U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-&G- INC.

DATE: NOV. 15, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which intends to operate a Lebanese restaurant, seeks to temporarily employ the Beneficiary as 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 Petitioner did not establish, as required, that it would be able to support a managerial or executive position within one year of approval of the petition.

We initially rejected the Petitioner's appeal as untimely filed, but have reopened the matter *sua sponte* in order to consider the merits of the appeal. On appeal, the Petitioner submits additional evidence, asserts that the new office is already relying on the services of professional contractors, and contends that the Beneficiary will be directing the activities of both professional and supervisory personnel in a managerial capacity 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).

II. DEFINITIONS

"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.

Based on the definitions of managerial and executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

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

The sole issue to be addressed is whether the Petitioner established that the new office would support a managerial or executive position within one year of approval of the petition.

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 states that it will operate a Lebanese restaurant. On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that the Beneficiary will manage, direct and coordinate the restaurant's operations; recruit, hire and fire personnel; analyze operations to evaluate performance; obtain necessary licenses; and negotiate deals with suppliers and contractors. In a supporting letter, the Petitioner added that the Beneficiary would be responsible for developing marketing plans, managing sales campaigns, conferring with managerial personnel and staff members, and directing and coordinating the marketing operations.

In a request for evidence (RFE), the Director advised the Petitioner that it did not provide sufficient information regarding the specific managerial or executive duties the Beneficiary would perform. In response to the RFE, the Petitioner submitted a copy of the Beneficiary's employment contract with the Petitioner's parent company. The contract indicates that he would be transferred to the U.S. to establish the petitioning company and to perform the following duties as the Petitioner's "executive director":

- Taking full responsibility for the establishment, development and the organization of . . . company, including all directions of business development, marketing, training, finance, human resources, delivery chain, etc.,
- Composition and implementation of the strategic plan of business, including composition and implementation of the plan of the sales purposes and profit,
- Formation of the staff of the company, development of marketing functions and business development processes and implementation of the objectives,
- Optimization of the business policy as an affiliate, in compliance with the regulations of the country, expansion of the consumer network,
- Planning and management of the marketing activities and events, fulfillment of the marketing promotion and advertising of the Company,
- Study of the market data, fields and goods, maintenance of a professional analysis of the relevant data,
- Creation of strategic partnerships with other companies to ensure the highest level of business profitability,
- Investment of the policy, procedures and ethical norms of the company in the staff and their implementation,
- Fulfillment of advertising campaigns, including processing of advertising materials of the sales.
- Foundation of a US affiliate that meets all internal regulations and standards of the restaurant operating in Armenia.

This description is overly broad as it does not list the specific tasks the Beneficiary would perform on a day-to-day basis during the first year of operations and beyond. Many of the listed duties focus on the Beneficiary's authority to establish and staff the company and set its policies. While such responsibilities are consistent with the Petitioner's claim that he will be the senior employee in the new office, it has not established that activities such as founding the U.S. company and developing

policies and processes would require a significant portion of his time on a regular and ongoing basis. Specifics are clearly an important indication of whether a beneficiary's duties will be 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).

While the Beneficiary's stated responsibilities for market research, marketing, and advertising are more specific, the Petitioner did not establish that such duties will be managerial or executive in nature or that he would delegate related non-qualifying tasks to proposed subordinates. Similarly, the Petitioner did not sufficiently elaborate on the nature of the strategic partnerships the Beneficiary is expected to create or the steps he will take to expand the "consumer network." The Petitioner indicates that the Beneficiary will negotiate deals with suppliers but does not indicate who will handle the more routine functions of ordering the necessary supplies for the Petitioner's restaurant.

We acknowledge that the Beneficiary, as the Petitioner's senior employee, would have authority to establish plans, policies, and objectives for the company, supervise any employees hired, and make major decisions regarding its finances and overall direction. However, the position description alone is insufficient to establish that a beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as a petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the proposed position. As noted, 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. Here, for the reasons discussed further below, the Petitioner has not established that these types of duties would primarily occupy the Beneficiary's time within one year.

