U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-G-, INC.

DATE: FEB. 28, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an import and export company, 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 Director of the California Service Center denied the petition, concluding that the record did not establish, as required, that: (1) the Beneficiary has been employed abroad in a managerial or executive capacity for at least one continuous year during the three years preceding the filing of the petition; (2) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer; and (3) the new office will support a managerial or executive capacity within one year after approval of the petition.

The matter is now before us on appeal. On appeal, the Petitioner submits additional evidence and asserts that the Director erred by making unwarranted assumptions and by disregarding evidence of eligibility.

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 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.*

II. PRIOR EMPLOYMENT ABROAD

The Director found that the Beneficiary had not met the "one-in-three" requirement of at least one continuous year of qualifying employment during the three years preceding the filing of the petition. On appeal, the Petitioner contends that the Director relied upon inaccurate information and disregarded rebuttal evidence that the Petitioner had submitted.

We find that, although the Director relied upon flawed evidence, the Director did arrive at the correct conclusion by finding that the Beneficiary lacked the required experience.

The Petitioner claims that the Beneficiary meets the experience requirement through her employment as finance manager of [redacted] from December 2007 to January 2010, prior to her entry into the United States in February 2010. The Director doubted this claim, citing evidence that appeared to indicate that the Beneficiary was in the United States from 2004 until October 2009.

By submitting a credible explanation supported by independent evidence, the Petitioner has refuted this finding and established, by a preponderance of the evidence, that she was outside the United States during the period claimed. This evidence, however, does not show that the Beneficiary meets the one-in-three requirement.

The regulation at 8 C.F.R. § 214.2(l)(3)(iii) requires "at least one continuous year of full-time employment abroad with a qualifying organization *within the three years preceding the filing of the petition*" (emphasis added). A beneficiary's lawful presence in the United States does not invariably suspend this three-year period. Rather, the regulations identify specific circumstances under which presence in the United States does not interrupt qualifying employment abroad:

> Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted towards fulfillment of that requirement.

8 C.F.R. § 214.2(l)(1)(ii)(A). In this instance, from 2010 to 2017 the Beneficiary was not in the United States "for a branch of the same employer or a parent, affiliate, or subsidiary thereof." Rather, she was in H-4 derivative status while her spouse was employed by an unrelated entity. Furthermore, a stay of more than seven years is not a "brief trip." The Beneficiary's December 2016 change of status from H-4 to B-1 did not reset the clock on the length of her stay or the continuity of her employment abroad.

In an attempt to show that the Beneficiary's time in the United States does not disqualify her, the Petitioner cited 1994 correspondence from an official of what was then the Immigration and Naturalization Service. This correspondence, however, concerned a beneficiary who was employed

by a qualifying entity in the United States, a circumstance contemplated by 8 C.F.R. § 214.2(l)(1)(ii)(A).

During the three years preceding the March 2017 filing of the petition, the Beneficiary was not employed by a qualifying organization either abroad or in the United States. The Beneficiary's long presence in the United States, in a status unrelated to qualifying employment, is disqualifying on its face and the petition cannot lawfully be approved.

III. QUALIFYING RELATIONSHIP

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 Director found that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer. The Director based this finding not on any direct evidence, but on inferences drawn from the Petitioner's finances.

The Petitioner claims to be "a wholly-owned subsidiary of [redacted]." The record documents the foreign entity's purchase of 100,000 shares of the petitioning company in exchange for a $1000 capital contribution.

On November 7, 2016, two weeks after [redacted] purchased its shares, the Petitioner received $75,000 from the [redacted] From the size of this transaction, the Director concluded that the [redacted] appeared to have purchased a controlling interest in the petitioning entity. On appeal, the Petitioner establishes that this payment was a loan against a line of credit. A trustee of the [redacted] states that neither the trust nor anyone associated with it "have any ownership interest in [the petitioning entity] or otherwise exercise control over the company." Nothing in the record contradicts or casts doubt on this assertion.

