U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-G-, LLC

DATE: JAN. 23, 2019

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, which owns a [redacted] Car Care Center franchise and invests in other businesses, seeks to continue the Beneficiary's temporary employment as its president under the L-1A nonimmigrant classification for intracompany transferees.[1] 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 record did not establish, as required, that the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred by disregarding "key material evidence" and making unwarranted assumptions about the operation of a franchise.

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 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. *Id.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period from September 1, 2016 until August 31, 2017. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary 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 one year within the date of approval of the petition to support an executive or managerial position.

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity under the extended petition. The Petitioner specifies that it seeks to employ the Beneficiary in an executive capacity, and therefore we need not discuss the requirements of a managerial capacity.

"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.

Based on the statutory definition of executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

In the denial decision, the Director cited the vagueness of the job description, inadequate staffing, and the lack of evidence that the Petitioner was conducting any business activity at the time it filed the extension petition. Because the third factor is dispositive, we need not discuss the staffing and job description in detail.

On the petition form, under "Type of Business," the Petitioner described itself as an "Investment Business and Automotive Service Company" with five employees. In addition to the franchise, which the Petitioner purchased in April 2017, the Petitioner indicated that it had also identified other business opportunities, including its March 2017 acquisition of a 1/3 stake in "an online stock trading and education platform"; "negotiations to acquire a 50% stake in a retail store"; and "active discussions to acquire a franchise." In later submissions, the Petitioner identified more such ventures as well as real estate investments. When the Petitioner filed the extension petition in August 2017, however, these other business ventures were not both (1) operational and (2) under the Beneficiary's executive control. The Petitioner must establish eligibility at the time of

filing. *See* 8 C.F.R. § 103.2(b)(1). We can take some near-term growth plans under consideration in the initial filing of a new office petition, but not in subsequent filings to extend that petition.

At the time of filing, the Petitioner had not yet purchased any interest in the [redacted] or [redacted] businesses. The Petitioner had previously acquired a minority equity stake in [redacted] in March 2017, but the Petitioner did not establish or claim that it had control over that business. (In subsequent submissions, the Petitioner described its future plans to purchase additional equity in order to secure a controlling interest.) Partial ownership without control does not establish the required qualifying relationship between [redacted] and the Beneficiary's foreign employer.[2]

The [redacted] franchise is the only business that the Petitioner owned and controlled at the time it filed the petition. In a letter submitted with the petition, the Petitioner stated that it purchased the [redacted] franchise in April 2017, but that "operations of the [redacted] franchise . . . have been significantly delayed" by factors including "stringent requirements provided by the [redacted] franchise regarding personnel requirements, hiring protocols and other highly detailed site and equipment specifications." Subsequent correspondence from December 2017, several months after the filing date, indicated that the franchise still had not yet opened for business owing to "various unexpected delays and complications."

At the time of filing, the Petitioner employed four people subordinate to the Beneficiary:

- General Manager
- Manager [redacted]
- Customer Service Assistant
- Assistant & Administrative Support

The job descriptions for these subordinates focused on what they will do once the [redacted] business is operational. The descriptions did not show that the employees were engaged in the support of an operational business at the time of filing.

The Petitioner also stated that it planned to hire additional mechanics, and the Petitioner provided the names of a lead mechanic and an operation/service manager "to be hired within the coming weeks." At the time of filing, however, the positions were vacant and had never previously been filled. When the Petitioner filed the petition, its [redacted] franchise had no mechanics on staff and therefore was not able to provide automobile service.

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[2] Ownership and control, together, determine whether a qualifying relationship exists between United States and foreign entities. *See, e.g., Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (Comm'r 1988); *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). Ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

The Petitioner asked the Director to "consider the greater picture" of the company's acquisition activities rather than "assess the Beneficiary's current and proposed executive duties solely through the lens of a [redacted] franchise operation." At the time of filing, however, the Petitioner did not own a controlling interest in any other business.

Although the [redacted] franchise had not yet opened at the time of filing, the Petitioner asserted that its staffing was sufficient for "an investment company that . . . is already engaged in the identification and acquisition of a portfolio of various commercial ventures and active investment undertakings." A company engaged solely in acquisition is not yet engaged in the regular, systematic, and continuous provision of goods, services, or both. The Petitioner stated that its "foundation and purpose . . . [is] to seek out multiple businesses to acquire, operate and generate profit." When it filed the petition, the Petitioner had begun acquiring businesses, but was not yet operating them or generating profit. The Petitioner did not show that its staffing was sufficient for revenue-generating activities such as providing automobile repair services.

When a new business is first established and commences operations, the regulations recognize that a designated executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of executive responsibility cannot be performed in that first year. The "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of a beneficiary in a primarily executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support an executive within the one-year timeframe. 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 an executive who will primarily perform qualifying duties. *See generally* 8 C.F.R. § 214.2(l)(3)(v).

After this initial one-year period, a petitioner seeking to extend the petition must demonstrate that the new office is doing business. *See* 8 C.F.R. § 214.2(l)(7)(i)(A)(*3*) and (14)(ii)(B). A petitioner must meet all eligibility requirements at the time of filing the petition. Therefore, the Petitioner in this proceeding cannot establish eligibility for the extension unless it can show that it was already engaged in the regular, systematic, and continuous provision of goods or services when it filed the extension petition in August 2017.

In its introductory statement, the Petitioner claimed that "the U.S. company has been continuously engaged in active business," but the activities described in the letter concerned preparations to do business rather than actually doing business. The Petitioner acknowledged that the [redacted] business component has yet to become fully operational," but the Petitioner asserted that the business was "undergoing final renovations" and anticipated "opening for active service in the coming weeks." The Petitioner stated that it had already completed "facilities acquisition, build-out

and . . . the recruitment and hiring of personnel," but none of these preparatory activities entail the regular, systematic, and continuous provision of goods or services.

In the denial notice, the Director stated that "at the time of filing the instant petition, it appeared the [redacted] center ha[d] not opened yet." On appeal, the Petitioner does not contest this conclusion. Instead, the Petitioner asks the Director to "grant the extension for only one year," which is the period granted for a new office, rather than the three years originally requested. A new office petition is subject to more lenient requirements than those for other L-1A nonimmigrant petitions. For a given beneficiary working for a given petitioner, the regulations expressly provide for only one year of L-1A status under these "new office" conditions. After that one year, a petition extension is available only if the petitioner is doing business as the regulations define that term. 8 C.F.R. § 214.2(l)(7)(i)(A)(*3*). New office status is contingent on progress towards fully establishing a functioning business within one year. If, at the end of that year, the new office has not made that progress, then this deficiency is grounds for ending the immigration benefit, not extending it.

Because the Petitioner was not yet doing business in August 2017, after a year under "new office" conditions, it was not prepared to employ the Beneficiary in an executive capacity at the time of filing.

The Petitioner asserted that the Beneficiary "will also continue to exercise significant executive authority in and with regard to [the parent entity's] operations in India." The Petitioner, however, did not show that the foreign entity conducts any business in the United States, or that there is any active, functional connection between the day-to-day operations of the Petitioner and its foreign parent company. The Beneficiary's claimed executive authority over a foreign company that does not do business in the United States cannot serve as a basis for L-1A nonimmigrant status.

III. CONCLUSION

The Petitioner was not yet doing business at the end of its year as a new office, and therefore it was not yet employing or prepared to employ the Beneficiary in an executive capacity at the time it filed the instant petition.

ORDER: The appeal is dismissed.

Cite as *Matter of K-G-, LLC*, ID# 1944551 (AAO Jan. 23, 2019)