U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-J-R-E- INC.

DATE: MAR. 13, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which intends to operate a real estate and property management business, seeks to temporarily employ the Beneficiary as director of its new office[1] 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 establish, as required, that it has secured sufficient physical premises to house the new office and that it would be able to support a managerial or executive position within one year of approval of the petition.

On appeal, the Petitioner asserts that it provided evidence of sufficient physical premises to commence operations in the United States and a business plan which supports its claim that the Beneficiary would perform primarily managerial or executive duties within one year.

Upon *de novo* review, we will dismiss the appeal.

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 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.*

[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.

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).

"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.

The term "executive capacity" is defined 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.

II. PHYSICAL PREMISES

The Director denied the petition, in part, based on a finding that the Petitioner did not establish that it has sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

The Petitioner submitted a [redacted] Agreement for a "coworking office" for one person, with a monthly fee of $219. The Petitioner later submitted a letter from [redacted] in response to a request for evidence (RFE) which stated that it has a "shared co-working space," and "will have the flexibility to upgrade at any given time to a bigger office space upon availability at the [redacted]."

The Petitioner, which intends to operate a real estate and property management business, stated in its initial support letter that it would employ five to seven employees within one year. The Petitioner's business plan indicates that it "has leased a small office for its operations for $219.00 per month to house two employees" as well as the Beneficiary. The financial assumptions included in the business plan indicate that the Petitioner's rent would remain fixed at $219.00 per month. However, the business plan also contains a three-year income projection showing that the Petitioner anticipates $90,000 in annual rent expenses.

The Director determined that "an office space allocated for one person cannot accommodate 5-7 people." The Director acknowledged the letter from [redacted] but emphasized that the Petitioner must establish that it met the physical premises requirement as of the date of filing.

On appeal, the Petitioner asserts that it is unreasonable to expect the Petitioner to rent a space large enough for seven employees prior to securing approval of its new office petition. The Petitioner emphasizes that the Beneficiary is a successful business person who does not spend money when there is no need to do so.

We agree with the Director's determination that the Petitioner has not met the physical premises requirement for its new office. While we recognize that it likely does have the option to expand beyond a single shared office, the Petitioner did not show that the premises secured as of the date of filing would be sufficient to accommodate the Beneficiary on a full-time basis upon approval of the petition. The Petitioner's "office service agreement" does not explain the terms and conditions of its shared "coworking" office or the extent to which the Petitioner would have access to the office. Without further explanation, it appears that the Petitioner has secured space that can be occupied by one person on a part-time basis.

Further, notwithstanding the Petitioner's option to expand beyond a shared office arrangement, it is unclear that the company has any intention to do so. The information provided in the business plan suggests that the Petitioner assumes that its rent will remain fixed at $219 per month, or, alternatively, will remain fixed at $90,000 annually. Of these two figures, the lower figure appears more likely to be accurate.

In sum, the Petitioner has not shown that the one-person office sharing arrangement in place at the time of filing was sufficient to allow the company to commence full-time business operations in the United States. Accordingly, the Petitioner has not met the physical premises requirement.

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

The Director further determined 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.

In the denial decision, the Director emphasized that the evidence submitted did not establish that there would be employees to relieve the Beneficiary from performing the day-to-day, routine operational activities of the company within one year. The Director also observed that the Petitioner's explanation of the proposed business was lacking in detail.

On appeal, the Petitioner asserts that the Director did not address its description of the Beneficiary's proposed duties and overlooked the fact that the company intends to hire a subordinate manager during the first year of operations, and five to seven employees in total.

In the case of a new office petition, we review a beneficiary's proposed job duties as well as 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).

A. Duties

The Petitioner indicates that it will operate a real estate business. Specifically, the Petitioner states that it will invest in business and commercial real estate in the metropolitan area, subcontract out repairs and renovations, and then rent or sell the remodeled properties to entrepreneurs and business owners seeking commercial space.

In a supporting letter, the Petitioner described the Beneficiary's proposed duties as "director" as follows:

> (1) Approving the strategic plans and main objectives of the company and supervising their implementation . . . .
> (2) Determining the most appropriate capital structure of the company, its strategies and financial objectives and approving its annual budgets.
> (3) Supervising the main capital expenses of the company and acquisition from disposal of assets.
> (4) Deciding the performance objectives to be achieved . . . .
> (5) Reviewing and approving the organizational and functional structure of the company on a periodic basis.
> (6) Laying down rules for the internal control system and supervising them . . . .
> (7) Reviewing annually the effectiveness of the internal control system.
> (8) Drafting a Director's executive management . . . . Ensuring the integrity of financial account procedures including procedures related to the preparation of the financial reports. Ensuring Corporate Governance Code . . . .
> (9) Laying down specific and explicit policies, standards and procedures . . . .
> (10) Outlining a written policy that regulates the relationship with stakeholders with a view to protect their respective rights.
> (11) Deciding policies and procedures to ensure the company's compliance with the laws and regulations and the company's obligation to disclose material information to creditors and other stakeholders.