B. Projected Staffing and Business Plan

If staffing levels are used as a factor in determining whether an individual will be acting in a managerial or executive capacity, we take 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. Accordingly, in a petition involving a new office, we evaluate the totality of the evidence to determine whether the proposed duties are 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).

As noted, the Petitioner intends to operate a Lebanese restaurant. At the time of filing in October 2017, the Petitioner provided evidence that it had signed a commercial lease for a 1918 square foot premises, had purchased some assets from an existing restaurant that formerly occupied the premises, and had begun preparations to remodel the restaurant.

The Petitioner submitted a business plan which included the company's proposed organizational chart. The chart depicted a total of 12 positions, including the Beneficiary's position of "CEO/COO" as the top of the hierarchy. The chart indicates that the Beneficiary would supervise a

manager and a chef.[2] The manager would, in turn, supervise two cashiers and "bus staff," while the chef would supervise an assistant chef and four subordinate cooks. The chart also includes a janitor among its proposed kitchen staff, and "contracted services," reporting to the Beneficiary. The Petitioner indicated that these contractors would include an accountant/CPA, attorney, architect, designer, general contractor, business management consultant, and a marketing agency.

The Petitioner did not provide position descriptions for any subordinate staff, nor did it state their proposed salaries, or provide a specific timeline for staffing the restaurant. However, the business plan did include a pro forma cash flow statement for the 2018 calendar year. This statement projects that the company would generate revenue throughout 2018, but indicated $0 in anticipated labor costs for the period January 2018 through July 2018, and monthly labor costs of $2,400 for August through December 2018. The pro forma statement did not include projected expenses for payments to contractors.

In the RFE, the Director requested additional information regarding the new office's scope, organizational structure, and financial goals, including a more detailed business plan with a timeline for each proposed action to be taken in the first year, and a list of proposed duties for subordinates to be hired. In response, the Petitioner resubmitted the same organizational chart and the above-referenced employment contract for the Beneficiary; it did not provide additional evidence regarding the projected subordinate staff, the new office's specific timeline for hiring employees, or other information regarding milestones it expects to achieve in its first year of operations.

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. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional."[3] *Id.* If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

The Petitioner does not claim that the Beneficiary would be a function manager, but does indicate that he is authorized to hire and fire employees and that he would supervise subordinates with

[2] The Petitioner indicated that it had filed an L-1B classification petition for its proposed chef. USCIS records show that this petition ( ) was denied in December 2017, prior to the Petitioner's submission of its response to the RFE in this matter.

[3] To determine whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Therefore, we must focus on the level of education required by the position, rather than the degree held by a subordinate employee.

managerial job titles. However, we agree with the Director's finding that the estimated labor costs stated in the Petitioner's business plan do not corroborate the projected staffing and structure indicated in the submitted organizational chart. The pro forma cash flow statement indicates that the Petitioner would begin paying salaries in August 2018 (10 months after the filing of the petition), and that it would pay only $2,400 per month from that point forward. The Petitioner did not show that this amount would be sufficient to compensate a manager, two cashiers, a bus boy, a chef, four to five cooks, and a janitor. As the Petitioner did not provide a timeline for hiring staff, we are unable to determine which positions would actually be filled within the first year of operations.

While we do not doubt that the Beneficiary will have the authority to hire and fire employees, the Petitioner did not establish that he would be primarily overseeing managerial or supervisory employees within one year, and it did not claim that the restaurant staff would hold professional positions requiring the completion of a bachelor's degree. The Petitioner did not provide position descriptions for the subordinate staff. Further, based on the projected salaries, it does not appear that the company will have the staffing or structure in place to relieve the Beneficiary from significant involvement in the day-to-day, non-managerial functions necessary for the operation of the restaurant. The projected monthly salary expenses of $2400 would not support even two full-time workers.

