U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-FTRDI-, LLC

DATE: JULY 27, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner seeks to temporarily employ the Beneficiary as the general manager 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 record did not establish, as required, that the new office would support a managerial or executive position within one year after approval of the petition.

On appeal, the Petitioner asserts that it has submitted sufficient evidence to establish that the Beneficiary will primarily serve in an executive or managerial capacity for the U.S. entity.

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

I. LEGAL FRAMEWORK

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 one continuous year within three years preceding the beneficiary's application for admission into the United States. 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. Section 101(a)(15)(L) of the Act.

An individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, must include evidence that the petitioner will employ the beneficiary in an executive or managerial capacity, or in

[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.

a position requiring specialized knowledge, including a detailed description of the services to be performed. 8 C.F.R. § 214.2(l)(3)(ii).

If the Form I-129 indicates that the beneficiary is coming to the United States in L-1A status to open or to be employed in a new office, 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 includes information regarding the new office's physical premises, 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. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Petitioner stated that the Beneficiary's foreign employer has "more than 50 proprietary technologies, more than 100 solutions about [redacted] involving pension, transportation, medical, environmental protection, education and other areas" and that the Petitioner "will continue to develop [redacted] technologies and operations in the U.S. market."

A. Business Plan

The record included a copy of a business plan which indicated that the foreign entity is seeking business opportunities in the United States, such as exploring and cooperating with smart city/building projects in the United States, health monitoring products, and procurement of '[redacted] related devices.

The initial record included ambiguous information regarding the Petitioner's actual business purpose. Although the Petitioner indicated generally that the foreign entity was involved in the [redacted] and created smart technology and ways such technology could improve everyday life, the record does not clearly state the Petitioner's purpose. For example, the Petitioner asserted that the Petitioner would "develop [redacted] technologies and operations in the U.S. market," and that the Beneficiary will "engage in the research and development of sales promotion." However, it is not clear if the Petitioner intends to create technologies for the U.S. market, or sell and promote the foreign entity's products, or both. Additionally, the Petitioner noted that the foreign entity is seeking business opportunities in the United States, such as exploring and cooperating with smart city/building projects in the United States, health monitoring products, and procurement of '[redacted]' related devices. Thus, it appears that the Petitioner will be exploring business opportunities rather than commencing actual business operations if the petition is approved.

In response to the Director's request for evidence (RFE), the Petitioner submitted a revised business plan and acknowledged that it would be in the "developing phase," the first two years. However, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the intended U.S. operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in U.S. Citizenship and Immigration Services' (USCIS) regulations allowing for an extension of this one-year period.

Although the revised business plan also indicated that the foreign entity would invest $200,000 in health monitoring, [redacted] and elderly care products for the Petitioner to market and generate revenue, it is not clear if these are the foreign entity's products or a third party's products. The record does not include sufficient, relevant evidence regarding the marketability of this endeavor. The revised business plan also referenced setting up the technological foundation for the Petitioner to initiate [redacted] projects in the United States. The Petitioner does not further explain the technological foundation it requires to initiate projects. The record does not include sufficient information or explanations regarding the Petitioner's actual plans for its new office. The Petitioner did not submit a cohesive business plan detailing the operations of and expectations for the new office. As such, we cannot analyze the proposed operations to properly assess the strength of its new office and determine if the Petitioner realistically would be able to support a manager or executive position within one year.

We note that a nonimmigrant intracompany transferee visa is not an entrepreneurial visa classification allowing a beneficiary a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. As noted above, the regulations allow for a one-year period for the U.S. entity to commence doing business and develop to the point that it will support a beneficiary in a qualifying managerial or executive position. The record does not include sufficient, probative evidence establishing that the U.S. entity in this matter will satisfy these requirements.

B. Duties and Staffing

Additionally, a review of the Beneficiary's proposed duties does not reveal her role within the petitioning organization for the first year of operations. The Petitioner asserted that the Beneficiary would be employed as the "highest-level executive" at the U.S. entity and that she would perform "executive" duties, including "execut[ing] the resolutions of the board of directors and presid[ing] over the daily business activities of the company" and "engag[ing] in the research and development of sales promotion."[2]

The record included a copy of the Petitioner's proposed organizational chart identifying the Beneficiary in the position of general manager and listing the foreign entity's executive committee and employees reporting to the U.S. position. The organizational chart also identified the Beneficiary's proposed duties and allocation of time to those duties as follows:

[2] In response to the Director's RFE, the Petitioner asserted that the documents it has provided demonstrate that the Beneficiary's position satisfy "the statutory standards for qualification of an intracompany managerial transferee." The Petitioner's interchangeable use of the terms "executive" and "manager" and related terms throughout the record creates additional ambiguity in the intended position. The Petitioner must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are either in an executive or managerial capacity. The Petitioner must demonstrate that the Beneficiary's responsibilities will meet the requirements of one or the other capacity.