However, the Petitioner's business plan included a substantially different description of the Beneficiary's proposed duties:

> [H]is responsibilities will include identifying new business properties to acquire, managing subcontractors, and negotiating leases and flip property sales. [The Beneficiary] maintains the record-keeping of the company and will initially manage the day-to-day activities of the company. As the day-to-day manager, [the Beneficiary] will be responsible for client development and marketing, hiring and

> oversight of company supervisors and office staff, taking bids from and hiring subcontractors, and negotiation of purchases, sales, leases and business contractors.

Unlike the initial job description, this summary of the Beneficiary's proposed duties indicates that he would be significantly involved in the day-to-day operations of the business as a part of his daily routine, rather than performing primarily managerial or executive tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

On appeal, the Petitioner attempts to reconcile these two descriptions by noting that the numbered list reflects the duties the Beneficiary will perform at the end of the first year of operations when additional staff have been hired, while the duties listed in the business plan reflects duties he will perform during the one-year start up period.

The Petitioner's assertion is not persuasive. While the numbered list of duties identifies general executive responsibilities, it provides very little insight into what the Beneficiary would be expected to do on a day-to-day basis as the director/CEO of a company that intends to buy, renovate, and lease or re-sell real estate. In fact, the duties are so broad that they could describe any senior executive position in any company. The Petitioner did not describe the "strategic plans and objective" the Beneficiary would approve and implement, what specific tasks he would perform to "review and approve" the company's organizational structure, or what internal control systems he would implement, nor did it elaborate on its repeated references to the company's policies and procedures. 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).

We acknowledge that the Beneficiary, as the Petitioner's senior employee, would have authority to establish plans, policies, and objectives for the petitioning company and make major decisions regarding its finances and overall direction. However, the Petitioner has not established that these types of responsibilities would primarily occupy the Beneficiary's time within one year. The fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. Therefore, even though the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, a broad overview of his responsibilities is insufficient to establish that his actual duties would be primarily managerial or executive in nature.

In addition, as discussed further below, the Petitioner has not credibly established the number or type of employees it would hire during the first year of operations. As such, the Petitioner's claim on

appeal that the Beneficiary would be removed from any significant involvement in the business' day-to-day operations within one year is not supported in the record.

B. Projected Staffing and Business Plan

In its initial support letter, the Petitioner provided a broad overview of the Beneficiary's duties, as discussed above, and indicated that its new office would employ five to seven employees within one year. The Petitioner did not submit a business plan, proposed organizational chart, or other evidence of the projected nature, scope, and staffing of the new office.

The Petitioner submitted its business plan in response to the RFE. According to the business plan, the company would hire personnel "once the company is operational," but it did not include a timeline for hiring. The Petitioner's business plan also did not support the Petitioner's assertion, made elsewhere in the record, that the Petitioner intends to hire at least five and up to seven employees during the first year.

The business plan identifies one proposed employee as a "manager/shareholder," who would earn a salary of $30,000 in 2018-19. The Petitioner identified the Beneficiary as its sole shareholder in its business plan, so the identification of a future subordinate "shareholder" was confusing and not adequately explained. For this reason, it is unclear whether a subordinate employee would hold this position, or if the duties attributed to the position are simply the Beneficiary's own duties. At the same time, the Petitioner seemed to indicate that it would fill the position in 2018 or 2019, and not necessarily during the first year of operations. Due to these ambiguities in the record, the Petitioner did not establish that it will fill a subordinate "manager" position within one year.

Further, the duties attributed to the "manager/shareholder" position overlap with those the Petitioner indicates the Beneficiary will perform.[2] These duties include establishing company policies, training employees, identifying and acquiring investment properties, negotiating contracts, approving plans for real estate improvements, resolving issues with tenants and contractors, reviewing and signing checks, maintaining schedules, ordering supplies, answering calls and taking messages, collecting data from customer surveys, and performing day-to-day bookkeeping. Apart from the responsibility for establishing policies, it appears that this position would be involved in all aspects of the company's day-to-day operations, rather than performing managerial duties. Therefore, even if the Petitioner had established that it will eventually hire a subordinate "manager/shareholder," the record does not establish that the position would be managerial or supervisory in nature.

The Petitioner also indicates that it may hire two to three part-time employees at minimum wage, depending on the company's workload. These employees would be responsible for managing the office, taking calls from realtors, tenants and subcontractors, and operating equipment as assigned.

