U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-H-US, INC.

DATE: JUN. 12, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, describing itself as a company that develops and markets a proprietary line of beverages, seeks to temporarily employ the Beneficiary as its chief executive officer ("CEO") 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 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 California Service Center denied the petition, concluding that the Petitioner did not establish, as required, that the Beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner disputes the Director's decision and submits a brief in support of its contentions.

Upon *de novo* review, we find that the Petitioner has not overcome the grounds cited for denial. Therefore, 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 capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. 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.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. MANAGERIAL CAPACITY

The discussion below will address the Director's findings regarding the Beneficiary's proposed employment with the U.S. entity, adding our own findings regarding the Beneficiary's current employment abroad with the Petitioner's parent entity.

A. U.S. Employment

The first issue we will discuss in this decision is the Beneficiary's proposed employment with the U.S. entity. The Petitioner claims that the Beneficiary will be employed in a managerial capacity. Therefore, we will only address this claim in our decision and will not contemplate whether the Beneficiary would be employed in an executive capacity.

"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.

1. Staffing

In determining whether the Beneficiary would be employed in a managerial capacity, we will examine the Petitioner's organizational structure, including any subordinates the Beneficiary may have, their job duties, the presence of other employees to relieve the Beneficiary from performing operational duties, and the nature of the business along with any other factors that will contribute to understanding the Beneficiary's actual duties and role within the petitioning organization.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we take 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.

In the present matter, the Petitioner indicated that it was established in 2014, but claimed only one employee and no income at the time of filing. The Petitioner provided a cover letter claiming that the Beneficiary's position as CEO will involve assigning work to an administrative staff. The Petitioner also provided a proposed organizational chart showing two divisions – "Beverage" and "Medical Food/Supplement" – comprising the organization. Although the chart depicts the CEO at the top of the hierarchy overseeing these two divisions, it indicates that the "Medical Food/Supplement" is a "new business" that is not currently "registered" and will only become operational within three years. The chart depicts a "farm" in Vietnam at the top of the beverage division, but does not indicate who runs the farm or who carries its daily operational tasks, nor does

it explain the farm's connection to the Petitioner's beverage division or the employees that comprise that division. Next, the chart depicts a managerial tier comprised of a supply chain manager, a sales manager, and a marketing manager. The chart also shows an "Administration & Finance" position subordinate to the Beneficiary, but does not indicate whether this position is specific to either of the company's two divisions. Lastly, the chart indicates that the beverage division will include a Vietnam-based marketing team that will assist a U.S.-based marketing manager.

In addition, the Petitioner provided a business plan stating that its initial goal is to enter the natural beverage market in the United States and that it planned to meet this goal by keeping "a lean organization" in 2017 and developing "strong relationships" with "key selected" business partners, such as suppliers, packers, and inventory managers. The Petitioner claimed that it plans to "carry out a pilot launching at specific geographic areas to test the reformulated products" during the second half of 2017. The Petitioner also described a future marketing strategy and a "3-month forecasting model" it plans to develop, stating that it will operate with a "limited number of human resources at the initial stage" of its operation.[1] The Petitioner stated that the Beneficiary is currently its only U.S. representative, claiming that aside from the Beneficiary, it is also working with various "third parties," including a registered corporate agent, a corporate legal advisor, a CPA firm, and other unnamed law firms for trademark and brand registration.[2] The Petitioner anticipated recruiting one administration/bookkeeping employee to support the Beneficiary "[i]n the short coming time," followed by an accounting and finance controller, a logistics coordinator, and a sales manager at the initial stage of its operation.

In a request for evidence (RFE), the Director observed that the Petitioner had no employees at the time it filed the instant petition, questioning the sufficiency of the Petitioner's organizational structure to relieve the Beneficiary from having to carry out its operational functions.

The Petitioner responded with a statement in which it repeatedly referred to itself as a "start-up" and explained that it planned to hire consultants with knowledge of the organic food and beverage market to help it access that industry. The Petitioner stated that it planned to hire personnel and develop a human resources department only after it meets its preliminary business objectives, such as establishing "key divisions within the company" and creating a marketing strategy and means to save on costs. The Petitioner did not state or provide evidence to show that it was ready to do business and that it had the ability to support the Beneficiary in a managerial position at the time it filed the instant petition.