On appeal, the Petitioner does not address the Director's concerns regarding the estimated labor costs stated in the business plan. The Petitioner instead states that the company is already relying on the services of professional contractors and consultants, and asserts that the Beneficiary "will direct the activities of supervisory personnel" including the manager, and the chef, whose L-1B petition was denied while this petition was pending. The Petitioner re-submits the same organizational chart without addressing the Director's finding that the evidence submitted did not sufficiently corroborate the company's proposed structure.

In support of the appeal, the Petitioner submits a "declaration" signed by the parent company's owner, who indicates that the new office has already retained the services of an attorney, an architect/interior designer, a general contractor, a business management consultant/accountant/CPA, and a marketing agency, and states that these individuals, some of whom are professionals, will report directly to the Beneficiary. The Petitioner submitted photographs showing the progress of the remodeling of its restaurant, but the record does not show that the Beneficiary will oversee general contractors, an architect, or an interior designer as part of his regular job duties once renovations are complete.

With respect to the accountant, attorney, and marketing agency, the Petitioner has not provided copies of its contracts with these third-party service providers, evidence of payments made to them, or other documents which would explain the nature and scope of the services they provide. As noted, the Petitioner did not appear to include payments to contractors in its projected first-year expenses, and we cannot conclude that the Beneficiary would direct the duties of these contractors on a regular basis.

For the foregoing reasons, the Petitioner has not met its burden to establish that the Beneficiary would act primarily as a personnel manager within one year, or that he would primarily perform managerial duties.

The Petitioner initially claimed that the Beneficiary will be employed in a "managerial or executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and they must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee.

As noted, the Petitioner submitted a broad description of the Beneficiary's responsibilities, but has neither defined his actual proposed duties in sufficient detail, nor adequately corroborated that the staffing and structure depicted in its organizational chart would be in place by the end of the initial year of operations. In fact, the Petitioner's projected labor costs suggest that the company would be minimally staffed after one year, and the Petitioner has not explained how the Beneficiary would be able to primarily focus on the broad goals and policies of the company within that timeframe, rather than participating in the day-to-day operations of the restaurant.

C. Investment in the New Office

In determining whether a new office would support a managerial or executive position, we also consider the information the Petitioner provides regarding the size of the United States investment and the financial ability of the foreign entity to remunerate the Beneficiary and to commence doing business in the United States.

At the time of filing, the Petitioner provided evidence that the parent company transferred $99,000 to its U.S. bank account as consideration for its 51% ownership interest in the company. The Petitioner has submitting documentation demonstrating that it spent $41,500 to secure its lease and over $30,000 to purchase assets and goodwill from the restaurant that formerly occupied the leased premises. The business plan did not identify the company's expected start-up costs or indicate the source of any additional funding for those expenses.

With respect to the Beneficiary's salary, the Petitioner stated on the Form I-129 that the Beneficiary would earn $4500 per month, but the business plan states that the manager would not draw a salary during the first year of operations. The Beneficiary's contract with the foreign entity, which assigns him to serve as the Petitioner's CEO, appears to stipulate that the foreign parent would pay his $4500 monthly salary.

In the RFE, the Director requested additional evidence regarding the size of the U.S. investment and the foreign entity's financial ability to remunerate the Beneficiary and cover the costs of commencing business in the United States.

The Petitioner provided the parent company's tax records, showing that it expected to achieve revenue of approximately $75,000 in 2017, and provided a balance sheet and summary of turnover for the years 2015 through 2017. The Petitioner stated that the parent company generates adequate income to support the U.S. company's operations if necessary.

The Director found insufficient evidence to demonstrate which entity would remunerate the Beneficiary and found that the evidence did not establish that the foreign entity had the financial ability to pay his salary and any expenses related to the U.S. entity. For this additional reason, the Director found that the evidence did not support a finding that the Petitioner would be able to support a managerial or executive position within one year.