The transaction, identified as a loan and an extension of credit, does not show that the [redacted] purchased shares of the petitioning entity. We withdraw the Director's finding that the Petitioner has not established a qualifying relationship with [redacted]

IV. NEW OFFICE

If a petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner must submit evidence that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. The petitioner must submit information regarding: (1) the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals; (2) the size of the United States investment and the financial ability of the foreign

entity to remunerate the beneficiary and to commence doing business in the United States; and (3) the organizational structure of the foreign entity. 8 C.F.R. § 214.2(l)(3)(v)(C).

A. Managerial or Executive Capacity

The petitioner in a new office petition must submit evidence to establish that the proposed employment involves executive or managerial authority over the new operation. 8 C.F.R. § 214.2(l)(3)(v)(B). The position must be primarily managerial or executive within one year after approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C), (1)(ii)(B) and (C).

The Director found that the Petitioner had not established that the Beneficiary's intended position will be managerial or executive. On appeal, the Petitioner asserts that the position will be managerial; we will therefore disregard the requirements for an executive capacity.

A managerial capacity is an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization, and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 101(a)(44)(A)(i) and (ii) of the Act. A personnel manager supervises and controls the work of other supervisory, professional, or managerial employees; the duties of a first-line supervisor are not considered managerial unless the employees supervised are professional. A personnel manager must also have the authority to execute or recommend personnel actions such as hiring, firing, and promotions. A function manager need not directly supervise other employees, but must manage an essential function within the organization, or a department or subdivision of the organization, and function at a senior level within the organizational hierarchy or with respect to the function managed. Section 101(a)(44)(A) of the Act.

The Director found that a majority (55%) of the Beneficiary's intended responsibilities do not reflect a managerial capacity. On appeal, the Petitioner asserts that the Director did not explain the basis for this finding. We agree that the Director did not sufficiently explain this basis for denial as required by 8 C.F.R. § 103.3(a)(1)(i). For this reason, we withdraw this particular finding, but the Petitioner has not met another key requirement relating to new office petitions.

B. Financial Ability of the Foreign Entity

A new office petition must include evidence establishing the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States. 8 C.F.R. § 214.2(l)(3)(v)(C)(*2*).

The Petitioner's business plan anticipated $225,000 in startup expenses, plus $104,587 in salaries during the first year of operations. The Director concluded that, near the time of filing, the foreign entity's bank balance was "approximately 133,386GTQ which converts to roughly $18,184USD."

The Petitioner also relies on a $300,000 line of credit from the as discussed earlier. The Director concluded that the available funds are not sufficient to cover the Petitioner's costs and remunerate the Beneficiary. The Director also found that the Petitioner's initial financial projections "do not appear to account for the cost of goods being acquired then shipped."

On appeal, the Petitioner does not dispute the figures cited by the Director, but asserts that "sufficient funding exists to pay the Beneficiary her salary and start doing business in the U.S." The Petitioner submits a projected profit and loss statement, anticipating the following first-year figures:

Revenues	$832,120
Cost of Goods Sold	580,592
Gross Profit	251,528
Total Operating Expenses	184,375
Net Profit	67,153

The Petitioner did not say how it would raise the $580,592 necessary to pay for the cost of goods sold, or how soon during the first year that it would require that sum.

The Petitioner emphasizes that it "secured a line of credit of up to $300,000 to cover startup costs of operation." The promissory note in the record shows that the made a loan directly to the Petitioner in the United States. A line of credit from an unrelated third party in the United States, making loans directly to the Petitioner, does not establish "the financial ability of *the foreign entity* to remunerate the beneficiary and to commence doing business in the United States." The regulations require the foreign entity to be financially responsible for the new office. In this case, the foreign entity has handed off this responsibility to an unrelated lender, in the form of an unsecured loan that places no obligation on the foreign entity.

The Petitioner has not established the foreign entity's ability to remunerate the Beneficiary and to commence doing business in the United States.

V. CONCLUSION

Because the Beneficiary was in the United States from 2010 to 2017, and was not employed by a qualifying employer during that time, she cannot meet the one-in-three employment requirement. Also, the Petitioner has not established the foreign entity's ability to compensate the Beneficiary and to commence doing business in the United States.

ORDER: The appeal is dismissed.

Cite as *Matter of E-G-, Inc.*, ID# 879594 (AAO Feb. 28, 2018)