U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-5588N-F-, LLC

DATE: JAN. 19, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, which claims to operate a fast food restaurant, seeks to temporarily employ the Beneficiary as its president 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) the Beneficiary has been employed abroad in a managerial or executive capacity; and (2) the Beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner asserts that the previously submitted evidence was sufficient to establish that the Beneficiary was employed abroad, and would be employed in the United States, in a managerial or executive capacity. The Petitioner contends that the Director failed to apply the preponderance of the evidence standard to the facts presented and erroneously determined that the Petitioner's operation of a franchised business would impact the Beneficiary's ability to perform in a qualifying capacity.

Upon *de novo* review, we will withdraw the Director's determination that the Petitioner did not establish that the Beneficiary was employed abroad in a qualifying capacity.[1] However, as the Petitioner did not overcome the remaining ground for denial, we will dismiss the appeal.

[1] The evidence is sufficient to establish that the Petitioner's claimed Chinese parent company employs the Beneficiary in a managerial capacity. The Petitioner established by a preponderance of the evidence that the Beneficiary primarily manages the organization, supervises subordinate supervisors, has the authority to hire and fire personnel, and exercises discretion over the day-to-day operations of the company. In addition, the Petitioner documented that the foreign entity has 21 employees and an organizational structure that removes the Beneficiary from significant involvement in non-managerial duties.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a managerial or executive capacity, or in a capacity involving specialized knowledge, 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 employment qualifies him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

"Managerial capacity" means 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.

"Executive capacity" means 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.

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) 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.

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

In the denial decision, the Director found that the Petitioner's description of the Beneficiary's proposed duties was vague and did not provide sufficient insight into the nature of his expected day-to-day tasks. The Director further found that the Petitioner had not shown that the Beneficiary would supervise subordinate managers, professionals, or supervisors. Finally, the Director found that, because the business that the Beneficiary would purportedly oversee is a franchise operation, the Beneficiary would not have sufficient authority over the day-to-day management of the business.

On appeal, the Petitioner asserts that the terms of its franchise agreement do not impact the Beneficiary's authority to manage the business. Further, the Petitioner claims that the evidence was

sufficient to establish that the Beneficiary will primarily oversee the organization as a whole, with responsibility for supervising subordinate managers.

When examining the managerial or executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, 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.

Accordingly, we will discuss evidence regarding the Petitioner's business and staffing levels along with the Beneficiary's job duties.

A. Nature of Petitioner's Business

The Petitioner, which was established in December 2013, states that it operates [redacted] a franchise restaurant located at [redacted] in [redacted] Texas. In addition, the Petitioner claims that it wholly owns [redacted] which operates another [redacted] restaurant, and indicates that the Beneficiary would have authority over both businesses. On the Form I-129, the Petitioner stated that it had 11 employees as of April 2017 and it listed its gross annual income as "$491,412 + $553=$491,974."

However, the Petitioner did not adequately document its claims that it operates two restaurants. With respect to the claimed primary restaurant location, the Petitioner submitted the following evidence:

- Its 2015 IRS Form 1120, U.S. Corporation Income Tax Return, which lists $1,659 in assets and $553 in "Other income" derived from [redacted] The company reported no salary or wage expenses, no rent expenses, and very limited operating expenses. The company self-identified as a management business providing "services."
- Lease agreement for the restaurant located at [redacted] which was executed in November 2013 and identifies [redacted] and [redacted] as tenants doing business under the trade name [redacted]
- Franchise agreement for the [redacted] restaurant at [redacted] effective March 2014, which identifies the franchisee as [redacted] and the operator and managing principal as [redacted]
- Copies of utility bills, invoices, tax payment receipts, and other business documents for the [redacted] which contain references to [redacted] and [redacted]

The Director specifically requested a copy of the Petitioner's 2016 tax return in a request for evidence (RFE), but the Petitioner did not provide this evidence. Most of the documents listed above support a finding that the Petitioner's claimed restaurant is actually operated by or ' and not by the Petitioner, whose relationship to this limited partnership has not been disclosed or documented. The Petitioner has not claimed that this is its subsidiary or that it operates this particular restaurant indirectly through a subsidiary. In fact, the Petitioner's tax return indicates that it had no subsidiaries in 2015.

The Petitioner did submit copies of IRS Forms W-2 and W-3 as evidence of wages paid to its claimed employees in 2015 and 2016, as well as copies of quarterly state and federal tax returns for these years. However, the Petitioner indicated on its 2015 tax return that it paid $0 in salaries and wages in 2015, despite submitting a Form W-3 that shows $171,572.65 in salaries and wages to 50 employees during that year. The Petitioner must resolve these inconsistencies 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.*

For the reasons stated above, the Petitioner has not supported its claim that it operates the restaurant at It has not shown that it has earned income from the restaurant, that it leases the restaurant's premises, or that it is the franchisee at this location. The primary annual income figure the Petitioner indicated on the Form I-129 ($491,412) is equivalent to the gross receipts reported by its claimed subsidiary, on its 2015 federal tax return, and does not represent sales at the location.