The Petitioner does not address the Director's finding in its appeal. It states that the Petitioner expects to generate gross revenue of $150,000 in the coming year, which is $90,000 less than the revenue projection included in its business plan. As noted, the business plan does not identify the expected start-up costs and amount of any additional investment that the company expects to receive. The Petitioner's pro forma cash flow statement indicates that the company expects to have monthly cash flow of $1850 to $2125 during 2018. Also, this cash flow statement is missing major expenses such as rent, shows minimal salaries to be paid to employees, and does not include other expenses that the Petitioner claims it will incur, including the cost of renovations and payments to contractors.

Therefore, we agree with the Director's determination that the record does not show that there has been a sufficient investment to accommodate the new office's startup costs and it remains unclear whether the foreign entity would have the ability to pay the salary stated on the petition. The Petitioner's business plan does not contain sufficient information to support a finding that the company is prepared to commence operations and expand to the point where it can support a managerial or executive position within one year.

IV. EMPLOYMENT ABROAD

Although not addressed by the Director, the record does not contain sufficient evidence to establish that the Beneficiary has at least one year of continuous employment abroad in the three years preceding the filing of the petition in October 2017. *See* 8 C.F.R. § 214.2(l)(3)(iii).

The Petitioner claims that the Beneficiary has worked full-time for its parent company since April 2011. The Beneficiary entered the United States in B-2 status in October 2016 and cannot count the period spent in the United States towards his period of qualifying employment abroad. *See* 8 C.F.R. 214.2(l)(1)(ii)(A). Therefore, the Petitioner must establish that he worked for the foreign entity on a full-time basis for one continuous year between October 2014 and October 2016.

The Petitioner submitted a copy of the Beneficiary's employment contract with the foreign entity, signed in April 2011, and a recent reference letter from the foreign entity's owner confirming his employment since that date. It also provided the Beneficiary's Armenian income tax records which show his employment and salary history. These records indicate that the Beneficiary's employment with the Petitioner's parent company began in April 2011, but they also show concurrent employment with [redacted] from June 2014 until March 2017, and with an unidentified third employer with a different tax identification number beginning in January 2016, with no end date noted. There are months during 2016 that show the Beneficiary receiving income from three different employers.

The Petitioner also submitted the Beneficiary's resume, which indicates that he worked for [redacted] from May 2006 until October 2010. Under the entry for this company, he also listed [redacted] as his employer from November 2013 until March 2017. The employment records and resume contain different information, but both documents indicate concurrent foreign employment with at least two entities during the relevant time period. However, the Petitioner's statements indicate that its parent company has been the Beneficiary's sole employer since 2011. 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).

As a result of this concurrent employment, which the Petitioner has not acknowledged or explained in its own statements, we cannot determine whether the Petitioner's parent company employed the Beneficiary on a full time basis during the relevant time period, or that his employment with the parent company satisfies the requirements of 8 C.F.R. § 214.2(l)(3)(iii). For this additional reason, the petition cannot be approved.[4]

V. CONCLUSION

The Petitioner has not established that it would employ the Beneficiary in a managerial or executive capacity within one year, or that the Beneficiary has at least one continuous year of full-time employment abroad with a qualifying entity in the three years preceding the filing of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of A-&G- Inc.*, ID# 1834813 (AAO Nov. 15, 2018)

[4] We also note that U.S. Department of State records show that when the Beneficiary applied for a B1/B2 visa at the U.S. Consulate in Yerevan in October 2016, he stated that he was employed by a petrol station, [redacted] as its 50 percent shareholder and director, and that he had previously worked for [redacted] as director and shareholder from 2004 until December 2015. On a previous visa application submitted in November 2014, the Beneficiary identified his employer as [redacted] and stated that he had previously worked for the Petitioner's parent company from March 2011 until November 2013. While we are not basing our adverse determination based on this information obtained from the U.S. Department of State, the Petitioner may need to address the Beneficiary's statements regarding his employment history in a future proceeding.