U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7094608

Date: JAN. 23, 2020

Appeal of California Service Center Decision

Form I-129, Petition for Nonimmigrant Worker (L-1A)

The Petitioner, describing itself as a dollar value retail store, seeks to temporarily employ the Beneficiary as a retail buyer in its new office[1] under the L-1A nonimmigrant classification for intracompany transferees. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the California Service Center denied the petition on multiple grounds, concluding that the Petitioner did not establish, as required, that: 1) it had a qualifying relationship with the Beneficiary's foreign employer; 2) the Beneficiary is employed in a managerial or executive capacity abroad; and 3) the Beneficiary would be employed in a managerial or executive capacity in the United States within one year.

On appeal, the Petitioner contends that the submitted evidence demonstrates that it and the foreign employer are owned and controlled by the same individual; and therefore, that they have a qualifying relationship. The Petitioner further asserts that the Beneficiary qualifies as a function manager abroad. Lastly, the Petitioner indicates that the Beneficiary would devote his time primarily to managerial duties in the United States.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving 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

[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.

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.*

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).

II. QUALIFYING RELATIONSHIP

The first issue we will address is whether the Petitioner established that it has a qualifying relationship with the Beneficiary's former 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"). Regulation and case law confirm that ownership and control are the factors that must be examined in determining 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.

As a preliminary matter, the Petitioner has not established its ownership as necessary to demonstrate a qualifying relationship. In section 1, items 9 and 10 of the L Classification Supplement to the Form I-129 the Petitioner stated that it and its foreign are subsidiaries and both 100% owned by [redacted]. However, in response to the Director's request for evidence (RFE), the Petitioner stated that "[redacted] owns both the foreign and the U.S. company completely." However, in the same letter, the Petitioner indicated that its corporate bylaws were signed by two parties, [redacted] and its vice president; and it stated that "each party declar[ed] [a] 50% interest in the U.S. entity." On appeal, the Petitioner again sets forth these conflicting ownerships; namely, stating both that the Petitioner is wholly owned by [redacted] and that he only owns 50% along with its vice president. The conflicting statements as to the ownership in the Petitioner leave substantial uncertainty as to its actual ownership. The Petitioner must resolve discrepancies 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).

Further, the Petitioner submits insufficient supporting documentation to substantiate its ownership. As general evidence of a petitioner's claimed qualifying relationship, a Petitioner must submit supporting documentation to demonstrate its ownership. This evidence would include stock certificates, a corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings. This evidence must be examined to determine the total number of shares issued, the exact number issued to shareholders, 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. at 365.

The Petitioner has not submitted any supporting documentation to establish its ownership; for instance, it did not provide stock certificates, a stock ledger, articles of incorporation, minutes of shareholder meetings, evidence of consideration paid for stock, or other such evidence to definitively demonstrate its ownership. The Petitioner only provided its bylaws, signed by its claimed owner, [redacted] and two other parties. However, the bylaws do not definitively set forth the Petitioner's ownership nor do they indicate to whom shares in the company were issued. In fact, the Petitioner leaves even further question as to its ownership by stating that "the issuance of private stock is also therefore contingent upon the business becoming operational" and that "there are future plans to issue the private stock to its owners." This statement appears to reflect that no Petitioner shares were issued to any owners as of the date the petition was filed, leaving substantial doubt as to its ownership and status as a qualifying entity. We recognize that the Petitioner's statement that is not a publically traded company and that it is not registered with the U.S. Securities and Exchange Commission (SEC); however this does not explain the lack of evidence of its ownership or its issuance of shares to owners. Therefore, since the Petitioner has not sufficiently established its ownership, it has not demonstrated that it has a qualifying relationship with the foreign employer.

In addition, the Petitioner has not submitted evidence to demonstrate the ownership in the foreign employer. The Petitioner stated in response to the Director's RFE that the foreign employer "is a sole proprietorship business…therefore, there are no Articles of Incorporation, or Securities and Exchange Commission Forms." The Petitioner indicated that "establishments or Sole Proprietorships are only required to register with the [redacted] Ministry of Commerce and Industry." We note that it is the Petitioner's burden to establish common ownership between it and the foreign employer; however, it has provided no supporting documentation to establish the foreign employer's ownership. In fact, its statements as to the lack of ownership in the foreign employer leave uncertainty as to whether the foreign employer is a qualifying organization. For this additional reason, the Petitioner has not established a qualifying relationship between it and the foreign employer.

The appeal must be dismissed as the Petitioner has not demonstrated that there was a qualifying relationship between it and the foreign employer.

III. FOREIGN EMPLOYMENT IN A MANAGERIAL CAPACITY

As we have discussed, the Director also denied the petition concluding that the Petitioner did not establish that the Beneficiary was be employed in a managerial or executive capacity abroad. Because of the dispositive effect of the above finding of ineligibility, we will only briefly address whether the Beneficiary acts in a managerial or executive capacity abroad. The Petitioner does not claim that the Beneficiary is employed in an executive capacity abroad. Therefore, we restrict our analysis to whether the Beneficiary is employed in a managerial capacity.

