased):

Payment - January 29, 2014 – October 7, 2016
– July 1, 2011 (date of employment)[5]
– August 1, 2001 (date of employment)
– June 1, 2015 (date of employment)[6]

[5] The translated tax return includes the statement "[r]eporting from this employer may be missing, so that the shown amount and your tax return may be wrong." Unlike the amount shown for the employing pharmacy, the tax return does not include any income received from

[6] The translated tax return includes the statement "[r]eporting from this employer may be missing, so that the shown amount and your tax return may be wrong." Unlike the amount shown for the employing pharmacy, the tax return does not include any income received from the located in

On appeal, the Petitioner asserts that the Beneficiary's explanation regarding the information she provided to the U.S. government on her DS-160 report, her statements regarding her part-time employment at the pharmacy and her duties at the restaurant, the letter from [redacted] and her income tax document "establish[] that she has one year of employment abroad with [f]oreign entity [redacted] [*sic*] [redacted] located in Denmark."

The record does not establish that the Beneficiary was employed full-time by a qualifying foreign organization for one continuous year in the three years prior to filing the petition. The record includes inconsistencies regarding the specific foreign entity that employed the Beneficiary, the date she began her "employment," and the Beneficiary's actual employment status. For example, the Petitioner claims on the Form I-129, L Classification Supplement, that [redacted] doing business as [redacted] employed the Beneficiary from 2009 to present. However, according to the records submitted, [redacted] did not commence operations until June 2014 and the Beneficiary's tax records indicate her date of employment for this entity as June 1, 2015.[7] Further, the Beneficiary did not consider herself "employed" by [redacted] as she was the owner, not an employee. Providing the oversight of an investor/owner in a business is not sufficient to establish employment for that entity. The minimum number of hours the Beneficiary spent at the foreign restaurant further weakens the Petitioner's claim that the Beneficiary was employed on a full-time continuous basis at the restaurant. The Petitioner has not provided sufficient probative evidence of the Beneficiary's employment with a qualifying organization for one year on a continuous basis within the three years preceding the filing of the petition. *See* 8 C.F.R. § 214.2(l)(3)(iii).

IV. EMPLOYMENT ABROAD IN AN EXECUTIVE CAPACITY

The Director denied the petition determining that the Petitioner's description of the Beneficiary's duties for the foreign entity did not appear consistent with those performed by someone in a managerial or executive capacity. The Director found that the description of the Beneficiary's daily duties described the Beneficiary as performing the necessary tasks to provide a service or to produce a product.

On appeal, the Petitioner states that the Beneficiary's tax information, the foreign entity's bank statements,[8] the foreign entity's organizational chart, and other documents show that the Beneficiary signed documents and was recognized as the foreign entity's president. The Petitioner asserts that

[7] Although the Beneficiary states on her resume that she also had owned "[redacted] since 2009, the record does not include evidence that the Beneficiary was the sole owner of this entity, or that it was owned by [redacted] rather the record includes references to the Beneficiary and her spouse owning the restaurant jointly.

[8] The foreign entity's bank statements are not translated. Any document in a foreign language must be accompanied by a full English language translation. 8 C.F.R. § 103.2(b)(3). The translator must certify that the English language translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.* Because the Petitioner did not submit a properly certified English language translation of the bank statements, we cannot meaningfully determine whether the translated material is accurate and thus supports the Petitioner's claims.

the documentation establishes the Beneficiary's position abroad was as an executive for the parent company.[9]

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.

When examining the executive capacity of a beneficiary, we review the description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definition of executive capacity has 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 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.

The foreign entity described the Beneficiary's duties as involving "everything from filling [*sic*] paperwork with state, managing employees, overseeing day to day operations, and auditing employee trails as well as books." This general description does not include sufficient detail to establish that the Beneficiary performed duties in a primarily executive capacity for the foreign entity.

The Beneficiary also provides a description for her duties and the amount of time she spends on her duties for the foreign entity as follows (bullet points added and paraphrased for clarity):

- Advertising using social media promotions and contacting newspaper organizations to promote events – half hour each day;
- Daily cash flow such as tracking money coming in and out, counting registers, auditing cashiers – half hour each day;
- Analyzing sales trend, pay bills, customer review, and balancing bank account – half hour each day;
- Ordering inventory and making sure inventory can handle demand – half hour each day;
- Scheduling employees and making sure all shifts are covered – half hour each day;
- Filling out paperwork and complying with health department requirements – hour each day;
- Updating menu and inventory pricing – hour per week;

[9] The Petitioner does not claim that the Beneficiary worked in a managerial capacity for the foreign entity.

- Quarterly and annual reports to be submitted to accountant – hour per week; and,
- Updating employee manuals and training – hour per month.

The Beneficiary added that she likes to stay engaged with customers so she tries to be in the restaurant for two or three shifts. She did not allocate a specific amount of time to this task.

