U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-E- INC.

DATE: MAR. 26, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which intends to import and sell textiles, seeks to temporarily employ the Beneficiary as the chief executive officer (CEO) 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 record did not establish, as required, that: (1) it had secured sufficient physical premises to house the new office; (2) the Beneficiary had at least one year of employment abroad in a managerial or executive capacity in the three years preceding the filing of the petition; and (3) the new office would support a managerial or executive position within one year.

On appeal, the Petitioner contends that the Beneficiary had been employed abroad in a managerial capacity for over one year at the time of filing. In addition, the Petitioner maintains that it submitted sufficient evidence to establish that its new office would support a managerial position within one year.

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.*

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

[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.

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. PHYSICAL PREMISES

The first issue to be addressed is whether the Petitioner established that it secured sufficient physical premises to house its new office as of the date of filing. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it intends to engage in the importing and wholesale of textiles, and indicated that the Beneficiary would work at [redacted] in [redacted] California. The Petitioner did not submit a lease agreement or other evidence that it had secured physical premises at this address, nor did it submit a business plan further explaining the intended nature of its business and the type of premises required to operate it.

In response to a request for evidence (RFE), the Petitioner submitted a letter from the manager of the [redacted] business complex who stated that the Petitioner occupies [redacted] at the address listed above, which is classified as an "office" with no storage of items permitted. The Petitioner provided photographs depicting the exterior of the building and office, as well as interior photographs of a small office with one desk, and a separate room containing stacks of unopened packages and a water cooler.

The Petitioner also submitted its business plan, which indicates its intent to establish "a unique clothing retail business," its plans for point-of-purchase advertising inside its retail store, and its intent to hire an employee who "will be responsible for the operations of the store."

In the denial decision, the Director determined that the Petitioner had not shown that the office secured at the time of filing was suitable for the operation of the retail clothing business described in its business plan. The Petitioner has not addressed this issue on appeal.

We agree with the Director's finding that the evidence was insufficient to demonstrate that the Petitioner satisfied the physical premises requirement. The office the Petitioner occupied is clearly not sufficient for the operation of the retail business mentioned in the business plan. Although the Petitioner initially indicated that it would engage in wholesale trade, the business plan does not support that statement and the Petitioner did not attempt to resolve this conflicting information regarding the nature of the proposed business.

As the Petitioner has not addressed this issue in its brief or submitted evidence to overcome the Director's adverse finding, we will dismiss the appeal.

III. BENEFICIARY'S EMPLOYMENT ABROAD

The next issue to be addressed is whether the Petitioner established that the Beneficiary has been employed abroad in a managerial or executive capacity. Specifically, the Petitioner must provide

evidence that the Beneficiary has been employed abroad for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

A. Period of Employment

In order to meet the foreign employment requirement, the Petitioner must establish that the Beneficiary worked outside the United States for an entire year. Certain periods of time spent in the United States, including brief trips to the United States for business or pleasure, are not interruptive of the one year of continuous employment abroad, but such periods shall not be counted toward fulfillment of that requirement. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A).

The Petitioner states that its Indian parent company hired the Beneficiary in the position of "Senior Merchandiser" in May 2016,[2] and provided copies of her monthly pay statements for the period October 2016 through October 2017.

The Petitioner filed the petition on November 20, 2017. At the time of filing, the Beneficiary was in B-2 nonimmigrant status and had last entered the United States on May 22, 2017. This six-month period of stay in the United States does not count towards her period of employment abroad, even if the foreign entity continued to pay her salary in India. The Petitioner must therefore show that she had a continuous year of employment abroad between May 2016 and May 22, 2017.

The Petitioner submitted a copy of the Beneficiary's passport, which shows that she made entries to the United States during this time period. Department of Homeland Security arrival and departure records show that the Beneficiary was in the United States from April 1, 2016, until August 16, 2016, and from November 5, 2016, until March 2, 2017.

Therefore, although the Petitioner claimed that the Beneficiary had been working for the foreign entity for approximately 18 months at the time of filing, the Beneficiary spent only five months and one week outside the United States during this period, and is well short of meeting the one year employment abroad requirement.

B. Employment Capacity

Because the Beneficiary does not have the required one year of employment abroad, the Petitioner cannot establish that she has the required period of foreign employment in a managerial or executive capacity. However, we will briefly address the Petitioner's evidence related to her position and job duties.

[2] We note that the Director questioned the Beneficiary's employment abroad because she indicated on a Form DS-160, Nonimmigrant Visa Application, that she was a "homemaker." However, this visa application was submitted to a U.S. Consulate in India in October 2015 and pre-dates her claimed period of employment with the Petitioner's parent company. Therefore, the information provided in the visa application was not inconsistent with the Petitioner's claims.

