U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-C-, INC.

DATE: JUNE 20, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an entity that intends to provide human resource (HR) solutions to small and midsize businesses, seeks to temporarily employ the Beneficiary as president of 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 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: (1) the Petitioner's foreign parent company, a distributor and product developer of the [redacted] brand of condoms, employed the Beneficiary in a managerial capacity; and (2) the new office would support the Beneficiary in a managerial position within one year of approval of the instant petition.

On appeal, the Petitioner disputes the denial asserting that the Director overlooked critical evidence and incorrectly characterized the Beneficiary's proposed job duties as non-managerial.

Upon *de novo* review, we find that the Petitioner has not established that the new office would support the Beneficiary in a managerial position within one year of the petition's approval. Therefore, we will dismiss the appeal. Because of the dispositive effect of this finding, we will reserve the remaining issue.

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

The Petitioner claims that it will employ the Beneficiary in a managerial capacity. The primary issue to be addressed in this decision is whether the Petitioner established that the new office would support a managerial position within one year of approval of the petition.

"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.

A. New Office Requirements

In the case of a new office petition, 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 of the petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed managerial or executive position is plausible based on 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).

If staffing levels are used as a factor in determining whether an individual will be acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) takes 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.

At the time of filing this petition, the Petitioner claimed nine employees and provided an initial supporting cover letter stating that it intends to use its own "technology platform and HR, benefits, and compliance expertise" in order to provide its clients a variety of HR services, such as compensation and benefits, payroll processing, health insurance, and workers' compensation programs. The Petitioner did not describe the characteristics of its "technology platform," but stated

that it would derive "expertise" in the related subject matter from "the collective insights and experience of our teams of HR and compliance professionals," who will assist the Petitioner's clients "in running their business[es]." The Petitioner stated that it plans to sell its services "through our direct sales organization," which will involve using sales representatives and digital marketing, participating in marketing events, and forging business relationships with "other vertical market industry associations."

The Petitioner also provided a business plan that is incongruent with its supporting cover letter in terms of the Petitioner's list of projected service offerings. Namely, the "Executive Summary" section of the business plan indicates that the Petitioner will offer "legal, HR, and management consulting services." Neither legal nor consulting services were mentioned in the initial support statement; rather, both were discussed in the business plan, which goes into considerable detail about the consulting services, stating that the Petitioner "will assist a variety of startups and individuals who need consulting on finding their niche." Although the business plan refers to a "future employee growth plan," it states that the Petitioner already "has a team of professional employees" who are able to provide consulting services to prospective business clients in "different industries."

Section 9 of the business plan addresses the Petitioner's existing staff, including a licensed attorney as its general counsel, an executive assistant, a financial manager, and sales and marketing manager.[2] The Petitioner offered job descriptions for these positions, indicating that the existing support staff will service the Petitioner and address its administrative and operational needs. The Petitioner did not indicate that the existing support staff would provide consulting, legal, or staffing services to its clients. Section 9.4 of the business plan shows that the Petitioner currently has five "leased employee professionals" and plans to hire more of these "employees" over the course of a three-year period. The Petitioner did not, however, explain how the in-house employees would differ from "leased employees" in regard to their employment status with the Petitioner given that both the in-house and the "leased" individuals are included in the Petitioner's payroll summary from June through August 2018. Aside from listing the leased employees in its payroll summary, it is not clear that they would otherwise be considered as the Petitioner's employees, given that they provide services to the restaurant where they will actually perform their work.

The Petitioner also provided a "Co-Employment Agreement" that was in effect the time of filing, showing that the Petitioner was contracted by [redacted] to staff a restaurant with five "leased" employees, including a server, a dishwasher, a busser, and two cooks. According to section 9.9 of the business plan, each leased employee "will hold at least a Bachelor's degree . . . or they may have significant work experience that qualifies them for the desired position" and will "provide managerial expertise and fill in for any additional load of work" as well as work "on a project basis as management consultants" allocating 30% of their time to consulting and another 30% to working "in professional roles." It does not appear that the employees who were hired to work as restaurant staff would provide "management consulting" services or assume "professional roles." Furthermore, the Petitioner did not provide evidence to show that either a Bachelor's degree or "significant work experience" is necessary to perform the duties required of these positions, nor did it indicate that the leased employees' job duties would involve serving as management consultants and working in

[2] Although the Petitioner listed the Beneficiary among its current staff, it indicated that the general counsel would be the acting manager until the Beneficiary is able to come to the United States to assume his proposed position.

