U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-C-L-B&B, INC.

DATE: JAN. 19, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, which intends to engage in property management and equine investment, seeks to temporarily employ the Beneficiary as the vice 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 the Beneficiary has been employed abroad in a managerial or executive capacity, or that the Petitioner would be able to support a managerial or executive position within one year of approval of the petition.

On appeal, the Petitioner submits additional evidence and asserts that its prior counsel was "not strong enough to establish the eligibility of our beneficiary." The Petitioner contends that the Beneficiary was employed abroad and would be employed in the United States in an executive capacity.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification for 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 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. Section 101(a)(15)(L) of the Act. The petitioner must also establish that the beneficiary's prior education, training, and

[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.

employment qualifies him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

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).

The term "executive capacity" is defined as an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; 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.

II. EMPLOYMENT ABROAD IN AN EXECUTIVE CAPACITY

The Director determined that the Petitioner did not establish that its claimed foreign affiliate employed the Beneficiary in a managerial or executive capacity.[2] The Director found that the submitted position description was too vague to establish what the Beneficiary actually did on a day-to-day basis while employed abroad, and noted that there was a discrepancy in the record with respect to her position within the foreign entity's organizational hierarchy.

On appeal, the Petitioner asserts that the Beneficiary was employed abroad in an executive capacity and claims that its former counsel did not provide a sufficient response to the Director's request for evidence (RFE). The Petitioner also submits additional evidence pertaining to the Beneficiary's foreign employment, including an undated employment contract, a revised job description, the foreign entity's payroll records from 2016, and business documents bearing the Beneficiary's signature as the foreign entity's authorized representative.

A. Employment Capacity

When examining the executive capacity of a given beneficiary, we will review the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties performed by the beneficiary. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) examines the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

[2] Although the Director referenced the definitions of both managerial and executive capacity, the Petitioner claims that the Beneficiary was employed abroad in an executive capacity.

However, in this case the Petitioner has provided conflicting job titles and job descriptions for the Beneficiary and inconsistent information regarding her placement within the foreign entity's organizational hierarchy. These inconsistencies prevent us from determining the true nature of her employment abroad and preclude a finding that she performed primarily executive duties.

The Petitioner stated on the Form I-129 that the foreign entity employed the Beneficiary from June 2012 until March 2014.[3] In its initial supporting letter, the foreign entity's president stated that the Beneficiary held an unspecified executive position in which she established financial and operational reporting policies; reviewed financial and operational reports for compliance; established cash flow management policies; established the company's operational and financial goals; met with other industry executives to gain insight into pricing; and reviewed the execution of financial budgets.

The Petitioner did not provide an organizational chart at the time of filing; however, according to the Beneficiary's individual monthly payroll record for March 2013 to March 2014, she worked in the "administrative department" with a basic salary of Bs.4500.

In response to the Director's RFE, the Petitioner indicated that the Beneficiary held the position of controller while employed abroad. It provided the employment contract and position description for her claimed successor in that position. An accompanying organizational chart depicted the controller position as senior to the company president, reporting only to the foreign entity's board of directors.[4]

In the denial decision, the Director found that the duties provided for the controller position were too general to establish the Beneficiary's employment abroad in a managerial or executive capacity. The Director also noted that there was an apparent inconsistency regarding the Beneficiary's placement within the organizational hierarchy. Specifically, the Director noted that the Beneficiary's payroll records showed that she worked in the foreign entity's administrative department, while the organizational chart depicted her role as a senior employee reporting only to the board of directors.

On appeal, the Petitioner generally claims that its prior counsel did not submit a strong response to the RFE, and provides additional evidence, which includes:

- An undated employment contract between the Beneficiary and the foreign entity indicating that she was hired to serve in the position of "General Manager in the Management Area" with responsibility for supervising all administration, human resources and operations activities;

[3] At the time of filing in May 2016, the Beneficiary had been physically present in the United States since March 20, 2014.

[4] The foreign entity's January 2016 employee list, submitted at the time of filing, did not include a "controller" position.

- An organizational chart which lists the Beneficiary as general manager, reporting to a vice president and supervising, directly or indirectly, all foreign entity staff, including subordinate managers[5];
- A duty description for the general manager position;
- The foreign entity's personnel list as of January 2014 which identifies the beneficiary as the general manager in the management department;
- A new "individual monthly payroll detail" for the Beneficiary which indicates that she held worked in the management department from June 2012 until December 2014 with a monthly salary ranging from Bs.25,000 to Bs. 40,000; and
- Foreign entity business ostensibly documents signed by the Beneficiary during the second half of 2014.