However, the Petitioner has not submitted sufficient evidence to support its claim that it wholly owns or that the Beneficiary would, as a result of this parent-subsidiary relationship, oversee both restaurant businesses. The record shows that was established in October 2014. The Petitioner submitted a "Purchase Agreement" indicating that it agreed to purchase all "shares" of this limited liability company for ten dollars in November 2016, and that the closing of the transaction would occur in 60 days. signed the document on behalf of both the buyer and seller in his capacity as "owner."

This purchase agreement, by itself, does not establish that the Petitioner acquired the claimed ownership interest in First, a limited liability company does not issue "shares" or "stock" and for that reason, the terms of the purchase agreement are not credible. Further, the Petitioner did not show that the transaction closed occurred 60 days after this agreement was signed or that the purchase was finalized. The Petitioner did not submit copies of the claimed subsidiary's operating agreement, articles of organization, minutes of membership meetings addressing a change in ownership, or copies of membership certificates. Finally, it is unclear whether the Petitioner's claimed minority owner, would have been authorized to sign the purchase agreement as the Petitioner's "owner."

As noted, the Petitioner opted not to provide a copy of its 2016 federal tax return, which would contain information regarding the company's ownership of other U.S. entities, and may have assisted

in corroborating its claimed relationship with As a result of these deficiencies in the Petitioner's evidence, it has not established that is its subsidiary. Therefore, in reviewing the Petitioner's claimed staffing levels and the Beneficiary's proposed duties, we will not consider his proposed supervision of staff employed by or evidence of its business activities.

Based on the foregoing discussion, the Petitioner has not established that it is operating, or that the Beneficiary would be managing, two restaurants, either directly or through a subsidiary company. Further, the Petitioner's 2015 tax return indicates that the company may be minimally operational.

B. Staffing Levels and Organizational Structure

As noted, the Petitioner provided evidence in the form of IRS Form W-2s, payroll statements from an external provider, and copies of state and federal quarterly wage reports in support of its claim that it is operating the claimed restaurant. The Petitioner did not explain why it did not report any sales or salary and wage expenses on its tax return, or why all other supporting evidence shows that the restaurant is more likely than not operated by a different company.

Nevertheless, even if the Petitioner had shown that it operates the restaurant and employs the persons identified in the organizational chart, the record does not establish that the business would support the Beneficiary in a managerial or executive capacity. The Petitioner's chart indicates that the Beneficiary will oversee a vice president who will in turn supervise a general manager. The chart indicates that two shift leaders report to the general manager. The lower-level staff includes three crew members, three fry cooks, and three cashiers.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional."[2] Section 101(a)(44)(A)(iv) of the Act.

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[2] In evaluating whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity.

The Petitioner's vice president , the only subordinate employee claimed to have a bachelor's degree, is not listed on its payroll records. The Petitioner claims it does not pay a salary to him because he will receive company profits as a minority owner. The Petitioner submitted resume, which indicates that he owns and manages a company engaged in property development and management, as well as operation of 10 and restaurants (including the Petitioner's claimed restaurant). The Petitioner has not shown that he would be a regular full-time employee, rather than managing his own company and its many investments and restaurants. Therefore, the Petitioner's claim that will spend 40 hours per week assisting the Beneficiary in overseeing the operation of a single restaurant is not credible, and his actual role in the day-to-day operations, if any, is unclear.

The Petitioner claimed that its store manager and two shift leaders are also full-time employees, but only the manager earned wages commensurate with full-time employment based on the most recent wage evidence available (fourth quarter of 2016). The wages paid to the two shift leaders during that quarter indicate that they worked an average of 21 and 29 hours per week, respectively. The remaining part-time employees earned combined salaries equivalent to an average of 128 working hours per week, or the equivalent of three full-time workers. The record contains evidence that the restaurant is open for at least 12 hours daily or 84 hours per week. The Petitioner did not establish how one manager, two part-time shift leaders, and the equivalent of 3 full-time workers would be sufficient to operate a restaurant with these operating hours. In fact, based on the Petitioner's description of its operations, the restaurant would need to have at least four workers present during all operating hours (a manager/shift leader, a cashier, a fry cook, and a crew member).

The evidence must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. By itself, an organizational chart showing multiple tiers of subordinate employees is not and will not establish that an organization is sufficiently complex to support a qualifying managerial position. Here, the totality of the evidence does not support a conclusion that the Beneficiary's claimed subordinates are supervisors, managers, or professionals. Instead, the Beneficiary's claimed subordinates perform the actual day-to-day tasks of operating the fast food restaurant. Therefore, even if the Petitioner had credibly documented that it is actually operating the restaurant, the evidence is still insufficient to establish that the company would employ the Beneficiary as a personnel manager or that it would have sufficient staff to relieve him from involvement in the day-to-day operations of the restaurant.

C. Duties

Initially, the Petitioner provided an extremely general description of the Beneficiary's proposed duties that could have described any senior position within any company. For example, the Petitioner stated that he will "establish and carry out company goals, policies and procedures," "direct and oversee the company's financial and budgetary activities," "manage general activities related to making products and providing services," and "oversee the public image of the company," among other duties. The Petitioner maintained that his duties would be primarily executive in nature.

