U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-USA CORP.

DATE: JUNE 27, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a software management and consulting services company, seeks to temporarily employ the Beneficiary as the president 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 Beneficiary has been employed abroad in a managerial or executive capacity; (2) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer; and (3) the new office would support a managerial or executive position within one year after approval of the petition.

On appeal, the Petitioner submits additional evidence and maintains that the Director overlooked evidence that was sufficient to establish eligibility with respect to all three grounds for denial.

Upon *de novo* review, we find that the Petitioner has submitted sufficient evidence to establish that the Beneficiary has been employed abroad in a managerial capacity and the Director's decision is withdrawn with respect to that issue. However, as the Petitioner has not overcome the two remaining grounds for denial, 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 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. QUALIFYING RELATIONSHIP

The Director found that the Petitioner did not establish that it had a qualifying relationship with the Beneficiary's 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. Here, the Petitioner claims to be a subsidiary of the Beneficiary's foreign employer, an Indian company.

The term "subsidiary" is defined as a firm, corporation or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity. 8 C.F.R. § 214.2(l)(1)(ii)(K).

On the L Classification Supplement to Form I-129, at section 1, item 10, the Petitioner stated that the foreign entity owns 75% of its shares and that [redacted] owns the remaining 25% of its shares. The Petitioner's initial letter in support of the petition (which the Beneficiary signed) and its undated business plan provided the same description of the company's ownership structure. The Petitioner did not provide stock certificates, a stock ledger, shareholder agreements, or other primary evidence of its ownership.

The business plan indicated that the Petitioner would issue 10,000 shares with $100 par value and that [redacted] would provide an initial payment of [redacted] (25% ownership), while the foreign entity "is welcomed to participate in the company capital for the amount of [redacted] in exchange for 75% ownership.

In a request for evidence (RFE), the Director advised the Petitioner of the lack of corroborating evidence to support the claimed parent-subsidiary relationship. The Director requested that the Petitioner provide additional documentation such as the minutes of shareholder meetings, copies of all stock certificates, stock purchase agreements, its stock ledger, and proof of stock purchase or capital contribution provided in exchange for ownership.

In response, the Petitioner stated "[o]ur company is actually 51% owned by our Indian parent company . . . . owns 49% of our company." The Petitioner provided copies of two stock certificates. Certificate number 1 showed that the Petitioner issued 51 of its 10,000 authorized shares (no par value) to the foreign entity on the same date it was incorporated (, 2016), and certificate number 3 indicated that it issued 49 shares to .

The Petitioner also submitted a different version of its business plan, also undated,[1] which states that the company planned to issue 10,000 shares at par value, with issued and outstanding stock to be valued at . It did not identify the investment to be provided by either shareholder, but did state that the foreign entity would have ownership and would have 49%. The Petitioner stated "[t]his version of the business plan was meant to have been included in the initial petition."

The record shows that the Petitioner had in its bank account at the time of filing, but did not include evidence of the source of the funds. In response to the RFE, the Petitioner provided a bank statement showing that the foreign entity transferred to its account in December 2016, three months after the petition was filed. In a letter included with the RFE response, the foreign entity's director and chief executive officer explained that the foreign entity had not invested any monies previously because "the initial startup costs were to be covered by in exchange for our decision to allow him to retain a minority (49%) stake." The Petitioner did not submit copies of any agreements between the shareholders or other evidence addressing this arrangement.

In denying the petition, the Director emphasized that the Petitioner submitted inconsistent statements regarding its ownership and therefore did not meet its burden to establish the claimed qualifying relationship.

On appeal, the Petitioner explains that its previous attorney accidentally submitted a draft of the business plan at the time of filing, which did not have the correct information regarding the company's ownership. The Petitioner maintains that the Director overlooked the stock certificates and notes that since there was "clearly an attorney error," the stock certificates showing that the foreign entity owns a 51% interest resolved the discrepancy and are sufficient to meet the Petitioner's burden of proof.

We find the Petitioner's "attorney error" explanation insufficient to overcome the discrepancies in the record. The 75-25 claimed ownership split between the foreign entity and was not confined to the Petitioner's initial business plan, which the Petitioner now claims was a draft document. Rather, both the Form I-129 signed by the Petitioner under penalty of perjury and the Petitioner's initial support letter, included this same information which the Petitioner now claims is incorrect. The Petitioner must resolve this discrepancy in the record with independent, objective

[1] Although both business plans are undated, both versions indicate that the Petitioner had already signed a lease for its office location in Georgia. The Petitioner signed its lease on June 1, 2016, so both versions of the business plan appear to post-date that event.

evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner's unsupported claim of "attorney error" is not sufficient.

