U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-4USA LLC

DATE: FEB. 19, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which intends to manufacture and sell concrete sculpted garden decorations, seeks to temporarily employ the Beneficiary as general manager 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 California Service Center denied the petition concluding that the Petitioner did not establish, as required, that: (1) it had secured sufficient physical premises to house its new office; (2) the Petitioner's foreign affiliate, a medical laser distributor, employed the Beneficiary in a managerial or executive capacity; and (3) the new office would support the Beneficiary in a managerial or executive position within one year of the petition's approval.

On appeal, the Petitioner disputes the Director's findings and points to previously submitted evidence in an effort to overcome the denial.

Upon *de novo* review, we find that the Petitioner has not established that the new office would support the Beneficiary in a managerial or executive position within one year of the petition's approval. Therefore, we will dismiss the appeal. Because of the dispositive effect of this finding and an additional issue that surfaced in our review of the record, we will reserve the two remaining issues.

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

[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.

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.*

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 A MANAGERIAL OR EXECUTIVE CAPACITY

The primary issue to be addressed in this decision is whether the Petitioner established that the new office would support a managerial or executive position within one year of approval of the petition.

In the case of a new office petition, we review a beneficiary's proposed job duties as well as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial or executive capacity. A petitioner has the burden to establish that it would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the evidence must be considered in analyzing whether the proposed managerial or executive position is plausible considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

A. Duties

The Petitioner indicates that it will operate as a retailer and wholesaler of sculpted garden and house decorations. It states that it will manufacture its own products and use "a variety of materials" not used by other manufacturers. Although the Petitioner claims that this distinction will be advantageous in developing its customer base, it does not clarify how its materials differ from those of other manufacturers of garden and home decorations.

In support of the petition, the Petitioner provided a prospective organizational chart depicting the Beneficiary at the top of the hierarchy overseeing a commercial director and a production manager during its first year of operation; it showed plans to open a second branch during its second year of operation and therefore included a branch manager as part of his subordinate staff. The Petitioner also provided a description of the Beneficiary's proposed job duties as general manager stating that he will plan strategies and make business decisions, manage finances, research the market and develop sales goals and business plans, oversee managerial employees and hire staff, and set quality standards to address customers' feedback and needs. The Petitioner did not indicate that the Beneficiary's duties during its "new office" phase of operation would be different from those he would perform during the company's second year of operation; rather, it indicated that the Beneficiary would perform these duties from 2018 to 2020. The Petitioner did not further address

the Beneficiary's job duties either in its response to the Director's request for evidence (RFE) or on appeal, which focuses on the Petitioner's financial projections and earning potential.

We find that the Petitioner provided a deficient job description that is so general that it could describe virtually any executive or senior management position with any company. It provides only vague information that focuses on the Beneficiary's discretionary authority, but says little about the actual tasks he would perform during the various stages of the company's development and makes no distinction between tasks that the Beneficiary would need to perform during the Petitioner's rudimentary phase and those he intends to perform once the company is no longer in the "new office" stage of development. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Although it is reasonable to conclude that the Beneficiary's duties would change to correspond with the Petitioner's operational development and changing needs, the Petitioner did not provide a job description that reflects this likely progression. Without a detailed iteration of the Beneficiary's job duties during the Petitioner's first year of operation, it is unclear how the Petitioner would progress beyond the "new office" phase.

We acknowledge that the Beneficiary would assume a position as the Petitioner's senior employee and that as a result, he would have authority to establish plans, policies, and objectives for the company and make major decisions regarding its finances and overall direction. However, the Petitioner has not established that these types of responsibilities would primarily occupy the Beneficiary's time within one year. 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. Therefore, even though the Beneficiary may exercise discretion over the Petitioner's day-to-day operations, a broad overview of his responsibilities is insufficient to establish that his actual duties during the Petitioner's first year of operation would lead to primarily managerial or executive duties within one year of this petition's approval.

B. Projected Staffing and Business Plan

If staffing levels are used as a factor in determining whether an individual will be acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) takes into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

The Petitioner's business plan indicates that it intends "to be well established within the first two years"; it states that its operating goals for the first year of operation include developing relationships with local retailers, building "a team of specialists," and achieving at least $700,000 in gross sales. The Petitioner also provided a business plan that included a profit and loss projections chart showing expected gross earnings of $706,139 and a net profit of approximately $190,000 after subtracting approximately $141,000 for cost of goods and $375,000 for total operating expenses

during its first year of operation. The business plan also includes a best and worst case earnings scenario showing $59,536 in monthly earnings as the best case scenario and $29,768 as the worst case scenario. We note that neither scenario is consistent with the above gross earnings projection. The Petitioner also included a personnel plan indicating that in addition to hiring the Beneficiary, it would also hire a commercial director, a sales manager, an advertising specialist, an artist, a caster, a sculptor, and a driver during its first year of operation; it indicated that it would incur $297,000 in payroll expenses.