In response to the Director's RFE, the Petitioner submitted a lengthy list of duties and assigned a percentage of time to each proposed task, indicating that such duties would require 105% of his time and would be primarily managerial in nature. The description indicated that he would conduct many job duties through the subordinate "Director" (also identified as the vice president) and the store "general managers." However, as discussed above, the Petitioner did not establish that it actually operates the restaurant at that it operates the restaurant at through a subsidiary, that it actually employs a vice president/Director, or that it has full-time general managers on staff. Therefore, the Beneficiary's claimed job duties are not corroborated by evidence and we cannot determine what he would actually be doing as the president of a company that reported $553 in annual income according to the most recent tax return submitted for our review.

Given the lack of evidence regarding the actual nature and extent of the Petitioner's activities, it is difficult to review the Beneficiary's proposed duties in context. The job description submitted in response to the RFE would be credible only if the Petitioner had established that it employs a full-time vice president, full-time subordinate general managers, and operates multiple restaurants. In addition, some of the stated duties are unclear, such as the Petitioner's claim that the Beneficiary would spent 10% of his time coordinating the management of the Petitioner with its claimed parent company. The Beneficiary owns and manages the foreign entity and it is unlikely that he would, for example, prepare and present reports to himself.

The Petitioner also claims that the Beneficiary would spend 20% of his time on business development, including evaluating marketing strategies, conducting commercial surveys, initiating market research studies, and presenting reports and recommendations for new business opportunities to the board of directors. The Petitioner has not established that these types of duties are managerial or executive in nature, rather than non-qualifying market research and reporting tasks. Further, the Petitioner has not identified what type of business opportunities the company would be pursuing, or provided credible evidence of the nature of the business to support a finding that it requires a manager or executive to devote a large portion of his time to these activities.

Similarly, the record does not establish how the Beneficiary would allocate 35% of his time to managing the company's financial and budgeting activities. As noted, the Petitioner has documented that it earned $535 in income in 2015 and opted not to provide evidence of its earnings for 2016. Based on this limited information, the Petitioner has not documented its need for a manager or executive who would spend more than one-third of his time overseeing these activities.

The Petitioner has not provided a realistic description of the Beneficiary proposed daily activities as necessary to establish that his role requires him to perform primarily managerial or executive duties. In addition, even if the Petitioner had sufficiently documented that it actually operates a restaurant as claimed, the submitted evidence did not establish that the Petitioner would have sufficient staff to remove the Beneficiary from involvement in the day-to-day operations of its claimed restaurant. The fact that the Beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the

meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial or executive in nature. Sections 101(A)(44)(A) or (B) of the Act.

Due to the deficiencies in the Petitioner's evidence, both with respect to the nature of the operations and the Beneficiary's duties, it has not established that he would be employed in a managerial or executive capacity.

III. QUALIFYING RELATIONSHIP

Although not addressed by the Director, the Petitioner has not submitted sufficient evidence to establish that it 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 states that it is a majority-owned subsidiary of the foreign entity, based on that entity's purchase of a 51% ownership interest in the company in November 2016. As evidence of the claimed relationship, the Petitioner submitted: (1) a "Stock Subscription and Purchase Agreement" indicating that the Petitioner agreed to issue 1041 of its 2041 authorized shares to the foreign entity in exchange for a total subscription price of $350,000 ($335.21 per share); (2) a wire transfer confirmation indicating that the Petitioner received a $350,000 wire transfer from a U.S. account owned by the Beneficiary and his spouse on November 30, 2016; (3) stock certificate no. 1 indicating that the Petitioner issued 1000 shares to [redacted] in December 2013; and (4) stock certificate no. 4 indicating that the Petitioner issued 1041 shares to the foreign entity in November 2016. The Petitioner later submitted a stock transfer ledger indicating that [redacted] transferred 1041 shares to the foreign entity, leaving him with 1000 shares. However, according to the purchase agreement, those "shares" were newly issued in 2016.

The Petitioner did not explain why a limited liability company (LLC) would issue stock certificates and stock subscription agreements as if it were established as a stock corporation. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership, and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. The Petitioner's submission of evidence related to stock transactions raises questions regarding the validity of these claimed transactions.

In addition, the Petitioner attempted to document the foreign entity's purchase of an ownership interest, but it did not explain why the funds it received came from the Beneficiary's personal bank account and not from the foreign entity. It did not provide documentation that the foreign entity paid for the claimed share purchase. For these reasons, the Petitioner has not submitted sufficient credible evidence of its qualifying relationship with the foreign entity.

IV. CONCLUSION

The Petitioner has not established that the Beneficiary would be employed in the United States in managerial or executive capacity or that it has a qualifying relationship with the Beneficiary's foreign employer.

ORDER: The appeal is dismissed.

Cite as *Matter of F-5588N-F-, LLC*, ID# 919697 (AAO Jan. 19, 2018)