"professional roles," as indicated in the business plan's job description for leased employees. Furthermore, although the above described "Co-Employment Agreement" states that the Petitioner "will invoice the Client at a rate of costs plus fifteen percent (15%)," the Petitioner did not define the term "costs" within the context of this agreement. As such, the fee structure for the staffing service the Petitioner provided, and possibly continues to provide, to the restaurant is unclear.

Further, although the business plan contains a "Financial Forecasts" section, which provides an overview of the Petitioner's "break-even" point, lists its projected costs and sales income, and includes a profit/loss table breaking down its expenses and profit margins, the Petitioner did not provide a fee schedule for the legal, consulting, and human resources services it plans to offer its future clients. As such, it is unclear how the Petitioner arrived at the annual revenue and cost of sales projections that were included in this section of the plan.

In a request for evidence (RFE), the Director pointed to and asked for an explanation regarding an inconsistency between a job duty breakdown for leased employee professionals and the actual work performed by the five leased employees who were hired to staff a restaurant.

In response, the Petitioner pointed to its existing staff of four in-house employees, contending that the Beneficiary's "managerial services" are required to oversee these professional and supervisory subordinates. The Petitioner further asserted that it has already attained a level of operation where it can employ the Beneficiary in a managerial capacity, even though it still qualifies as a "new office" and would not be required to employ the Beneficiary in a managerial capacity under an approved petition. The Petitioner also copied portions of the business plan into its response letter and explained that its existing in-house staff will oversee any additional leased employees, stating that "these subordinate employees will be either professional or managerial themselves." The Petitioner did not clarify whether the phrase "these subordinate employees" applied to its existing in-house staff or whether it applied to the additional "leased employee professionals." Given that the five existing leased employees were hired to staff a restaurant and would not be deemed professional or managerial, the same may be true of any leased employees the Petitioner will hire in the future. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Furthermore, the Petitioner did not address the Director's concern regarding the incongruity between the types of positions filled by the existing leased employees and the types of job duties listed in the business plan's job duty breakdown for leased employees. Instead, the Petitioner resubmitted previously provided job descriptions for its in-house and "leased" personnel without explaining who will provide clients with legal, HR, and consulting services, which the Petitioner claimed as critical functions for generating revenue.

The Director denied the petition concluding that the Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity within one year of the petition's approval.

Although the Petitioner has appealed the Director's decision, it has not established that it would have the staff in place to relieve the Beneficiary from having to provide consulting services to its future consulting clients. Despite providing evidence showing that the Petitioner currently employs an

attorney, an executive assistant, and two managers, the job descriptions offered for these positions do not indicate that the existing employees would be responsible for working with businesses to provide legal and business consulting services or the various HR administrative and operational services the Petitioner plans to offer its clients. As such, it is unclear how the Petitioner would carry out the tasks needed to generate income and meet its revenue projection so that it can function and progress beyond its first year of operation. We cannot assume that the Beneficiary's subordinate staff will carry out job duties beyond those that have been included in their respective job duty descriptions, nor can we assume that the Petitioner will be adequately staffed with employees who will provided the actual services that will generate income. As stated above, the Petitioner must support its assertions with relevant, probative, and credible evidence. *Id.*

Moreover, the record remains inconsistent as to the proposed functions of the Petitioner's "leased employee professionals." Despite the job description contained in the business plan, which indicates that the leased employees will hold "professional roles" and "[w]ork as consultants," the leased employees that had actually been hired as of the date this petition was filed did not fit either of these characteristics, as they were hired to staff a restaurant and would perform tasks that are consistent with that operation rather than tasks of a professional consultant. The Petitioner must resolve this inconsistency 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 deficiencies described above, we find that the Petitioner has not established that its operation will be adequately staffed with employees who will provide the legal, consulting, and HR services it plans to offer its future clientele.