The Petitioner also provided a bank statement from March 2018 showing a balance of $113,000 in its business market account, which included a $10,000 deposit from the Beneficiary and a $55,000 deposit from an unknown source. Although the Petitioner claimed that the Beneficiary invested $75,000 into the Petitioner's account, it did not substantiate this claim with evidence of a deposit or fund transfer. It is therefore unclear who funded the Petitioner's start-up expenses.

In response to an RFE, the Petitioner provided additional expense and revenue projections that were not entirely consistent with its initial submissions. For instance, the new payroll calculation did not include a sales manager in the list of proposed first-year hires. Although this was reflected in the decreased projection in payroll expenses, the Petitioner did not explain the reason for the change or state who would be responsible for selling the Petitioner's merchandise in the absence of a sales-based employee. The Petitioner also provided a new set of best and worst case scenarios that do not match those initially submitted. The new projections indicate that the best case scenario will range from $29,768 in the Petitioner's first month of operation rising steadily to reach a projected $69,408 in its 12th month of operation. Likewise, the new worst case scenario projections range from $14,884 in the first month of operation and reaching a projected $34,704 in its 12th month. The Petitioner did not explain the factors that accounted for these different projections.

In light of the Petitioner's uncertain earning potential as a new office, it is reasonable to review the amount of the U.S. investment and the foreign entity's financial ability to pay the Beneficiary and commence doing business. 8 C.F.R. § 214.2(l)(3)(v)(C)(*2*). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). As indicated above, the Petitioner has not provided evidence to substantiate the claim that the Beneficiary has invested $75,000 towards its start-up and payroll expenses, nor has it established the amount of the U.S. investment, despite its bank account balance in March 2018.

Although the original projections estimated approximately $141,000 as the cost of goods sold, the new projections indicate that the cost will be approximately $96,000 – a difference of $45,000. The new breakdown of expenses also includes $5000 in gas, which was not included in the original breakdown of expenses. These inconsistencies preclude us from gauging the total amount of operating expenses the Petitioner expects to incur during its first year of operation; they also lead us to question the validity of the Petitioner's hiring projections and the likelihood that it will progress beyond a rudimentary phase of development.

Although it appears that the Petitioner expects to hire a commercial director and production manager to assist the Beneficiary, it is not clear how it plans to meet its sales goals without the assistance of any sales personnel. As noted above, the business plan that was submitted in response to the RFE is inconsistent with the Petitioner's initial hiring projection, which indicates that a sales manager would be hired during its first year of operation. Moreover, it is unclear what the Beneficiary will be doing at any stage of the Petitioner's operation, nor does the record establish that he will primarily supervise a subordinate staff of professional, managerial, or supervisory personnel within one year. *See* section 101(a)(44)(A)(ii) of the Act.

In sum, the Petitioner also has not shown that it will attain the scope of operations needed to support the Beneficiary in an executive role where he would reasonably be required to focus on the broad goals and policies of the company within 12 months. The Petitioner has consistently stated that the Beneficiary will occupy the most senior position in the new office, but has not submitted a job description or supporting evidence sufficient to demonstrate that he would primarily engage in managerial or executive duties, or that the new office would support a managerial or executive position, after the initial year of operations.

III. QUALIFYING RELATIONSHIP

Finally, while not previously addressed in the Director's decision, we find that the Petitioner has not provided sufficient evidence to establish that it has a qualifying relationship with the Beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, a 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 generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The Petitioner claims that it and the Beneficiary's foreign employer are affiliates because both are owned by the Beneficiary. As noted earlier, the Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376. Although the Petitioner has provided evidence of the Beneficiary's ownership of its stock, the same cannot be said of the foreign entity, whose ownership is based entirely on the third party statement of the foreign entity's accountant. The Petitioner provided no stock certificates, stock ledger, or other corporate documentation establishing that the Beneficiary owns the foreign entity's stock as claimed.

IV. CONCLUSION

The Petitioner has not established that it would employ the Beneficiary in a managerial or executive capacity within one year or that it has a qualifying relationship with the Beneficiary's foreign employer. As these elements are fundamental to establishing eligibility and the Petitioner has not met these requirements, we will not address the remaining grounds that the Director cited in the denial decision.

ORDER: The appeal is dismissed.

Cite as *Matter of A-4USA LLC*, ID# 2060746 (AAO Feb. 19, 2019)