U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-H-L-, INC.

DATE: MAR. 13, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an Asian bakery, seeks to temporarily employ the Beneficiary as its "CEO/President" 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 California Service Center denied the petition concluding that the Petitioner did not submit sufficient evidence to establish that the Beneficiary was employed abroad in a managerial or executive capacity and that the Beneficiary would, within one year of commencing its U.S. operation as a new office, be employed in a managerial or executive capacity in the United States.

On appeal, the Petitioner disputes the Director's decision, claiming that the Beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity. With regard to the Beneficiary's employment abroad, the Petitioner clarified the Beneficiary's role within the foreign entity, pointing to her job duty breakdown and her placement within the organization. The Petitioner pointed to the Beneficiary's discretionary authority over the foreign entity's finance and marketing activities and the division heads who carry out the underlying duties related to those activities.

Upon *de novo* review, we find that the Petitioner submitted sufficient evidence to establish that the Beneficiary was, more likely than not, employed in a managerial or executive capacity. Therefore, we find that the Petitioner has overcome the Director's decision regarding the Beneficiary's employment abroad. However, we find that in making the determination regarding the Beneficiary's proposed U.S. employment, the Director erroneously relied on the regulatory provisions at 8 C.F.R. § 214.2(l)(3)(v), which pertain to a beneficiary who is coming to the United States to open or to be employed in a new office.[1] The record shows that the Petitioner responded "No" to the question on the petition asking whether the Beneficiary would be coming to the United States to open a new office. Therefore, the Petitioner did not file the Form I-129 seeking treatment as a new office. As

[1] The term "new office" is defined as an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F).

the Director applied an incorrect regulatory provision when making the determination regarding the Beneficiary's proposed position with the Petitioner and the evidence showing that the Beneficiary was more likely than not employed abroad in a managerial or executive capacity, we will withdraw the Director's decision.

I. BASIS FOR REMAND

Notwithstanding the Director's error, we find that the record as presently constituted does not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity or that the Petitioner has a qualifying relationship with the Beneficiary's employer abroad.

A. U.S. Employment

First, we find that the Petitioner did not establish, as required, that it would employ the Beneficiary in a managerial or executive capacity under an approved petition. Neither the Beneficiary's job description nor the Petitioner's staffing structure adequately demonstrates that the Petitioner was able to employ the Beneficiary in a managerial or executive capacity at the time the petition was filed. *See* 8 C.F.R. § 103.2(b)(1).

As noted above, the Petitioner did not ask for treatment as a new office. Therefore, going forward, a determination of whether the Beneficiary's prospective employment would be in a managerial or executive capacity must be made in reliance on the applicable regulatory provisions that pertain to non-new office petitions.

B. Qualifying Relationship

We also find that this petition is not approvable because the Petitioner has not provided sufficient evidence to establish, as required, that it has a qualifying relationship with the Beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, a 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 that they are related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

In the present matter, the Petitioner marked the box for "affiliate"[2] at Section 1, No. 9 of the Form I-129, L Classification Supplement, but claimed that the foreign entity is majority owner of the Petitioner's stock at Section 1, No. 10 of the L Classification Supplement. We note, however, that evidence of the foreign entity owning the majority of the U.S. entity is indicative of a parent-

[2] The term "affiliate" is defined in relevant part, as (1) one of two subsidiaries both of which are owned and controlled by the same parent or individual, or (2) one of two legal entities owned by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. 8 C.F.R. § 214.2(l)(1)(ii)(L).

subsidiary relationship.[3] Here, in addition to the inconsistency described herein, the record contains other, more critical anomalies that preclude a finding that the Petitioner has the required qualifying relationship either as an affiliate or a subsidiary of the foreign entity.

First, we note that the Petitioner's Articles and Certificate of Incorporation show that the Petitioner was established on November 28, 2016. The record also contains a document titled "Term Sheet," dated October 14, 2016, which was executed on November 15, 2016, by who was identified as the Petitioner's owner. However, the record does not clarify when became the Petitioner's owner or how the Petitioner could have offered stock for purchase prior to its coming into existence as a recognized entity. The Petitioner must resolve this incongruity 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).

Second, the record includes documents that are inconsistent as to the identity of the Petitioner's majority owner. Namely, Section 1, No. 10 of the L Classification Supplement indicates that the foreign entity is the Petitioner's majority stockholder; this claim is consistent with the Petitioner's stock certificate no. 1004, which names the foreign entity as owner of 600,000 of one million shares of the Petitioner's issued stock. However, the record includes a capitalization table that was included as "Appendix A" of the "Term Sheet" and specifically names the Beneficiary, rather than the foreign entity, as owner of the 600,000 shares. This inconsistency must also be addressed and resolved in order to establish the identity of the Petitioner's majority stockholder.

Lastly, the Petitioner provided stock certificate nos. 1005 and 1004, issued in January and March 2017, respectively. It is unclear why the certificate that was issued in March sequentially precedes the one issued earlier in January. As with the above described inconsistencies, this anomaly must also be addressed through the submission of credible supporting evidence.

II. CONCLUSION

Accordingly, we hereby withdraw the Director's decision and remand this matter for further consideration and entry of a new decision. The Director should request any additional evidence deemed necessary to determine the Petitioner's eligibility and allow the Petitioner to submit such evidence within a reasonable period of time.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of S-H-L-, Inc.*, ID# 1009894 (AAO Mar. 13, 2018)

[3] The term "subsidiary" is defined, in relevant part, as an entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(K).