U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-G-, LLC

DATE: JUNE 20, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an oil and gas company,[1] seeks to temporarily employ the Beneficiary as the chief executive officer of its new office 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 Petitioner has secured sufficient physical premises to house the new office; (2) the new office would be able to support a managerial or executive position within one year after approval of the petition; (3) the foreign entity will continue to do business as a qualifying organization abroad; and (4) the Beneficiary's services in the United States would be temporary.

On appeal, the Petitioner submits additional evidence and maintains that it has met all eligibility requirements for the requested classification.

Upon *de novo* review, we will withdraw the Director's decision, in part. The record contains sufficient evidence to establish that the Beneficiary's services in the United States would be temporary and that the foreign entity would continue doing business abroad during the Beneficiary's proposed temporary assignment to the United States. However, as the Petitioner has not overcome the remaining grounds for denial of the petition, 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 position involving specialized knowledge, 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

[1] The Petitioner's business plan indicates that it intends to rent oil drilling equipment to other U.S. companies, and export oil and gas equipment, as well as shoes, clothes, food items, and automobiles and related parts and accessories to Nigeria.

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.

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). If the Form I-129, Petition for a Nonimmigrant Worker, 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. PHYSICAL PREMISES

The Director found that the Petitioner did not submit evidence that it had secured sufficient physical premises to house the new office. The Director acknowledged that the Petitioner submitted two different leases, one at the time of filing and one in response to a request for evidence (RFE), and determined that neither office location appeared to be sufficient to accommodate the Petitioner's projected staffing levels.

The Petitioner filed the Form I-129 in December 2015. 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). Evidence of sufficient physical premises is required initial evidence for an L-1 "new office" petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

At the time of filing, the Petitioner submitted a sublease agreement indicating that it would rent 1000 square feet of space within a larger Texas, office suite from sublessor, The sublease, which was not signed by either party, specified a 12-month term commencing on January 1, 2016, and the agreed use was "for general office and for no other purpose." The terms of the agreement suggest that the master lessor's written consent for the sublease may be required. The Petitioner did not provide any additional description of the property or how it was sufficient for the Petitioner's proposed business activities, nor did it provide a copy of the master lease, evidence of the master lessor's consent to the sublease, or evidence that it had paid the security deposit due on December 1, 2015.

The Director advised the Petitioner that the unsigned sublease agreement alone did not establish that it had satisfied the physical premises requirement and requested additional evidence regarding the premises such as a signed and dated agreement, a statement describing the type of premises and how it is suitable for the business, a letter from the property owner confirming that the sublease was authorized, and color photographs.

In response to the RFE, the Petitioner submitted a different, 26-month commercial lease agreement for a 1320 square foot office suite located in Texas. The Beneficiary signed the lease in June 2016 for a term beginning on August 1, 2016, more than eight months after the petition was filed. The Petitioner included photographs and a floorplan for the suite, which includes a reception area, two offices, and approximately 725 square feet of warehouse space. The Petitioner did not submit any additional evidence related to its sublease agreement for the location.

In denying the petition, the Director reviewed the newly submitted lease agreement, but determined that it would not accommodate more than four employees, while the Petitioner projected 12 employees by the end of the first year of operations.

On appeal, the Petitioner asserts that the Texas, office suite is sufficient for the company's initial business activities and emphasizes that it may make alterations to the office, with its landlord's consent, to accommodate additional employees.

Upon review, the Petitioner has not established that it had secured sufficient physical premises to house its new office as of the date of filing. As noted, there were several problems with the sublease agreement submitted with the petition, as it was neither signed nor dated, there was no evidence that the master lessor had agreed to the sublease terms, and it was unclear whether the Petitioner had paid the security deposit and intended to occupy the office. Further, the subleased premises did not include warehouse space, which, based on the nature of the business and the type of space ultimately secured, will be needed for the Petitioner's business.

The Petitioner must establish that it met all eligibility requirements at the time of filing in December 2015. While the Director nevertheless reviewed the sufficiency of the lease agreement signed in June 2016, that lease agreement did not cure the deficiencies of the initial sublease agreement or establish that the Petitioner had met this requirement when the petition was filed.