The Beneficiary describes her actual duties for the foreign entity as performing the operational and administrative tasks necessary to keep the restaurant open. She performs the marketing and promotion duties, some bookkeeping services, staff scheduling, and inventory work. The record does not show that these duties are delegated to other employees. These duties are the ordinary operational activities of the foreign restaurant. Also as discussed above, the Beneficiary performs these duties for the foreign restaurant on a part-time basis.

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.*

Although the Beneficiary may sign documents on behalf of the foreign entity and may occupy the top position in the foreign entity's hierarchy, the record does not establish that she primarily directs the management of the organization. Rather, as the Beneficiary stated she performs many of the operational duties of the organization. Operational and administrative tasks are non-qualifying duties. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. Section 101(A)(44)(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 record does not include sufficient probative evidence establishing that the Beneficiary's duties are primarily executive in nature.

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

The Petitioner was organized in October 2016 to open a restaurant in the United States. The Petitioner entered into a five-year lease agreement for the restaurant in November 2016 and opened the restaurant around March 2017. Thus, the Petitioner had not been doing business for a full-year prior to filing the new office petition on March 8, 2017.

The Director determined that the record did not contain sufficient information to demonstrate that the "new office" would support an executive or managerial position in one year. On appeal, the Petitioner asserts that it has provided documentation that it has sufficient physical premises and that the U.S. entity has sufficient financial support for an executive position. The Petitioner resubmits invoices to demonstrate that the restaurant is doing business.

The issue here, however, is whether the Petitioner has submitted sufficient evidence to establish that it will support the Beneficiary in an executive or managerial capacity, as the statute defines those terms, within one year. When a new business is first established and commences operations, the regulations recognize that a designated executive or manager 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 executive or managerial 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 executive or primarily managerial 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 an executive or manager 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 an executive or manager 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.*

The Petitioner has provided a two paragraph business plan indicating that it "saw [the] United States as a big and expanding market during this time of interest in healthy food options" and that it believed its "healthy concept can become a huge success in this current market." The Petitioner noted that it expected to hire 10 to 12 full-time employees within the first year of business. The Petitioner indicated that the full-time employees would include "two managers, three cooks, and two cashiers." The Petitioner added that the "[e]xecutive roles will be to develop the business to a success and to manage the restaurant in regards to accounting, human resources, inventory control, and compliance." The Petitioner does not further describe the Beneficiary or others' "executive roles" within the business. The Petitioner does not include evidence of staff currently employed and does not describe the restaurant's current or expected hours of operation. The record does not include the Petitioner's proposed organizational chart.

The Petitioner has provided profit and loss statements for: (1) October to December 2016 which shows sales of $7922.91 and wages of $1898.28; and (2) January to February 2017 which shows sales of $27,272.36 and wages of $2399.56. It is not clear what the Petitioner is selling during these time periods because the restaurant apparently did not open until March 2017. The record includes a third profit and loss statement for the January to March 2017 time frame (now incorporating the

month of March). This statement shows sales of $59,904.63 and wages of $3243.46. The Petitioner does not identify the recipients of the wages paid on any of the profit and loss statements or elsewhere in the record.

The record does not include further information regarding the Petitioner's current financial status and does not include the Petitioner's financial projections in terms of sales and salary expenses. Nor does the record include a market study or other evidence to support the Petitioner's belief that its concept will succeed.

The record lacks evidence regarding the Petitioner's financial projections and a staffing plan. The business plan lacks basic information regarding the Petitioner's projected employees and their salaries. The record does not include evidence of the Petitioner's current employees, the actual salaries paid, and their position within the Petitioner's organizational structure. There is insufficient evidence in the record to adequately evaluate and analyze whether the Petitioner will realistically grow and expand to support the Beneficiary in a managerial or executive position within one year.

The record also lacks a detailed description of the Beneficiary's duties and information on how the Beneficiary will advance from performing non-qualifying duties during the first year of operations to primarily performing executive or managerial duties. The evidence in the record does not establish that the company will be able to support a qualifying 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 qualifying position within that time. In this case, the record lacks adequate staffing and financial projections, and a credible business plan. There is insufficient evidence in the record to support a finding that the Beneficiary will have a sufficient staff to relieve her from performing the daily tasks of running the petitioning business within one year. It appears more likely that she will perform many of the tasks that the Petitioner claims will be executive or managerial.

VI. CONCLUSION

The appeal will be dismissed because the Petitioner has not established a qualifying relationship with the Beneficiary's foreign employer, and has not established that a qualifying foreign entity employed the Beneficiary for one continuous year within three years preceding the filing of the petition or that her foreign employment was in an executive or managerial capacity. The Petitioner also has not established that it will employ the Beneficiary in a managerial or executive capacity within one year of approval of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of M-2016, Inc.*, ID# 841790 (AAO Dec. 28, 2017)