U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-USA, INC.

DATE: JAN. 17, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner intends to operate a restaurant and seeks to temporarily employ the Beneficiary as the president 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, Vermont Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Beneficiary would be employed in a managerial or executive capacity within 1 year of approval of the new office petition.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that it established by a preponderance of the evidence that the Beneficiary's duties will be primarily executive in nature and that the Petitioner will experience sufficient growth during its initial year to support an executive position.

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

I. LAW

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a managerial or executive capacity, or in a specialized knowledge capacity, for 1 continuous year within 3 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, executive, or specialized knowledge capacity. *Id.*

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as "an assignment within an organization in which the employee primarily":

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take 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 regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien 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.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the 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 shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by 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.

II. ANALYSIS

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity under the extended petition. The Petitioner does not claim that the Beneficiary would be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

Upon review of the petition and the evidence of record, including the Petitioner's brief in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary would be employed in an executive capacity within 1 year of the approval of the new office petition or that the new office would support an executive position within 1 year.

The Petitioner was established in 2016 and states that it intends to acquire and operate an existing pizza restaurant doing business as " When a new office is 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 activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require a petitioner to disclose the proposed nature, scope and organizational structure of the business and the size of the U.S. investment, and thereby establish that the proposed enterprise will support an executive or managerial position within 1 year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). 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.

When examining the managerial or executive capacity of the Beneficiary, we first review the 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 would be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees, within 1 year of the approval of the petition. *See, e.g., Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World, Inc.*, 940 F.2d 1533.

At the time of filing, the Petitioner provided a letter from the Beneficiary's foreign employer, which included a description of the Beneficiary's proposed responsibilities as president and indicated he will "direct the management of the organization" through a subordinate manager and two department supervisors; "research market demand and implement marketing strategies; establish the company's budgetary policies and goals; "set customer service standards"; "ensure compliance with legal requirements" such as health code regulations; hire an experienced manager, marketing personnel and other restaurant staff, and make other personnel decisions; act as the company's signatory on important documents; and "develop and implement the business strategy" for the Petitioner.

Although we find that these duties indicate that the Beneficiary's "proposed employment involves executive or managerial authority over the new operation" as required by 8 C.F.R. § 214.2(l)(3)(v)(B), several of the proposed qualifying duties described are contingent upon the hiring of subordinate staff to relieve the Beneficiary from performing the day-to-day operations of the intended restaurant business. For example, the Petitioner suggests that the Beneficiary will rely on subordinates to oversee the lower-level workers, to assist him with researching and implementing marketing strategies and campaigns, routine banking and financial transactions, monitoring compliance with service and quality standards, and "review[ing] quality, service and cost-effective management of resources."

For this reason, a position description alone is insufficient to establish that the Beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the Petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the Beneficiary in the intended managerial or executive capacity. Again, a petitioner must establish that it would require the beneficiary to perform duties that are primarily managerial or executive in nature within 1 year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering a petitioner's anticipated staffing levels and stage of development within a 1-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

The Director concluded that, while the evidence established that the Beneficiary would have the authority to manage the new office as its senior employee, the totality of the evidence indicated that he "will primarily be responsible for the tasks necessary to deliver a product or service." However, as noted by the Petitioner on appeal, the Director did not further address the totality of the evidence provided or explain how she reached this conclusion. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence did not to satisfy its burden of proof pursuant to section 291 of the Act.

8 C.F.R. § 103.3(a)(1)(i). As we review appeals on a *de novo* basis, we will address the Petitioner's proposed business and personnel plans below.

As of the date of filing, the Petitioner had agreed to purchase the assets of an existing restaurant known as ' for a price of $175,000. Its business plan, financial projections and personnel plan are based on an assumption that it will be operating this specific restaurant. In its letter, the foreign entity explained that the restaurant currently derives 70 percent of its sales from deliveries to local hotels, and noted that current management is catering to only 30 out of 200 hotels in its geographic area. The Petitioner stated that it would grow the business by expanding its marketing efforts to target these additional hotels, which would necessitate the hiring of additional positions, including a manager, marketing/branding & delivery supervisor, order booking, delivery drivers and servers. The Petitioner noted that the restaurant had gross sales of $410,000 in 2014 and $476,000 in 2015, and projected that it would grow to have 12 employees and $600,000 in sales in its first full year operating the restaurant in 2017.

The Petitioner submitted an organizational chart showing that the Beneficiary would supervise a manager who, in turn, would supervise a dining supervisor/chef and a marketing/branding and delivery supervisor. The chart shows that the dining supervisor/chef would supervise an assistant chef, an assistant chef/server, a server, and a dishwasher, while the marketing/branding and delivery supervisor would supervise a marketing/branding assistant, an "order taking" employee, and three delivery drivers. The Petitioner provided position descriptions for each of these positions.

The Director issued a request for evidence (RFE) requesting additional details regarding the Petitioner's staffing plans and financial projections to show how the company would support a managerial or executive position within 1 year, including a timetable for each proposed action for the first year. In response to the RFE, the Petitioner submitted a letter from the foreign entity indicating that the company planned to complete the purchase and takeover the restaurant's operations as of August 1, 2016, contingent upon approval of the petition. It stated that the Petitioner would assess and make decisions as to whether to hire or terminate the restaurant's existing employees within the first week, and immediately begin additional recruitment efforts. The foreign entity said the Petitioner will implement its marketing and promotional plan within the first 3 months, and expected to increase revenues to the "projected rate" within 6 months. A separate "staffing plan" chart indicated that all staff listed on the previously provided organizational chart would be hired within 2 months.[1]

The Petitioner also provided a business plan with 5-year financial projections which include projected salary expenses. The Petitioner indicates that its payroll expenses (which appear to include both salaries and wages and payroll taxes) will be $142,314 in 2016 and $171,977 in 2017. The business plan mentions that its projections are based on the current restaurant owner's 2015 tax return, which has not been submitted for the record.