The Petitioner asks that we rely on its two submitted stock certificates as sufficient evidence of the claimed parent-subsidiary relationship. However, as general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, 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. 1632. Without full disclosure of all relevant documents, we are unable to determine the elements of ownership and control. Although the Director suggested that the Petitioner provide these various types of documentary evidence of its ownership and control, it opted to submit the stock certificates alone in response to the RFE.

Further, the Petitioner submitted only stock certificates numbers 1 and 3, with no further explanation about stock certificate number 2. The issued stock certificates account for only 100 shares, while both versions of the business plan, both of which appear to post-date the issuance of stock, indicate that the Petitioner intended to issue all 10,000 shares. With no stock ledger, shareholder meeting minutes, corporate by-laws, shareholder agreements, or other relevant documentation, we cannot determine that the two certificates provided account for all of the issued shares. Notably, the brief submitted on appeal refers to the Petitioner as the Beneficiary's "business investment," although the Petitioner has not otherwise claimed he is an owner. Therefore, while either 75% or 51% ownership would generally be sufficient to establish that the foreign entity is the Petitioner's parent company, we do not appear to have complete evidence of the Petitioner's ownership.

In sum, the Petitioner has not adequately resolved the discrepancies in the record or submitted sufficient and complete objective evidence of its ownership to overcome the Director's determination on this issue.

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.

The Director acknowledged the submitted position description, but found that the Petitioner's business and hiring plans were too vague to establish how the Beneficiary would be relieved from significant involvement in the day-to-day operations of the company within a one-year period. The Director also found insufficient evidence that the foreign entity made an investment in the Petitioner prior to filing the petition.

On appeal, the Petitioner asserts that it provided a business plan and detailed job description sufficient to show that the company would support the Beneficiary's proposed position as president within one year. It submits three additional client proposals "to show the growth of the company." Further, referring to guidelines for new offices found on the U.S. Citizenship and Immigration Services public website, the Petitioner asserts that it satisfied all requirements and should be granted the one-year new office approval in order to prove that it can carry out its business plan.

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. Projected Staffing and Business Plan

On the Form I-129, filed in September 2016, the Petitioner listed its number of employees as "1 + 6 prospective future hires." In its supporting letter, the Petitioner stated that it is a "software management and consulting company," and will offer "IT services and management and retail operational services." It indicated it will offer professional and specialized IT services to business and then expand its services to the retail industry in the near future. According to the supporting letter, the Beneficiary would be recruiting six additional staff.

The business plan states at section 3.3 that "initially 2 Technical & 1 Marketing and front desk Administration resource shall be hired" and that "the staff could be augmented" based on demand.[2] The plan includes a proposed personnel plan, showing that four employees would be hired by the end of 2016, with two additional employees added in 2017. Initial employees would include the Beneficiary, a developer, a graphic designer, and an office assistant. In 2017, the Petitioner would add a project manager and a marketing employee. An accompanying organizational chart shows that the project manager, marketing assistant, and office executive would report to the Beneficiary.

The business plan also includes a "proposed action plan" which mentions that it would: hire staff members in the marketing department in the second quarter of 2017; hire staff for accounting and finance, sales and marketing and IT in the third quarter of 2017; and add a "few more staff members" to its U.S. staff in the last quarter of 2017. The personnel plan, which indicates anticipated hiring through 2019, does not depict these same anticipated increases in staff or include any accounting and finance or sales staff at all, with the IT staff being limited to one graphic designer and one developer through 2018. Therefore, the projected staffing information provided in the business plan was inconsistent.

In the RFE, the Director noted the inconsistencies in the business plan with respect to the number of employees to be hired and the hiring timeline. The Director requested additional evidence to show how the company would support a managerial or executive position within one year and asked for additional information regarding the number and types of employees to be hired, including a summary of proposed duties and educational levels for projected staff.

In response, the Petitioner submitted a different version of its business plan, but the latter version did not contain any additional information regarding the proposed staffing. It included the same personnel plan and action plan which the Director had found to be inconsistent.