[1] Although the business plan indicates that the Petitioner was at a rudimentary developmental stage at the time this petition was filed, the Petitioner checked the "No" box in the L Classification Supplement, when asked if the Beneficiary was coming to the United States to open a new office. We therefore cannot apply "new office" regulations and accord the Petitioner treatment as a new office.

[2] We note that at the time of filing, the Beneficiary was subject to the limitations of a nonimmigrant B-1 visitor visa, which does not authorize employment in the United States.

In the denial decision, the Director concluded that the Petitioner did not establish that the Beneficiary would be employed in a managerial capacity. The Petitioner disputes the Director's conclusion and contends that the Director applied an incorrect standard when reviewing the evidence. The Petitioner asks us to consider "ALL the evidence" within the scope of the company's early developmental phase. Having done so, we find that the Petitioner incorrectly relies on its early phase of development to justify its lack of a support staff. While the Petitioner's current organizational needs may be reasonable based on its operational phase, those needs will not supersede the statutory criteria requiring the Beneficiary to "primarily" perform managerial job duties. *See* sections 101(a)(44)(A) of the Act. In the present matter, the Petitioner's claimed eligibility is based primarily on projected actions, including the hiring of support personnel, which had not yet taken place at the time this petition was filed.

Although we acknowledge the Petitioner's submission of a business plan and the various business projections made therein, the Petitioner 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). As noted earlier in our discussion, the record indicates that at the time of filing the Petitioner was at a rudimentary developmental phase and had no support staff to relieve the Beneficiary from having to allocate her time primarily to operational tasks in order to commence business operations and ensure that the Petitioner progresses to the next developmental phase. The Petitioner claimed only one employee at the time of filing – presumably the Beneficiary. In fact, it expressly stated that it planned to operate with the Beneficiary as its only employee for an undetermined period of time. The Petitioner did not explain how this limited organizational structure, which included no lower-level employees to relieve the Beneficiary from having to devote her time primarily to the organization's operational and administrative functions, would be sufficient to support the Beneficiary in a managerial capacity at the time of filing.

2. Duties

Based on the statutory definition of managerial 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). The Petitioner must also demonstrate that the Beneficiary will be *primarily* engaged in managerial 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.

Accordingly, in order to establish eligibility, the Petitioner must provide a job description that clearly describes the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The Petitioner's supporting cover letter stated that the Beneficiary's proposed position will involve overseeing the U.S. operation and reporting to the foreign entity's board of directors, developing and implementing policies and strategies, conducting market research to identify business opportunities, proposing a budget and business plan for developing and selling products, recruiting and hiring

personnel, engaging in contract negotiations with suppliers, and developing systems to manage the Petitioner's finances, human resource structure, and supply chains.

In the RFE, the Director informed the Petitioner that the job description submitted in support of the petition was insufficient because it lacked detail about the Beneficiary's daily job duties and the amount of time she would allocate to those duties.

In response, the Petitioner provided a new job duty breakdown, which categorized the Beneficiary's job duties as "Executive Duties," "Business Development Activities," and "Operations Related Activities"; it indicated that the Beneficiary would allocate 40% of her time to duties in each of the first two categories and 20% of her time to the job duties in the third category. The Petitioner listed several job duties that the Beneficiary would have been unable to perform at the time of filing. For instance, the Petitioner indicated that the Beneficiary would review and monitor financial indicators and communicate with clients and distributors. However, the Petitioner does not appear to have commenced doing business as of the date of filing and therefore would have had no financial indicators for the Beneficiary to review and no clients or distributors with whom to communicate. Likewise, the Petitioner referred to the Beneficiary's oversight of its "multiple divisions," including sales, product development, finance, operations, quality control, and human resources, and indicated that the Beneficiary would collaborate with "division leads" and set standards for hiring and conducting performance reviews. However, these divisions had not yet been established when this petition was filed, thereby precluding the Beneficiary from being able to carry out any job duties that required overseeing company divisions or working with the leadership of and staff within those divisions.