At the time of filing, the Petitioner claimed that the Beneficiary worked as a senior merchandiser for the foreign entity "responsible for managing the store, and overseeing the operations of the entire facility and amenities offered." The Petitioner noted that she was responsible for training and overseeing employees to provide sufficient guest services.

The Petitioner also provided a breakdown of her duties, indicating that she developed and executed merchandising strategies; prepared business plans; ensured that company policies and legal guidelines are communicated and followed; oversaw "financial performance, investments and other business ventures"; delegated responsibilities and supervised the work of "executives"; collaborated with buyers, suppliers and distributors; and analyzed "problematic situations and occurrences and provide[d] solutions to ensure company survival and growth." Most of these duties appeared to be inconsistent with the Petitioner's assertion that the Beneficiary was responsible for managing a retail store and providing training and supervision for its employees.

Further, the Petitioner submitted an organizational chart for the foreign entity which depicted the Beneficiary in the position of "international sales" with no subordinates, and did not corroborate either of the above descriptions of her role with the foreign entity. Finally, we note that the organizational chart did not include the position of "senior merchandiser" although this is the job title that appeared on the Beneficiary's foreign pay stubs. The Petitioner must resolve these inconsistencies 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).

We agree with the Director's determination that the Petitioner did not provide detailed, consistent information regarding the Beneficiary's role or duties with the foreign entity in support of its claim that she was employed abroad in a managerial capacity. The information the Petitioner provided contained unexplained discrepancies that prevented an understanding of the true nature of her role and responsibilities.

On appeal, the Petitioner has not resolved these issues; it simply refers to the Beneficiary's position as "Sr. Merchandiser/International Sales," and claims she managed an essential function for the foreign entity. The Petitioner's brief does not address the inconsistencies noted above with respect to the Beneficiary's actual position and duties, or attempt to reconcile its new function manager claim with its initial claim that she was a retail store manager or supervisor. Therefore, even if we determined that she had a full year of employment abroad with the foreign entity, the Petitioner did not meet its burden to establish that her employment was in a managerial capacity as claimed.

IV. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The final issue to be addressed is whether the Petitioner established that its new office would support a managerial position within one year. The Petitioner does not claim that the Beneficiary would be employed in an executive capacity.

"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.

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 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 intends to "unique clothing retail business." The Petitioner described the Beneficiary's proposed "specific duties" as follows:

- Supports operations and administration by advising and informing Board members and staff. 10%
- Oversees design, marketing, promotion, delivery, and quality of products and services. 10%
- Effectively manages the corporation according to authorized policies and procedures that fully conform to current laws and regulations. 15%
- Assures the organization and its mission, programs, products, and services are consistently presented in strong, positive image to relevant customers. 15%
- Bear the overall responsibility of planning, directing, and coordinating the business operations. This entails the responsibility of formulating business policies and managing daily operations. 20%
- Manage human resources with the authority to hire promote and terminate employment of all managing staff. 5%
- Providing guidance to subordinates, including setting performance standards and monitoring performance. 10%
- Developing constructive and cooperative working relationships with others, and maintaining them over time. 5%
- Assessing the value, importance, or quality of things or people. 5%
- Implementing staff policies. 5%

This description is overly broad, as it focuses on the Beneficiary's authority over policy, procedures, strategies and overall "business operations," without explaining the specific tasks she would be

performing on a day-to-day basis within the intended business to carry out these responsibilities by the end of the Petitioner's initial year of operations. Further, some of the duties are so ambiguous that that it is difficult to discern what specific activities they would entail. For example, we cannot determine how the Beneficiary would go about assessing the "value, importance or quality of . . . people" or how this duty relates to the business.

Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *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); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Here, the Petitioner has not provided the necessary detail or an adequate explanation of the Beneficiary's proposed activities in the course of her daily routine.

We acknowledge that the Beneficiary, as the Petitioner's senior employee, would have authority to establish plans and policies for the company, supervise any employees hired, and make decisions regarding the company's overall direction. However, the Petitioner must also establish that these types of responsibilities would primarily occupy the Beneficiary's time within one year, and to make this determination, we review the totality of the evidence. The Beneficiary's discretionary authority is only one of several factors we consider in determining whether the Petitioner would employ her in a qualifying capacity at the end of the one-year new office period.

The Director's decision reflects that he properly considered the evidence as a whole to determine whether the Petitioner met its burden to show that it would have a reasonable need for the Beneficiary to primarily perform the claimed managerial duties within one year. For the additional reasons discussed below, the Petitioner has not met this burden.