1) To be in charge of the production and operation management and organize to implement the resolution of the meeting of the shareholders or the board of directors. Implement the resolution and indicating of the board of directors of the company. And do all the work well. (18%)
2) Determine the direction of development and management objectives of the company. And organize to make the development plan, annual business plan, annual budget and final accounts, review and approv[e] the company's major financial expenses and corporate funds retained the use and allocation scheme. Complete the various tasks that the Board issued according to the decision of the board of directors. (15%)
3) Overall responsibility for the company's administrative work, and organize to develop company's organization establishment and staffing. And appoint or dismiss the deputy general manager of the company to the board of directors and the officer in charge of finance. And reward and punish the great things of the company. (20%)
4) Chair and hold the executive committee meeting and coordinate all functions. (10%)
5) Responsible for the organization to make the rules and regulations of the company, improve the management level of the company. (10%)
6) Directly lead the executive committee, and in charge of sign[ing] all documents and reports in the name of the company. (12%)
7) Regularly report to the board of directors, accept the advisory and supervision of the board of supervisors. (10%)
8) Other powers granted by the articles of association and the board of directors. (5%)

This description is broad, indicating that the Beneficiary will spend a significant portion of her time implementing and completing the board's directives and reporting to the board of directors. However, the record does not include information on the type or nature of the directives she will be expected to carry out; the duties described do not include detail that is specific to the Petitioner or the foreign entity's business operations.

The new office regulations recognize that a designated manager or 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 managerial responsibility cannot be performed in that first year. However, a petitioner's evidence in support of a new office petition should demonstrate a realistic expectation that the enterprise is prepared to commence business operations 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. Accordingly, the entire record must be considered to determine whether the proposed duties are 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).

Here, the description indicates that generally the Beneficiary will be in charge of production and operation management, the company's administrative work, establishing the organization's staffing, and making the rules and regulations for the company. Although these are typical duties for a new company, these duties are generic. They are not specific to the Petitioner so that we may analyze the proposed duties and ascertain whether the Beneficiary will realistically be primarily performing managerial or executive duties within one year of approval of the petition. Further, the Petitioner stated that the Beneficiary will be responsible for the annual business plan, budget, and final accounts as well as the company's major financial expenses. However, the Petitioner's personnel plan outlined in the revised business plan identifies only the Beneficiary in the position of chief executive officer and one other individual in the position of chief marketing officer for the Petitioner's first two years of operation. The record does not include evidence that the Petitioner plans to employ any staff to take orders, process payments, store inventory, ship products, and perform basic bookkeeping and other administrative duties to carry out the daily and routine business operations of the company. Accordingly, the record does not establish that the Petitioner will be sufficiently complex to require the services of an executive or manager, as those terms are statutorily defined, after the first year of its operations.

We recognize that the Petitioner plans for the foreign entity's executive or professional employees to assist the Beneficiary to expand the U.S. operations. In the revised business plan, the Petitioner claimed that the foreign entity's chief executive officer and chief technology officer will assist the Beneficiary to "facilitate building the new marketing structure and product development plans," and that these individuals and the chief operations officer and chief product officer will be in touch with the Beneficiary through "online text messages and Skype conference once a week." The Petitioner noted that the chief administrative officer "will keep assisting [the Beneficiary] and help remotely scheduling her agenda once a week." However, the Petitioner does not clarify how the foreign employees will relieve the Beneficiary from performing operational duties within one year of approval of the petition. For example, on appeal Petitioner asserts that the foreign entity's "professional personnel" will support the Beneficiary until the Petitioner hires sufficient personnel for the U.S. office. However, as mentioned above, the Petitioner's business plan identifies only the Beneficiary and a marketing officer as employees in the U.S. office for the first two years of operations. The Petitioner does not identify any of the foreign entity's staff who will perform the routine duties necessary to operate the Petitioner's business and relieve the Beneficiary from performing primarily non-qualifying duties. The Petitioner must clearly describe the relationship between the Beneficiary's position and the foreign entity's positions so that we may determine whether the Petitioner will be sufficiently complex to support the Beneficiary in a managerial or executive position within one year. The Petitioner has not provided the necessary detailed evidence here.

We also point out that the fact that the Beneficiary will manage or direct 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" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion

over business operations and possess the requisite level of authority with respect to discretionary decision-making, the Petitioner has not established that it will sufficiently develop and expand to support the Beneficiary in a primarily managerial or executive position within a one-year period.

III. SUFFICIENT PHYSICAL PREMISES

In addition to the ground for denial enumerated in the Director's decision, the Petitioner has not established that it secured sufficient physical premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office. The phrase "sufficient physical premises" is broad and somewhat subjective, leaving USCIS great flexibility in adjudicating this legal requirement. In this matter, the Petitioner submitted a copy of a sublease for a portion of its attorney's office. The sublease expires November 1, 2016, a date less than two months after the petition was filed. The Petitioner, however, must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). The record also does not include evidence that the Petitioner paid the rent specified in the sublease. Accordingly, the record does not include sufficient probative evidence establishing that the Petitioner acquired and continues to have sufficient physical premises to house the new office. The Petitioner must address this issue in any subsequent filings.

IV. CONCLUSION

The appeal is dismissed because after considering the totality of the record, including the Petitioner's business plan, anticipated staffing levels, and the Beneficiary's duties, the Petitioner has not established that the U.S. company will support a managerial or executive position within a one-year period.

ORDER: The appeal is dismissed.

Cite as *Matter of S-FTRDI-, LLC*, ID# 451631 (AAO July 27, 2017)