In denying the petition on these grounds, the Director determined that the Beneficiary's foreign duties appeared to include non-qualifying operational tasks and noted that the Petitioner did not indicate how

much time she would devote to these non-qualifying duties. The Director also indicated that the foreign organizational chart reflected that the Beneficiary would have no subordinates; and therefore, no one to relieve her from performing the aforementioned non-qualifying tasks. On appeal, the Petitioner contends that the Beneficiary qualifies as a function manager.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary is managing an essential function, it must clearly describe the duties performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary primarily *manages*, as opposed to *performs*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

As noted by the Director, the Petitioner has not established that the Beneficiary qualifies as a function manager as her duties indicate that she is primarily engaged in non-qualifying operational duties; or more specifically, performing her function rather than managing it. For instance, the Beneficiary's foreign duty description includes a number of day-to-day operational tasks, including her conducting site safety inspections, taking account of workplace hazards, keeping records of these matters, producing statistics for managers, creating management reports and newsletters, ensuring the safe installation of equipment, investigating accidents and injuries in the workplace, and delivering educational programs related to safety. In fact, the foreign organizational chart reflects that the Beneficiary reports to a health and safety manager, while her position is that of health and safety officer. As such, it appears most likely that the Beneficiary is performing all the non-qualifying operational tasks of the health and safety function, while the health and safety manager oversees this function.

Whether the Beneficiary is a managerial employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See* sections 101(a)(44)(A) of the Act. Here, the Petitioner does not document what proportion of the Beneficiary's duties would be managerial functions and what proportion would be non-qualifying. The Petitioner lists the Beneficiary's duties as including both managerial tasks and administrative or operational tasks, but does not quantify the time she spends on these different duties. For this reason, we cannot determine whether the Beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). In sum, the submitted evidence indicates that the Beneficiary is more likely than not performing her asserted function, rather than managing it.

For this reason, the Petitioner has not established that the Beneficiary acts in a managerial capacity abroad.

IV. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The last issue we will address is whether the Petitioner established that the Beneficiary would be employed in a managerial or executive capacity in the United States within one year of an approval of

the petition. Again, because of the dispositive effect of the above findings of ineligibility, we will only briefly address this issue.

In denying the petition, the Director noted that the Beneficiary would act as a "retail buyer" for the Petitioner's planned dollar store and determined that she would likely be primarily engaged in non-qualifying operational duties in this position. Further, the Director pointed to conflicting hiring plans, including those provided in a projected U.S. organizational chart as compared to those reflected in a submitted business plan. Lastly, the Director stated that the Petitioner did not submit sufficient evidence of the foreign employer's investment in the new office as required by the regulations.

On appeal, the Petitioner does little to overcome the Director's reasons for denying the petition on this ground. 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 of the business and the size of the U.S. investment, and establish that the proposed enterprise will support a managerial position within one 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 who will primarily perform qualifying duties.

First, the Petitioner does not address on appeal the conflicting hiring plans it submitted which were emphasized by the Director in the denial. As such, its first year plans are not clear; and in turn, whether they are likely to allow the new office to develop as necessary to support the Beneficiary in a managerial capacity within one year. Further, the Petitioner lists several apparent non-qualifying operational tasks for the Beneficiary in her proposed position, retail buyer, such as enacting a point of sale and video surveillance systems, establishing cash handling procedures and performing product purchasing and inventory duties. The Petitioner does not sufficiently articulate how the Beneficiary would be primarily relieved from performing these non-qualifying operational tasks within one year; in fact, it only further emphasizes these non-qualifying duties on appeal.

Lastly, the Petitioner did not demonstrate the foreign employer's investment in the new venture in the United States as required by the regulations. On appeal, the Petitioner questionably states that it has only invested "limited funds" in the new venture for a bank account, a lease, permits, and basic supplies; but notes that "the partners will provide future funding when the Beneficiary is able to work in the U.S." However, there is no information on these referenced "partners," how much they would invest, how much investment is required to launch the business successfully, or any supporting documentation to substantiate that sufficient funds to invest are available. For these reasons, the Petitioner has not established the size of the U.S. investment in the proposed new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

For the above stated reasons, the Petitioner did not establish that the Beneficiary would act in a managerial capacity within the first year.

V. CONCLUSION

The appeal must be dismissed because the Petitioner has not established that: 1) it has a qualifying relationship with the Beneficiary's foreign employer; 2) Beneficiary is employed in a managerial or

executive capacity abroad; or 3) the Beneficiary would be employed in a managerial or executive capacity in the United States within one year.

ORDER: The appeal is dismissed.