U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-B-I- LLC

DATE: FEB. 9, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an entity that intends to provide consulting services to "facilitate cross-border investments between Brazil, Portugal, and the United States," seeks to temporarily employ the Beneficiary as the 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 Vermont Service Center denied the petition, concluding that the Petitioner did not establish, as required, that: (1) it had secured sufficient business premises to house its new business operation; (2) the Beneficiary was employed abroad in a managerial or executive capacity; and (3) the new office would support the Beneficiary in a managerial or executive position within one year after approval of the petition.

On appeal, the Petitioner contends that the Director's decision was erroneous and points to previously submitted evidence concerning the sufficiency of the leased premises it had obtained prior to filing the petition. The Petitioner also contends that the Beneficiary was employed abroad and would be employed in the United States in a managerial capacity, pointing to the Beneficiary's top-most position with the foreign entity and the U.S. entity's business plan to support its arguments.

Upon *de novo* review, we find that the Petitioner has submitted sufficient evidence to show that it had secured sufficient business premises prior to the date of filing. We also find that the Petitioner reconciled an inconsistency pertaining to the foreign entity's employee job titles and provided sufficient evidence to show that the Beneficiary was more likely than not employed abroad in a managerial capacity. However, we find that the Petitioner did not provide sufficient evidence to show that it would have the ability to employ the Beneficiary in a managerial capacity within one year of approval of the instant petition. Therefore, we will dismiss the appeal.

[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.

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 petitioner must also establish that the beneficiary's prior education, training, and employment qualifies him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

Also, 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).

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 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.

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director acknowledged the submitted job duties for the Beneficiary and the Petitioner's business plan, but found that the Petitioner did not adequately demonstrate how it would have the ability to relieve the Beneficiary from significant involvement in the day-to-day operations of the company within a one-year period.

On appeal, the Petitioner points to information provided in its business plan about the way it plans to market and sell its services to clients. The Petitioner emphasizes the Beneficiary's many years of experience in setting up a similar business in Brazil and states that the Beneficiary will oversee the work of two professional employees.

A. New Office Requirements

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 of the petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed managerial or 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).

In the present matter, the Petitioner provided an initial cover letter, stating that it will target U.S. companies that are looking to enter markets in Portugal and Brazil as well as Portuguese and Brazilian companies looking to do business in the United States. The Petitioner stated that it plans to provide its clients with "a one-stop" business opportunity by providing them with corporate, immigration, and other types of business advice that they can use to make investments in the United States and abroad.

The Petitioner also provided a business plan indicating that it would initially focus on building its clientele among Brazilian families and business owners who are already in or are seeking to immigrate to the United States. The business plan includes information that pertains to the Petitioner's planned operations, including a list of its start-up expenses and purchased assets, a hiring plan for in-house employees, an organizational chart depicting the projected employees and contracted service providers, a discussion of the strategies the Petitioner plans to use for selling and marketing its services, and financial forecasts showing the Petitioner's projected profits and losses during a five-year period.

The business plan also included an organizational chart of the Petitioner's projected staffing hierarchy. The Beneficiary was depicted at the top of the hierarchy, which consisted of two in-house subordinates – an operations manager and a relocation specialist – with four service providers – a corporate attorney, "suppliers," a "CPA," and banks and financial institutions – under the direct control of the Beneficiary. The chart also shows four other service provider positions – certified accountants, attorneys, realtors, and a marketing specialist – under the direct control of the operations manager. The Petitioner did not explain the difference between the services to be provided by the "CPA" and corporate attorney under the Beneficiary's direct control, and the services to be provided by the certified accountants and attorneys, who would be under the direct control of the operations manager.

In a request for evidence (RFE) the Director noted that while the business plan contains an organizational chart depicting a marketing specialist position, there is no timeline showing when the Petitioner plans to fill that position or how it plans to implement its marketing and sales plan. The Director determined that further evidence was necessary and that the record, as constituted at that time, did not establish that the Petitioner would be sufficiently staffed to relieve the Beneficiary from having to primarily perform non-managerial tasks within one year of the petition's approval.

In response, the Petitioner offered evidence of the foreign entity's initial investment of $50,000 and submitted a statement from the foreign entity stating that it plans to employ an operations manager with a marketing degree to develop and implement a digital marketing strategy and use the services of an outside accounting firm "to administrate and fulfill the account and corporate tax compliance

among others." The letter did not specify what is meant by "among others," nor did it clarify whether it would use the same accounting firm for all of its accounting needs to explain why its organizational chart lists "CPA" separately from "Certified Accountants" when depicting the service providers it plans to use in the course of running its business. Likewise, the letter did not distinguish between the functions of the "Corporate Attorney" and "Attorneys," despite the fact that the Petitioner listed these two positions separately and indicated that they would be subject to the control of two different employees.