We agree with the Director's conclusion that the Petitioner did not meet the physical premises requirement; however, our finding is based on the insufficiency of the initial sublease agreement. As the Petitioner did not establish that it had secured sufficient physical premises prior to filing the petition, we need not make a determination regarding the sufficiency of the premises secured several months later.

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

The Director also denied the petition finding that the Petitioner did not establish that its new office would be able to support a managerial or executive position within one year of approval of the petition.

The Act defines "managerial capacity" as 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.

The Act defines the term "executive capacity" as 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.

In determining that the Petitioner did not establish that the new office would support a managerial or executive position within one year, the Director focused on the Petitioner's business plan, projected revenue and expenses, and the size of the U.S. investment, and found that the record did not show how the company would be able to cover its first year operating expenses, including paying the Beneficiary's salary and commencing operations in the United States.

On appeal, the Petitioner asserts that the Director did not consider its anticipated revenue or additional funds it had secured beyond the initial investment from its foreign affiliate company.

A. New Office Requirements

In the case of a new office petition, beyond the description of a beneficiary's proposed job duties, we review the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial or executive capacity. A petitioner has the burden to establish that it would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the evidence must be considered in analyzing whether the proposed managerial or executive position is 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).

1. Size of the U.S. Investment

As noted above, the Petitioner's business plan indicates that it intends to rent oil drilling equipment to other U.S. companies, and export oil and gas equipment, as well as shoes, clothes, food items, and automobiles and related parts and accessories to Nigeria. The business plan indicated that the foreign entity has already invested $160,000 and would invest an additional $300,000 during the first year, but it did not state how the additional funds would be spent or further explain its start-up costs. The business plan further indicated that the Petitioner anticipated first year sales of $871,660.

The Petitioner also signed a participation agreement with a U.S. company that owns an oil and gas tract, and will earn 5% of the net oil and gas revenue generated through the development of three

wells located on that tract. The Petitioner's foreign affiliate financed the $100,000 investment in the oil well development project and the purchase of a $60,000 pulling unit.

In the RFE, the Director requested additional evidence showing that the foreign entity had the ability to provide an additional $300,000 in funding as indicated in the business plan. In response, the Petitioner provided evidence of an additional $40,500 bank transfer and resubmitted a foreign entity company resolution that explained that it would make a $400,000 investment to finance the establishment and development of the Petitioner which would "include office space, drilling equipment, oil prospect etc." The resolution further stated that the $400,000 would be derived from payments of contracts it executed with two clients in Nigeria. The Petitioner submitted additional supporting evidence including bank statements for both entities.

The Director acknowledged the additional evidence, but found that the Petitioner had "not submitted any evidence of potential revenue in the next year." The Director appears to have overlooked a sales forecast found at page 50 of the Petitioner's business plan, where it provides an itemized list of anticipated revenue for drilling equipment rental, oil and gas production, and sales of drilling equipment, shoes, clothes, food items, automobiles, and accessories.

However, the record contains insufficient evidence regarding the company's actual start-up costs. It appears the Petitioner had secured additional funding to purchase equipment, but without an explanation of the amount and type of equipment to be purchased, and the anticipated costs, we cannot determine whether the sales forecasts are credible. For example, the Petitioner anticipates that the drilling equipment rental segment of its business would generate $300,000 in revenue in the first year. The Petitioner had purchased one piece of equipment at a cost of $60,000 and also appears to have its own equipment needs outside of the rental business, as it intends to hire six oil and gas laborers to engage in oil production. The business plan does not account for initial funding needed to begin purchasing and exporting automobiles and other goods. Therefore, the Petitioner did not provide sufficient information to establish that the $300,000 in funding from the foreign entity is sufficient to meet the company's initial equipment purchasing and other start-up costs.