[2] The Petitioner also stated that, in addition to these duties, the manager/shareholder would initially perform all "day-to-day bookkeeping," until an office manager is hired, but there are no additional references to an office manager in the business plan.

As with the "manager/shareholder" position the Petitioner did not provide a timeline for hiring any part-time hourly staff.

Further, the business plan did not show how the company would grow during the first year of operations to the point where it would require the Beneficiary to perform primarily managerial or executive job duties. The Petitioner provided evidence that it has received $200,000 in funding and indicates that it would spend $100,000 on property acquisition, $7,500 on an architect, $30,000 on start-up costs (advertising, expenses, salary, and rent for six months), $2,500 on office equipment, and the balance of $60,000 on renovating the property acquired. The Petitioner did not provide evidence that it had begun the process of researching investment properties and there is little information to indicate what type of property the Petitioner is likely to acquire for $100,000.

Nevertheless, while this breakdown of first year expenses seems reasonable based on the size of the investment, the Petitioner did not provide credible financial projections indicating its expected revenue for the first year of operations and beyond. The Petitioner provided a "Three-Year Income Projection" chart showing it anticipated $672,000 in "flip property income" and $75,000 in lease income in its initial year of operations. The expense breakdown identifies $465,781 in expenses and cannot be reconciled with the first year costs identified above, although both breakdowns appear on consecutive pages of the same business plan. For example, the Petitioner indicates that its expenses will include $143,000 for salaries, $30,000 for "chemicals," and $90,000 for rent. Notably, the projection does not include any costs associated with real estate commissions, architect fees, or subcontractor fees. The Petitioner has not explained these discrepancies and the record does not support the Petitioner's apparent claim that it generate gross receipts of nearly $750,000 in its first year after acquiring a property for $100,000.

The lack of credible financial projections raises further questions regarding the Petitioner's actual hiring and expansion plans for the first year of operations. Based on this limited staffing plan and lack of a timeline for hiring, the Petitioner has not demonstrated that the Beneficiary will primarily supervise a subordinate staff of professional, managerial, or supervisory personnel within one year. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the Petitioner has not established that it would employ sufficient staff who would relieve the Beneficiary from performing non-qualifying duties.

The Petitioner has consistently stated that the Beneficiary will occupy the senior position in the new office, 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, after the initial year of operations.

IV. QUALIFYING EMPLOYMENT ABROAD

Although not addressed in the Director's decision, we find the Petitioner has not established that the Beneficiary has at least one year of full-time continuous employment abroad in a managerial or executive capacity in the three years preceding the filing of the petition. *See* 8 C.F.R. § 214.2(l)(3)(iii).

The Petitioner claims that the Beneficiary has been employed by [redacted] in [redacted] the Petitioner's claimed parent company, as a partner since 2011 and indicated on the Form I-129, Petition for a Nonimmigrant Worker, that his duties abroad are exactly the same as those he will perform in the United States. For the reasons discussed above, the numbered list of 11 duties was too vague to establish what the Beneficiary has been doing on a day-to-day basis and is insufficient to support a finding that he performs primarily managerial or executive duties for the foreign entity. Although the Petitioner provided an organizational chart for the [redacted] company indicating that it has three employees in addition to its two partners, the Petitioner did not provide position descriptions for these employees or otherwise establish that they relieve the Beneficiary from involvement in the company's day-to-day operational activities.

Further, the Director informed the Petitioner in the RFE that when the Beneficiary applied for a U.S. visitor visa in October 2015, he indicated on his visa application that he was employed at the time as a tailor for [redacted] in Saudi Arabia, with no prior employment. In response, the Petitioner provided a letter from the Beneficiary, who stated that he started this men's tailoring company in 2009 and that he owns the company, even though his name does not appear as its owner. He explained that he divides his time between the Petitioner's parent company in [redacted] and the tailoring company in Saudi Arabia and did not work for only one company. Based on this statement, the Petitioner has not established that the Beneficiary's full-time employment with [redacted] Also, the record does not contain evidence of the Beneficiary's ownership of [redacted] in support of his claim that it is an affiliate of the [redacted] company. Absent evidence that the two foreign entities are related companies, the Petitioner has not established that the Beneficiary meets the full-time foreign employment requirement.

For the foregoing reasons, the Petitioner has not submitted sufficient evidence to establish the Beneficiary's full-time continuous employment abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition.

V. CONCLUSION

The Petitioner has not established that it secured sufficient physical premises to house the new office, that it would employ the Beneficiary in a managerial or executive capacity within one year, and that the Beneficiary has the required one year of full-time employment abroad in a managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of A-J-R-E- Inc.*, ID# 1032692 (AAO Mar. 13, 2018)