The Petitioner does not explain why it previously claimed the Beneficiary served as the foreign entity's controller if she was actually the general manager. If she was the general manager, as stated by the foreign entity's president on appeal, it is unclear why he did not simply state this in his letter submitted at the time of filing. The position description provided at the time of filing bears no resemblance to the newly submitted general manager job description. On appeal, a petitioner cannot materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The Petitioner also has not addressed why the two payroll details submitted for the Beneficiary show vastly different salaries for the same period of employment, as well as different assigned departments. Further, the Petitioner does not indicate how the Beneficiary signed invoices and purchase orders on behalf of the foreign entity in Venezuela while residing in the United States in the latter portion of 2014. In fact, the Petitioner previously indicated that her employment with the foreign entity ended in March 2014.

The Petitioner must resolve inconsistencies 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). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

The evidence submitted on appeal does not resolve the deficiencies or inconsistencies noted by the Director. Rather, the new evidence introduces even more significant inconsistencies into the record. The Petitioner has not established that the Beneficiary actually held the position of general manager, a position it attributes to her for the first time on appeal. Further, the Petitioner now appears to have abandoned its earlier claim that she held the position of controller, a position that is not consistently depicted as part of the foreign entity's organizational structure. As a result, the Petitioner has not provided us with a credible job description or organizational chart to evaluate.

[5] This version of the chart does not include a controller position.

The Petitioner has not provided consistent, credible information or evidence establishing the nature of the Beneficiary's duties with the foreign entity or her placement within the foreign entity's organizational hierarchy. Therefore, it has not met its burden to establish that she was employed abroad in an executive capacity.

B. One Year of Employment Abroad

Although not addressed by the Director, the Petitioner has not established that the Beneficiary had at least one year of continuous full-time employment abroad in the three years preceding the filing of this petition, as required by 8 C.F.R. § 214.2(l)(3)(iii).

Periods of time spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof, and brief visits to the United States for business or pleasure, are not interruptive of the one year of continuous employment abroad but such periods are not counted towards fulfillment of that requirement. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A).

As noted, at the time of filing, the Beneficiary had been in the United States continuously for 26 months. The Beneficiary entered the United States on a B-2 visa in March 2014, received an extension of that status until March 2015, was denied a change of status from B-2 to L-1A in July 2015, and remained in the United States when this petition was filed in May 2016.

The Petitioner indicated on the Form I-129 that her employment with the foreign entity ended in March 2014. Even if the foreign entity continued to pay her salary thereafter, her one year of employment abroad must have occurred outside the United States between May 2013 and May 2016. The Beneficiary had no more than ten months of employment outside the United States during this period and cannot meet this requirement. For this additional reason, the petition cannot be approved.

III. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director further determined that the Petitioner did not establish that its new office would be able to support an executive position within one year of approval of the petition.

In the denial decision, the Director emphasized that the Petitioner's business plan was lacking information regarding the company's anticipated business benchmarks for the first year of operations and did not provide sufficient support, such as market data or industry research, for the company's projected growth. The Director further found that the Petitioner's description of the Beneficiary's proposed duties was vague and did not show how she would function at an executive level within one year.

On appeal, the Petitioner asserts that the Beneficiary will be employed in a qualifying capacity and that the Director appears to have erroneously denied the petition due to "the large gaps of information" contained in the RFE response prepared by former counsel. The Petitioner submits an updated three-year business plan and asserts that the company has the strength "to continue and sustain our beneficiary immediately." The Petitioner also provides additional evidence related to

real estate transactions undertaken by several claimed U.S. affiliates, as well as reference letters from various business associates.

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. 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. Projected Staffing and Business Plan

The Petitioner indicated at the time of filing that its core activity will be the purchase, training, racing, and sale of thoroughbred horses. Specifically, the Petitioner indicates that it will purchase yearling foals and train its horses for racing alongside other foals entrusted to its care by third parties, who will pay the Petitioner fees and commissions. The Petitioner then intends to sell its two-year old horses at auctions for a profit. In addition, the Petitioner indicates that it will provide, as a "collateral business" a residential real estate management service for properties owned by affiliated companies and third parties.

The Petitioner indicated that it would hire a total of 16 employees during its first year of operations. These employees would include: the Beneficiary (vice president); a general manager; an equine operations manager who will supervise a race horse trainer, two exercise riders, an operations and logistics supervisor and three grooms; and a real estate and equine facilities manager, who will supervise a handyman, a "tenant, landlord, horse owner services clerk", and a "payments and record keeping clerk." The Petitioner also identified several contractors including equine supply vendors, a boarding facility, equine transportation providers, event subcontractors, and veterinary service providers.