Given the Petitioner's early developmental phase at the time of filing, the Petitioner did not have either the need or the ability to assign the Beneficiary the above-listed duties. Although it is plausible that the Petitioner would eventually reach a phase of development that would require the Beneficiary to perform these duties, it had not attained that phase when the petition was filed. As noted earlier, the Petitioner 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). As such, we cannot determine the Petitioner's eligibility based on facts and circumstances that did not yet exist at the time of filing. Here, we find that a number of the assigned duties were projected for a future position that the Beneficiary could not have held when the petition was filed, as the Petitioner had not yet attained the organizational complexity or level of business activity that was required for the Beneficiary to be able to execute those duties.

In sum, we find that the Petitioner made unsupported claims about the Beneficiary's proposed job duties and provided insufficient evidence to show that it was able to relieve the Beneficiary from having to allocate her time primarily to non-managerial job duties at the time the petition was filed. Therefore, we cannot conclude that the Beneficiary would be employed in a managerial capacity under an approved petition.

B. Foreign Employment

We also conclude that the Petitioner did not demonstrate that the Beneficiary was employed abroad in a managerial capacity.

First, we note that there are inconsistencies with regard to the Beneficiary's dates of employment with the foreign entity. In the L Classification Supplement, the Petitioner stated that the Beneficiary has been employed by the foreign parent entity from November 2009 through the present; the Petitioner indicated that this period of employment was briefly interrupted from 2015-2016 when the Beneficiary left to complete the requirements for a master's degree. The claim regarding the Beneficiary's dates of employment is inconsistent with an employment verification letter from the foreign entity's general director, who confirmed the Beneficiary's departure from July 2015 to August 2016, but stated that the Beneficiary's employment with the foreign entity commenced on February 1, 2013.

We further note that the Petitioner provided inconsistent organizational charts to illustrate the Beneficiary's placement within the foreign entity's organizational hierarchy. In support of the petition, the Petitioner provided a chart depicting the Beneficiary as overseeing a sales and marketing director. That chart indicated that the sales and marketing division is comprised of the following positions: marketing, sales, customer service, research and development, and application lab. However, in response to the RFE, the Petitioner provided another organizational chart of the foreign entity depicting the Beneficiary as directly overseeing an investment and sales planning employee, a marketing and communications employee, a projects unit, a research and development unit, a sales and customer service unit, and a marketing and communication unit. While both charts depict the Beneficiary as an international development director who is directly subordinate to the general director, they do not consistently illustrate the same staffing hierarchy within the team or division that the Beneficiary oversees.

Next, we find that the Petitioner did not adequately explain its submission of an organizational chart depicting the Beneficiary as the division director of marketing and communication of Bac a Bank, which the L Classification Supplement listed as an "affiliated company." In its RFE response statement, the Petitioner explained that the Beneficiary held "parallel roles" with both entities, claiming that "this is nothing more than to demonstrate [the Beneficiary]'s long term working relationship with the company's chief of conglomerate (the Chairwoman) and its financier and the trust the core board of management has in [the Beneficiary]." In order to meet the filing requirements for an individual petition, the Petitioner is required to establish that the Beneficiary has at least one continuous year of full-time employment abroad with its foreign affiliate. *See* 8 C.F.R. § 214.2(l)(3)(iii). The fact that the Petitioner claims that the Beneficiary assumed a top management position within two entities during overlapping time periods leads us to question whether the Beneficiary's employment broad is sufficient to satisfy the regulatory provision that requires the Beneficiary to have been employed abroad on a full-time basis.

The Petitioner must resolve the above listed discrepancies and ambiguities 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). In light of the above, we find that the record lacks sufficient consistent and reliable evidence establishing that the Beneficiary met all applicable foreign employment requirements.

III. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary has been employed abroad and will be employed in the United States in a managerial capacity. The appeal will be dismissed for these reasons.

ORDER: The appeal is dismissed.

Cite as *Matter of T-H-US, Inc.*, ID# 1184578 (AAO Jun. 12, 2018)