[1] There was one minor change to the personnel list; in response to the RFE, the Petitioner stated that it would employ two servers and one assistant chef as opposed to one server, one assistant chef, and one hybrid assistant chef/server position.

Upon review, the evidence submitted is insufficient to establish: (1) that the Petitioner can feasibly employ 13 workers (including the Beneficiary) based on the projected payroll expenses; and (2) that the projected staffing would be sufficient to relieve the Beneficiary from significant involvement in the day-to-day operations of the restaurant. The Petitioner indicates that it may retain some of the restaurant's existing employees, but has not provided any information regarding the restaurant's current employees or the restaurant's current salary expenses. Further, it has not provided the anticipated salary expenses for individual employees or indicated whether all employees will be full-time workers. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

Therefore, we cannot determine whether the amount to be paid in payroll expenses during the first year of operations (which would fall between $142,314 and $171,977 given the Petitioner's plan to take over the business in the third quarter of 2016), would reasonably cover the salaries of 13 workers. The Beneficiary's offered salary is $40,000 which would leave approximately $100,000 to $130,000 to be divided among 12 employees. A business with 12 full-time (40 hours per week) workers earning minimum wage would need to budget $200,928 annually for wages alone, not including payroll taxes, and the Petitioner anticipates paying significantly less than this amount in total payroll expenses. Further, we assume that the manager and supervisors will not be paid minimum wage based on the stated requirements for these positions.

We must also consider the nature of the business and the fact that, as a restaurant, it would not be operating with a 40-hour workweek. The Petitioner submitted a photograph of the restaurant's storefront and it has a sign in its window indicating that it is "open till 4 AM." The Petitioner has not mentioned any proposed reduction in operating hours in its plans to expand the business. It is reasonable to assume that the restaurant opens at 11:00 a.m. daily for lunch and may be open as many as 119 hours per week if 4:00 a.m. is its standard closing time.

Even if the evidence showed that the Petitioner intends to hire only full-time workers, the record would not support a finding that the restaurant would be sufficiently staffed for over 100 hours per week. For example, the Petitioner intends to hire only one chef (who is described as having has limited food preparation responsibilities because he/she would also serve as the dining supervisor), and one assistant chef. The Petitioner has not explained how these two employees would handle the food preparation responsibilities of this restaurant. Similarly, the Petitioner plans to employ only two servers and three drivers, and only one person to handle incoming orders, while claiming that it expects to significantly expand its delivery services. Finally, while the record indicates that the manager would handle much of the day-to-day oversight of the restaurant, operational tasks such as food and supply orders and deliveries, and administrative matters when he/she is on duty, it is unclear who would be available to perform these non-qualifying duties during the up to 80 hours per week when the manager is not available. Similarly, any supervisory duties performing by the dining supervisor would be left unfulfilled during the many hours per week when this employee would be unavailable. With so many non-qualifying functions of the restaurant left unattributed, we cannot

conclude that the Beneficiary would be sufficiently relieved from involvement in non-executive activities within 1 year.

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, 8 U.S.C. § 1101(a)(44)(B). 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 a beneficiary 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 an 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.*

Here, while we do not doubt that the Beneficiary would have the appropriate level of authority and would allocate some of his time to qualifying duties, the record does not support a finding that he would be primarily focused on the broad goals and policies of the company or that he would be sufficiently relieved from involvement in the day-to-day operations of the company within 1 year. The Petitioner's projected hiring plans, organizational structure and payroll expenses do not support a finding that the company will employ sufficient staff to perform the day-to-day, non-qualifying duties associated with the restaurant within 1 year. Accordingly, the Petitioner has not established that the Beneficiary would be employed in an executive capacity.

Finally, we note that there is some question as to whether the ' restaurant remained available for purchase following the denial of the petition. The Petitioner provided a copy of a "Standard Asset Purchase Contract and Receipt" relating to its planned purchase, which indicates that it was to pay the seller a $10,000 escrow deposit by May 4, 2016, $15,000 to reimburse the seller for its payment of a security deposit on the restaurant's lease, and would pay the remaining $165,000 by wire transfer on the closing date on July 1, 2016. The terms of the contract indicate that "Any extension of this Closing Date must be in writing and signed by Buyer and Seller." Further, item 45 of the contract states: "This offer is contingent upon Buyer receiving L1 Visa. . . . Should the Buyer not be awarded an L1Visa, the contract shall be null and void and the Buyer will receive a full refund of the Escrow Deposit."

The record contains the Petitioner's April 2016 bank statement for its checking account showing a balance of $170,000. The Petitioner did not provide evidence that it actually paid the $10,000 escrow deposit or the $15,000 security deposit reimbursement in May 2016, such as canceled checks or evidence of wire transfers to the seller's account. Further, the Petitioner filed the Form I-129 on June 6, 2016; however, the July 1 closing date had passed by the time the Petitioner submitted its response to the Director's request for evidence (RFE) on July 15, 2016, and it did not provide evidence that the parties had agreed, in writing, to extend the closing date. In addition, it appears that the Director's denial of the petition may have nullified the purchase contract for this restaurant

and it is unclear whether it remained available for the Petitioner to purchase after July 1, 2016, and whether it is still available to purchase. If the Petitioner pursues this matter further, it should be prepared to address the current status of its purchase agreement for the restaurant. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1).

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary would be employed in an executive capacity within 1 year of approval of the petition.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of S-USA, Inc.*, ID# 158130 (AAO Jan. 17, 2017)