The Petitioner's business plan indicates that it anticipates $685,622 in revenue from its equine division (from the sale of its own horses and management fees for horses owned by others) and $39,420 from its real estate division. It further indicates that the company would achieve over $250,000 in net income in its initial year. The Petitioner notes that, due to the nature of the business, it would operate at a loss for several months and states that it will receive a total of $200,600 in loans from the foreign affiliate and other "related entities" but it did not further document the availability of these funds.

The Petitioner submits a slightly revised business plan on appeal which indicates that the company "has invested in the business of buying and selling residential properties through its affiliates in order to self-manage and diversify our investments." The Petitioner notes that the Beneficiary directs these investments "through direct negotiations with the brokers," and notes that it acquired a total of eight residential properties since March 2013, some of which were rented and some which

had been sold. The Petitioner provides a letter from a representative of who states that the Beneficiary is "the manager and the principal executive of the real estate companies and "as a divisions of [the Petitioner]" and notes that has had a commercial relationship with her since 2014.

The Petitioner submits entity details for all of which identify the Beneficiary as a company officer. However, the Petitioner does not provide evidence of ownership for these companies in support of its claim that they are "related entities" who will provide guaranteed income.

While the Petitioner has provided a lengthy business plan and an organizational chart depicting multiple tiers of subordinates who would report to the Beneficiary, we agree with the Director that the business plan does not substantiate the feasibility of the Petitioner's projected staffing and financial objectives. The Petitioner owned one horse at the time of filing and indicated it would purchase one horse monthly until it has six horses, with plans to board and train six third-party horses. The Petitioner also indicated that it owned one property, which would serve as the Beneficiary's residence in the United States. The Petitioner's most recent bank statement at the time of filing showed a balance of less than $1500. Given these facts, the Petitioner did not adequately support its claim that it would rapidly develop to the point where it would support a staff of 16 people within a matter of months.

Much of the business plan focuses on the Petitioner's specific methods for the training and maintenance of horses, but the plan is lacking specific details regarding how the company will develop from owning a single horse and one residential property to operating two fully-staffed divisions with revenues of over $700,000 in its initial year. The business plan includes a breakdown of revenue, costs, and expenses to show how it derived its projected net income figure; however, this portion of the plan is mostly illegible.

The additional information submitted on appeal appears to add a third line of business to the company (buying and selling residential property), but the updated business plan does not include a revised staffing plan or any additional financial projections reflecting this line of business. In fact, the Petitioner does not indicate who, besides the Beneficiary, would be responsible for non-executive duties related to this area of the business.

We note that the updated business plan includes a photograph of the Beneficiary "during a meeting with veterinarian, trainer and administrative personnel" from December 2016. However, the Petitioner did not provide evidence related to any employees hired while the petition was pending, which may have helped support the Petitioner's hiring plan.

Finally, the record lacks job descriptions for the company's proposed employees and therefore does not contain sufficient information to show that the subordinate staff would relieve the Beneficiary from involvement in the day-to-day supervision and operations of the horse training and real estate businesses, so that she could perform primarily executive duties.

B. Duties

At the time of filing, the Petitioner provided a lengthy duty description for the Beneficiary's proposed position of vice president. The Petitioner indicated that she will establish goals and policies related to foal training and competition, sales, insurance, personnel, subcontractor selection, independent audits, real estate management services, client services, veterinary care, and geographical expansion.

In addition, the Petitioner stated that she will direct the management of the company by meeting regularly with the general manager, reviewing reports, performing on-site visits to training/boarding facilities and horse racetracks, providing direction to the general manager, reviewing audit reports, reviewing training and veterinary logs of individual horses, and reviewing performance metrics of the herd. Further, the Petitioner indicated that she would make decisions on matters requiring executive approval, such as approving variances in horse training plans, meeting with prospective and existing clients, authorizing changes in the commission and fee structure, making decisions regarding race venues and events, and reviewing all bank account statements.

Finally, the Petitioner stated that she would receive only general direction from the company president, have the autonomy to establish and modify policies, make final decisions concerning legal, fiscal, or commercial actions, have the authority to hire and fire the general manager, and keep the president informed of company activities on a monthly basis.