In the denial decision, the Director emphasized that there was minimal information provided regarding the employees to be hired during the first year, and as such, the Petitioner did not establish how the Beneficiary would be relieved from involvement in the day-to-day operations of the company within one year. On appeal, the Petitioner emphasizes that it provided a business plan showing how the company would grow, and provides evidence of website design and enhancement proposals that it claims it has already delivered to potential clients.

However, the Petitioner does not address the specific deficiencies addressed in the RFE and denial, namely, the lack of consistent information regarding the number and types of employees to be hired, their anticipated job duties, and their projected hire dates. Therefore, we agree with the Director's conclusion that the Petitioner has not shown how the Beneficiary would be relieved from involvement in the day-to-day operations of the company within one year.

[2] The record contains two business plans. Both versions of the business plan contain essentially the same information regarding proposed personnel, with some slight differences in projected salaries.

As noted, a new office 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. While the Petitioner emphasized that it provided a business plan, the Petitioner itself claims that one of the submitted plans contains incorrect information. Further, the Petitioner has not addressed the Director's concerns regarding the proposed staffing and personnel information that is included in both plans. We cannot determine the number of staff the Petitioner reasonably expects to hire during the first year of operations or what duties they would perform. The Petitioner indicated that the Beneficiary would hire six staff, but the business plan suggests that the employees hired within one year may include, at most, the Beneficiary and four other employees, while the "action plan" indicates higher projected staffing levels.

In addition, both business plans mention the Petitioner's intent to expand its lines of business to include facilities management, business process outsourcing, and retail network development. While it appears that the Petitioner proposes hiring up to three IT staff, it is unclear who would perform duties associated with these other areas of business.

Without more consistent and detailed information, we cannot determine, for example, whether the staff would be sufficient to relieve the Beneficiary from performing non-managerial and non-executive duties such as sales, marketing, bookkeeping, customer service, and administrative and clerical tasks within the first year.

B. Duties

The Director also reviewed the Petitioner's descriptions of the Beneficiary's proposed duties and found the duty descriptions, when considered along with the Petitioner's business and hiring plan, to be insufficient to establish that he would perform primarily managerial or executive duties within one year.

Initially, the Petitioner provided a vague overview of the Beneficiary's proposed responsibilities, noting that he would allocate 60% of his time to executive duties and 40% to performing managerial duties. In the RFE, the Director observed that the initial description was overly broad and appeared to describe duties performed by a manager or executive of a much larger, established company rather than duties associated with the start-up of a new office.

Later, in response to the RFE, the Petitioner listed the Beneficiary's proposed duties as president as follows:

1. Provide leadership and vision for the company;
2. Develop and articulate a strategic direction for the company and determine and adjust first year budget, appropriate capital allocations and expenditures;
3. Recruit and hire subordinate managerial personnel;
4. Participate in the development and execution of a strategic marketing plan;
5. Attend industry trade shows to start cultivating business contacts;
6. Negotiate and finalize contracts with clients and strategic partners;

7. Evaluate employee performances;
8. Coordinate with minority business partner to render decisions on respective financial obligations and scope of project involvement and responsibilities;
9. Choose and retain corporate counsel to advise on applicable business legal requirements and responsibilities;
10. Create the company's business culture and establish and implement company policies, guidelines and action plans.

This description, like the description provided at the time of filing, provides little insight into the specific nature of the Beneficiary's expected day-to-day duties. Some duties, such as "provide leadership and vision," "develop and articulate a strategic direction," and "create the company's business culture and establish and implement company policies," indicate the Beneficiary's heightened level of authority, but do not specifically convey the duties he is likely to perform on a daily basis during the first year of operations and beyond. 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).

Other duties, such as attending trade shows, negotiating contracts with clients, and executing marketing plans, suggest that the Beneficiary will be the employee responsible for most sales and marketing functions. As noted above, the Petitioner's proposed staffing plan for its first four year of operation does not include any sales staff and it is unclear that any marketing staff would be hired during the initial year of operations.

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 he would primarily engage in managerial or executive duties, or that the new office would support a managerial or executive position, within one year.

IV. CONCLUSION

The Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer or that it will employ the Beneficiary in a managerial or executive capacity within a year.

ORDER: The appeal is dismissed.

Cite as *Matter of E-USA Corp.*, ID# 458977 (AAO June 27, 2017)