2. Projected Staffing and Business Plan

During its first year, the Petitioner states it intends to hire the Beneficiary as CEO, a production manager, a purchasing manager, six part-time oil and gas production laborers, three sales representatives, and a part-time bookkeeper, with anticipated payroll expenses of $349,000.

The business plan includes position descriptions for the subordinates. The production manager would mainly be concerned with oil and gas production, a small segment of the Petitioner's intended business. The position description for the purchasing manager generally states that this employee would negotiate contracts with suppliers; oversee personnel engaged in buying, selling and distributing goods; process requisitions and purchase orders; direct distribution operations; and negotiate transportation rates and services.

While it appears that the Petitioner anticipates hiring sufficient staff for its oil and gas production segment (with more than half of its projected staff working in this area), it is unclear who would be responsible for handling the rental of heavy equipment in this segment. In addition, the Petitioner has not established how one employee, the purchasing manager, would reasonably be able to handle all purchasing, logistics, and distribution requirements for a company that anticipates engaging in several lines of business. The Petitioner indicates that it would be engaged in the purchase and export of various types of drilling equipment, as well as automobiles, food, shoes, and clothing. We cannot determine that one purchasing employee would sufficiently relieve the Beneficiary from performing administrative and operational duties associated with these areas of the business by the end of the first year of operations.

3. Duties

As noted, the Director denied the petition primarily based on evidentiary deficiencies relating to the Petitioner's business plan and the size of the U.S. investment. We have also reviewed the Petitioner's descriptions of the Beneficiary's proposed duties as chief executive officer.

The Petitioner included a breakdown of the Beneficiary's proposed duties for the first year in its business plan. The description includes a mix of qualifying and non-qualifying duties. For example, the Beneficiary's duties include helping customers to choose the best products for their needs, staying alert on new trends, preparing customs documents and financial statements, performing financial forecasts and analyses, managing all orders made, seeking out and communicating with suppliers' representatives to secure desirable procurement deals, and performing procurement analysis to lower the cost of goods. The Petitioner indicated that these duties would require 35% of her time. However, as noted above, the Petitioner would have only one employee responsible for the entirety of the company's purchasing and distribution operations, so it is reasonable to believe that the Beneficiary's actual time allocations to purchasing, distribution and administrative duties will be more significant than stated.

In addition, in a separate description, the Petitioner indicated that the Beneficiary "will devote considerable time to the development of the client base, represent the Company, and develop relationships with clients through meetings and phone calls," suggesting that the amount of time she would spend on non-managerial sales and marketing functions may also exceed the small time allocation provided in the position breakdown.

Further, many of the managerial and executive duties attributed to the Beneficiary are stated in very general terms and provide little insight into the expected nature of her day-to-day duties. For example, the Petitioner states that she will "establish and communicate goals and objectives," "work on the setting up of a strategy for being time efficient," "direct, design and implement strategic plans in a cost-effective and time-efficient manner," and "direct and approve service and products' strategies." Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The Petitioner must show that the Beneficiary will perform certain high-level responsibilities found in the definitions of managerial or executive capacity. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Second, the Petitioner must prove that the Beneficiary would be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees, by the end of the first year of operations. *See, e.g.*, *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533

Here, the Petitioner has consistently stated that the Beneficiary will occupy the senior position in the company, but has not submitted a job description or supporting evidence sufficient to demonstrate that she would primarily engage in managerial or executive duties, or that the new office would support a managerial or executive position, within one year.[2]

IV. CONCLUSION

The Petitioner has not established that it had secured sufficient physical premises to house the new office at the time of filing the petition, or that it would employ the Beneficiary in a managerial or executive capacity within one year of approval of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of N-G-, LLC*, ID# 357486 (AAO June 20, 2017)

[2] Finally, we note that during routine verification checks, we found that Texas public records show the Petitioner's corporate entity status has been "involuntarily ended." *See* https://mycpa.cpa.state.tx.us/coa (last visited June 7, 2017). If the Petitioner seeks to pursue this petition, it would need to provide U.S. Citizenship and Immigration Services with evidence of its continued legal existence and authorization to conduct business in the United States.