B. Duties

We also reviewed the job descriptions of the Beneficiary and his projected subordinates and we find the duty descriptions to be insufficient to establish that the Beneficiary would perform primarily managerial job duties within one year of the petition's approval, as claimed.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. The term "function manager" applies generally when a beneficiary is primarily responsible for managing an "essential function" within the organization. *See id.*

The Petitioner included a job duty breakdown listing a number of vague job duties for the Beneficiary's proposed position. Namely, the Petitioner stated that the Beneficiary would allocate his time in the following manner:

- 15% overseeing "all positions in the daily operations";
- 15% directing managers in implementing strategies and identifying business opportunities;
- 10% supervising management in their search for business opportunities;
- 10% overseeing the creation and implementation of sales and marketing campaigns;
- 10% reviewing managers' reports on "outsourced marketing strategy";

- 10% reviewing financial reports and making adjustments to the budget;
- 20% directing management in the creation of "strategic and tactical plans"; and
- 10% establishing client relationships.

Although the Petitioner also indicated that the Beneficiary would have the authority to set business objectives, hire and fire employees, adjust their work schedules and evaluate performances, and make recommendations to change existing rules, it did not explain its reference to an "outsourced marketing strategy" and "strategic and tactical plans" within the context of a business consulting company; nor did the Petitioner provide information establishing how the Beneficiary would oversee management's creation of those plans. Likewise, the Petitioner did not state the types of activities that would be required to oversee "all positions" and to create and implement marketing campaigns. Moreover, the Petitioner did not state whether the above job description applies to the position currently being offered to the Beneficiary or whether it would apply to the Beneficiary in the future, once the Petitioner enters its next developmental phase. Given the vague content of the job description, we are unable to make this critical distinction.

In the RFE, the Director noted that the Petitioner did not provide sufficient details about the Beneficiary's proposed job duties. Although the Petitioner provided a response and addressed various other portions of the RFE, it did not provide further information elaborating on the Beneficiary's proposed job duties or clarify whether the job duty breakdown that was included both in the original business plan and in the RFE response applied to the Beneficiary's proposed position under the instant petition within the context of a new office.

In the denial decision, the Director again noted the need for providing specific information when offering a description of the Beneficiary's proposed employment, noting that the job duty breakdown the Petitioner provided did not adequately demonstrate that the Beneficiary would be employed in a managerial or executive capacity within one year of the petition's approval. Although the Petitioner disputes the Director's finding on appeal, it does not offer additional information about the Beneficiary's job duties to explain precisely how he would ensure that the U.S. operation progresses beyond the new office phase of its development. Instead, the Petitioner argues that the act of "overseeing" or "directing" something or someone qualifies as a managerial job duty. We note, however, that despite the sense of discretionary authority that these terms denote, they are broad and ambiguous and therefore insufficient to convey a meaningful understanding of the precise nature of the activities the Beneficiary will perform within the scope of the Petitioner's business during its current or future state of development. The actual duties themselves reveal the true nature of the employment. *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).

Although we agree that the Beneficiary is not expected to perform primarily managerial job duties at this initial stage of the Petitioner's development, a detailed description of job duties is nevertheless critical for the purpose of explaining precisely how the Beneficiary, through the duties he would perform under an approved new office petition, will help the Petitioner to progress beyond its current new office phase. As the Petitioner has not adequately stated what tasks the Beneficiary would be expected to undertake under an approved petition, we cannot make a conclusion as to the likelihood that the Beneficiary would be relieved from having to primarily perform the Petitioner's non-

managerial operational tasks within one year of the petition's approval. We further note that the Petitioner placed great emphasis on the Beneficiary's current job with the foreign entity, stating that the Beneficiary is "responsible for the overall operations of the Chinese company" and its "strategic decisions"; the Petitioner claimed that the Beneficiary's "education and business experience have given him a sound basis for leading" the U.S. entity. The Petitioner did not, however, explain how serving as a general manager and brand planning director for a company that develops and distributes a brand of condoms provided him with an understanding of how to run the U.S. entity, which plans to generate revenue by working with businesses to provide legal, consulting, and HR services.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of S-C-, Inc.*, ID# 3817021 (AAO June 20, 2019)