B. Business Plan and Projected Staffing

In order to qualify for L-1A nonimmigrant classification during the first year of operations, the regulations require a petitioner to disclose the proposed nature of the business and the size of the U.S. investment, and establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The Petitioner's initial submission included a broad description of the Beneficiary's proposed duties, but did not include the evidence needed to satisfy the regulatory requirement at 8 C.F.R. § 214.2(l)(3)(v)(C). In the RFE, the Director requested a business plan including a timeline for each proposed action during the first year of operations; the Petitioner's proposed organizational chart, a description of the positions to be filled during the first year, and evidence demonstrating the size of the foreign entity's investment in the United States and the Petitioner's current financial status.

In response, the Petitioner submitted a five-page business plan indicating its intent to operate a retail business selling clothing for men, women, and children. The Petitioner did not explain why it previously stated on the Form I-129 that it would operate an import and wholesale business.

With respect to staffing, the business plan indicates that "[w]ithin the first year, two full-time employees will be hired. One person will be responsible for the operations of the store and the second person will be responsible for customer service and inventory control." The Petitioner also identified its parent company as its main supplier and noted that it would work with some local wholesalers. The business plan does not include any financial information, such as the company's anticipated start-up costs and operating expenses, the amount of the investment, its expected revenues, or the amount of rent, salaries and other routine business expenses to be paid on a monthly basis.

The Petitioner provided a letter from indicating that the Petitioner opened an account in December 2017 (after the filing of the petition) and had a current balance of $525.03 as of May 3, 2018. The Petitioner also provided bank statements for the months of February, March, and April 2018. These statements show a total of $39,000 in incoming funds from the Petitioner's foreign parent company, one outgoing wire transfer that appears to coincide with a purchase invoice in the record, and various debit and ATM transactions, all of which took place in and Nevada despite the company's California location.

In the denial decision, the Director emphasized that the Petitioner made conflicting statements about the type of business it intends to operate and provided an insufficient business plan that lacked information regarding the business's intended structure, scope, staffing plans, start-up costs, and financial projections. Given these deficiencies, the Director found inadequate support for the Petitioner's claim that it would hire two employees as stated, or that such employees, even if hired, would relieve the Beneficiary from significant involvement in the day-to-day operations of the business within one year.

The Director also addressed the size of the U.S. investment, noting that the business plan did not indicate the value of the investment made to set up the business. The Director concluded that without consistent information regarding the nature of the business, the size of the investment, and the company's planned staffing and structure, the Petitioner had not met its burden to establish that it would employ the Beneficiary in a managerial position within one year.

On appeal, in response to the Director's finding that the Petitioner did not adequately describe the scope of the entity, its organizational structure and its financial goals, the Petitioner reiterates that it intends to establish "a unique clothing retail business in Southern California," and re-submits the business plan that was already reviewed by the Director and found to be insufficient. We agree with the Director's finding that the extremely broad five-page business plan does not contain sufficient relevant information to satisfy the Petitioner's burden of proof. The Director adequately explained why the submitted business plan was deficient and the Petitioner has not addressed these deficiencies on appeal. Further, as noted above, the Petitioner states that it will operate a retail store, but the business plan and other evidence in the record indicate that the company will operate from an office.

With respect to the size of the United States investment and the financial ability to commence doing business, counsel states:

> All business expenses incurred by the Petitioner will be paid by Foreign Entity. Foreign Entity is regularly transferring funds to the Petitioner's bank account to cover all business expenses, including employee's salaries. The Foreign entity will continue to transfer more funds once Beneficiary begins working for Petitioner. The Foreign Entity has enough funds to cover the Beneficiary's annual salary and the salaries of her direct and indirect subordinates.

However, neither the Petitioner's business plan nor its own statements mention that the company will receive full financial support from the foreign entity. Counsel's statement that the foreign entity's investment is sufficient and that it has sufficient funds to support the new office does not satisfy the Petitioner's burden. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.

We acknowledge that the Petitioner received $39,000 from the foreign entity in the first half of 2018, but this evidence alone is insufficient to show the intended size of the U.S. investment or the Petitioner's ability to commence business operations as a retail store. The record does not identify the total amount of investment needed, the amount the foreign entity intends to provide, or how the money would be allocated. Again, the business plan contains no breakdown of start-up costs, revenues, expenses or any other detailed financial information for the first year of operations.

After reviewing the totality of the evidence, we find that the Petitioner has not adequately described what the Beneficiary will be doing during the initial year of operations or beyond, nor has it sufficiently or consistently explained the intended nature and scope of the Petitioner's activities or its financial objectives. Accordingly, the Petitioner did not demonstrate that the Beneficiary would primarily engage in managerial duties, or that the new office would support a managerial position, within one year of approval of the petition. For this additional reason, the appeal will be dismissed.

V. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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 L-E- Inc.*, ID# 2861587 (AAO Mar. 26, 2019)