We agree with the Director's conclusion that the job description is too vague to establish that the Beneficiary's duties would be primarily executive in nature within one year. Even though the Petitioner indicates that the Beneficiary will have the executive authority to set goals and establish the company's policies, it is unclear how much time she will spend on these responsibilities once those initial company policies are in place. Similarly, the Petitioner's statement that she will receive minimal supervision and exercise authority to make decisions indicates her seniority within the organizational structure, but does not provide insight into the expected nature of her day-to-day tasks during and after the company's initial year of operations. Both of these broad responsibilities closely resemble the statutory definition of executive capacity. However, conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *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); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The Petitioner indicated that the Beneficiary would be responsible for "directing the management of the company," but this area of responsibility included a number of non-executive duties. For example, the Petitioner stated that the Beneficiary will review training logs of individual horses, review veterinary logs, review performance metrics of the herd, and conduct on site visits. It did not explain how these duties qualify as executive in nature, or why they would not be delegated to a subordinate manager or supervisor in the equine line of the Petitioner's business. Similarly, the Petitioner indicates that the Beneficiary's responsibility to "exercise wide latitude in discretionary decision making" will include reviewing individual horse's training plans, reviewing bank account

statements, and meeting with current and prospective clients. The Petitioner has not shown that these types of duties are executive in nature, rather than routine supervisory, financial, and sales and marketing duties. In fact, it is not clear whether other staff would be responsible for any interactions with prospective clients, as the company does not intend to employ any sales, marketing, or business development staff, and the Petitioner has not provided job descriptions for its proposed subordinate employees.

Further, the new business plan submitted on appeal raises further questions regarding the nature of the Beneficiary's proposed duties. The initial job description provided for the Beneficiary mentioned the company's real estate business only in passing, and the Petitioner initially indicated that its activities would be limited to property management. On appeal, the Petitioner indicates that the company has "invested in the business of buying and selling residential properties" and indicates that the Beneficiary "directs" these investments. The Petitioner has not identified other staff that would assist the Beneficiary with this area of the business. In fact, the Petitioner provided evidence that the Beneficiary attended a course that is a pre-requisite for obtaining a Florida real estate license. Therefore, it is reasonable to believe that the Beneficiary's intended duties will include real estate functions that are not included in the position description the Petitioner provided.

Similarly, the Petitioner's new business plan raises additional questions regarding the Beneficiary's intended level of day-to-day involvement in the horse training aspect of the business. The Petitioner outlines 20 tasks involved in the company's thoroughbred management service and indicates that the Beneficiary is or will be responsible for the management of these services, but the record does not identify who will be responsible for performing some of the underlying tasks. For example, the Petitioner indicates that the company will provide valuation assessments, advise clients on selection of new livestock, and assist clients in purchasing and/or bidding process for horses. It is unclear who would perform these duties and they cannot readily be attributed to any of the subordinate staff based on the very minimal information provided regarding their roles.

The Petitioner has consistently stated that the Beneficiary will occupy the senior position in the new office, but has not submitted a job description or supporting evidence sufficient to demonstrate that she would primarily engage in executive duties, or that the new office would support an executive position, after the initial year of operations.

IV. QUALIFYING RELATIONSHIP

Although not addressed by the Director, the record does not contain sufficient evidence to establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer. 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 Petitioner claims that it is an affiliate of the Beneficiary's foreign employer, noting that [redacted] owns 100% of the foreign entity and 50% of the U.S. entity, with the remaining 50% owned by the Beneficiary. The Petitioner provided sufficient evidence of [redacted] ownership of the foreign entity, but did not adequately document the ownership of the U.S. company.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. In addition, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting control of the entity. *See Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1962). Without full disclosure of all relevant documents, we are unable to determine the elements of ownership and control.

The Petitioner submitted the following stock certificates at the time of filing:

Number	Shares	Owner	Date
00	50	Beneficiary	March 17, 2016
01	50	[redacted]	June 1, 2013

On appeal, the Petitioner provides the following stock certificates, but does not include copies of the previously submitted certificates:

Number	Shares	Owner	Date
04	60	Foreign entity	May 24, 2013
05	30	[redacted]	May 24, 2013
06	10	Beneficiary	May 24, 2013

The stock certificates indicate that the company is authorized to issue 100 shares, but based on the evidence submitted, it has actually issued at least 200 shares. It is unclear why the Petitioner would issue stock certificates numbers 00 and 01 subsequent to issuing numbers 04 through 06, and the Petitioner has not provided copies of all of its share certificates as necessary to fully document its current ownership and control.

Here, the evidence does not corroborate the Petitioner's claimed ownership, and is insufficient to establish that the Petitioner has a qualifying relationship with the foreign entity.

V. CONCLUSION

The Petitioner has not established that the Beneficiary has been employed abroad in an executive capacity for at least one year in the three years preceding the filing of the petition, that it would

employ her in an executive capacity within one year, or that it has a qualifying relationship with the Beneficiary's foreign employer.

ORDER: The appeal is dismissed.

Cite as *Matter of W-C-L-B&B, Inc.*, ID# 929192 (AAO Jan. 19, 2018)