The Director acknowledged the Petitioner's response to the RFE, but found that the Petitioner's business plan lacked hiring timelines and benchmarks for expected business growth. The Director also noted the absence of evidence, such as service agreements, to support the Petitioner's claim that it intends to hire outside vendors and consultants to perform various business functions.

The Petitioner disputes the Director's findings on appeal, pointing out that "all actions to start the [U.S.] operations," along with a second installment of $50,000 (in addition to the existing $50,000 investment), are pending the approval of the instant petition. We note, however, that the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). Although the Petitioner provided information in its business plan to show that the foreign entity's initial $50,000 investment was sufficient to cover its start-up costs, the record does not show that the Petitioner had resources available at the time of filing to pay employee salaries or cover the costs of contractors and service providers. Stating that an additional fund infusion from the foreign entity is contingent upon the Beneficiary getting a visa approval is insufficient to establish that the Petitioner had the resources it would need to become operational at the time of filing.

Further, we agree with the Director's finding that the Petitioner neglected to provide a timeline for hiring a marketing specialist. Regardless of whether a marketing specialist would be a direct employee or, as the Petitioner indicated, this would be a contracted position, it is critical to know when the Petitioner plans to fill this position and the duties it would encompass, given the Petitioner's emphasis on marketing as an element that is integral to its growth and development. Although the Petitioner's projected profit and loss statement shows that it anticipates paying $20,000 to its contractors during its initial year of operation, it did not provide a more detailed breakdown showing when it plans to hire these contractors or how it plans to allocate that amount among the various types of services its business would require.

The Petitioner also did not provide a list of duties that the various contractors would perform or explain why the amount of funds it allocated to paying for contractors was disproportionately small compared to the anticipated increase in revenue. If the Petitioner's business hinges on attorneys and accountants providing legal and tax advice to its clients, it stands to reason that an increase in the number of clients should result in a proportional increase in the Petitioner's demand for legal and accounting advice. However, the Petitioner's projected profit and loss statement shows that while it projects a revenue increase of over 160% from year one to year five of its operation, it projects an increase of less than 13% in the amount of funds it would allocate to its service providers over the same five-year period. The Petitioner has not reconciled its projected revenue growth rate with the

projected rise in the costs of doing business. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). While we acknowledge the Petitioner's projection that the amount it would pay in wages and salaries in year five of its operation would be more than double what it would pay during its first year of operation, the record does not contain a more precise plan explaining the cause(s) for this projected rate of increase in employee wages and salaries. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Without sufficient evidence, we cannot determine that the Petitioner will have either the need or the ability to employ the Beneficiary in a managerial capacity within one year of approval of the petition.

In light of the above, we find that the Petitioner has not provided an adequate business plan or evidence to show that its operation is adequately funded such that it would progress to a stage of development that would support the Beneficiary in a primarily managerial position.

We also find that the Petitioner has not established that it will, within one year of the petition's approval, have the infrastructure to relieve the Beneficiary from having to allocate his time to primarily nonmanagerial job duties.

2. Duties

We also reviewed the job descriptions of the Beneficiary and his projected subordinates and we find the duty descriptions to be insufficient to establish that the Beneficiary would perform primarily managerial duties within one year of the petition's approval.

On appeal, the Petitioner states that its entire sales strategy will involve the use of virtual tools and the internet to target clients. However, the Petitioner did not specify who within its organization would be primarily responsible for selling the services offered by the Petitioner. Given that the operations manager would allocate only 25% of his/her time to "[s]upporting the President in meetings with U.S. clients," sales does not appear to be the chief function of this position. In fact, the Petitioner did not assign the sales function to any of its employees. This leads us to question who, if not the Beneficiary, would primarily assume the responsibilities associated with this function, which is critical to the Petitioner ability to generate revenue. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Moreover, given that the operations manager would be "[s]upporting the President in meetings with U.S. clients," it is logical to assume that the Beneficiary would have a critical role in meeting with clients. However, this job duty was not included in the Beneficiary's job description, thereby indicating that there is an inconsistency between the Beneficiary's listed job duties and those of the

operations manager. The fact that the Petitioner did not disclose how much time the Beneficiary would actually spend meeting with clients leads us to question how much of his time he would allocate to this, and possibly other, nonmanagerial tasks one year after the petition's approval. The Petitioner must resolve this incongruity 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).

In sum, we find that the Petitioner provided inconsistent information as to the actual time the Beneficiary would be required to allocate to the sales function. Given that the Petitioner has not established that it would have the infrastructure to relieve the Beneficiary from having to carry out its sales function within one year of the petition's approval, we cannot conclude that the Beneficiary would be primarily employed in a managerial capacity.

III. CONCLUSION

The Petitioner has not established that it will employ the Beneficiary in a managerial or executive capacity within one year of the petition's approval.

ORDER: The appeal is dismissed.

Cite as *Matter of P-B-I- LLC*, ID# 927793 (AAO Feb. 9, 2018)