U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-USA, LLC

DATE: NOV. 20, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a company engaged in "geophysical well logging and drilling for groundwater acquisition," seeks to temporarily employ the Beneficiary as the general manager 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 the new office would support a managerial or executive position within one year of approval of the petition.

On appeal, the Petitioner asserts that it satisfied all evidentiary requirements for a new office petition and argues that the Director erred by focusing on whether the Beneficiary would be employed in a managerial capacity. The Petitioner contends that it submitted sufficient evidence to show that he would be employed in an executive capacity and that the company would support an executive position 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 for 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. Section 101(a)(15)(L) of the Act. The petitioner must also establish that the beneficiary's prior education, training, and

[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).

employment qualifies him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

If the Form I-129, Petition for a Nonimmigrant Worker, indicates that a 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 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).

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. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director 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. However, the Director's analysis was focused on the definition of "managerial capacity" at section 101(a)(44)(A) of the Act. The Director acknowledged the Beneficiary's job description, but found that the Petitioner's business and hiring plans indicated that the Beneficiary would be a first-line supervisor of two non-professional employees within one year, and would not be performing primarily managerial duties. Finally, the Director found that the Petitioner's description of the proposed business lacked sufficient detail.

On appeal, the Petitioner asserts that, although it submitted evidence intended to show that the Beneficiary's subordinates are professionals, it never claimed that it would employ the Beneficiary in a managerial capacity. The Petitioner contends that the Director erred by not considering whether the Beneficiary would be employed in an executive capacity within one year. In addition, the Petitioner objects to the Director's finding that it did not sufficiently describe the proposed business, noting that it submitted a 39-page business plan as well as 500 pages of documentation in support of the petition.

In the case of a new office petition, we review the beneficiary's proposed job duties, 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 is a subsidiary of a Colombian company that conducts studies to locate groundwater sources, drills and constructs wells, and installs pumping systems powered by solar energy. The Petitioner indicates that its new U.S. office was established to establish a customer base for these services in North America, to more efficiently interface with vendors located in the United States, to export solar panels and other equipment used in its pumping systems, and to create an educational training facility. The Petitioner stated that the Beneficiary's duties as chief executive officer will be the same as those he currently performs as the foreign entity's managing director, and will include:

1. Responsible for the full operation of the company, including the following:
   a. Annual budget and yearly performance (10%);
   b. Formulation and execution of business strategy (15%);
   c. Establish goals for the organization (5%);
   d. Develop the company and introduce the company's brand and products into the U.S. industry to further its expansion (10%);
   e. Hire professional employees to manage the company effectively and efficiently (5%);
   f. Planning for new product development (10%);
   g. Marketing, advertising and branch promotion (10%);
   h. Identify logistical needs for new and existing clients (5%);
   i. Coordinate with Board of Directors in Colombia to establish general business and planning strategies (15%);
   j. Work towards expanding the organization by opening a branch office in U.S. (10%); and
2. Such other related duties and responsibilities as assigned (5%).

The Petitioner emphasized that the Beneficiary's position is in an executive capacity as he will direct the organization as a whole, establish its goals and policies, exercise wide latitude in discretionary decision-making, and receive only general supervision from the board of directors.

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. Further, a beneficiary 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. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general

supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The brief job description provided by the Petitioner establishes the Beneficiary's authority to oversee the business, but it also indicates he would be involved in product development, marketing, promotion, and logistics-related tasks that are not executive in nature. Other portions of the description are vague and merely paraphrase the statutory definition of "executive capacity." 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.).

Further, the Petitioner's claim that the Beneficiary will perform the same duties as the head of the Petitioner's three-person new office that he performed abroad as the managing director of an established company with at least 12 employees is not persuasive. The Petitioner indicates that it will be conducting groundwater surveys, providing training, drilling wells powered by solar pump systems, and exporting equipment. This is a broader range of activities than the foreign entity engages in and, as discussed further below, the Petitioner has not explained who would actually provide the company's services. The Beneficiary is a civil engineer with industry training and appears to be the only proposed employee qualified to do so.

Finally, the position description alone is insufficient to establish that a beneficiary's duties would be primarily in an 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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v)(C).

B. Business Plan and Projected Staffing

The Petitioner provided a business plan explaining the scope of its intended operations, its hiring plans, and its financial projections for the first five years of operations. The Petitioner intends to convert existing wells to solar technology, work with businesses to find new sources of groundwater, launch a training facility offering certification courses in this field, and export solar panels and other equipment. The Petitioner indicated that it will need to obtain licenses in order to drill wells, but expects to do so within one year.

According to the company's revenue forecast, it anticipates $540,000 in gross sales during its initial year of operations, including $200,000 from "training," $295,000 from sales of equipment (solar panels, solar pumps, inverters), $15,000 from drilling wells, and $30,000 from "geophysical records of wells."

The Petitioner stated that it has already hired a full-time administrator and a full-time sales representative and it does not anticipate hiring additional staff during the first year, but will add two additional sales representatives by its fourth year. The Petitioner's financial projections show

$2,000 in monthly contractor expenses but it has not identified the number or types of contractors it intends to use or the nature or scope of their services.

The Petitioner stated that the administrator will "plan, direct and coordinate the administrative functions of the company" and "recruit, interview and hire new employees." Although the Petitioner compared the position to that of a human resources manager, the Petitioner did not explain why a company that intends to hire two additional employees in the next four years would require a full-time manager for this function, particularly given the Petitioner's claim that the Beneficiary will be recruiting staff. Further, the Petitioner states this employee will "direct" administrative functions, but, because there are no anticipated reports, it appears that she will in fact perform the company's administrative duties.

The "sales representative" is in charge of overseeing marketing, setting sales goals, and reporting sales quotas and marketing plans to the Beneficiary. However, despite claims that this employee would perform higher-level sales and marketing duties, the Petitioner did not identify anyone who would perform routine sales and marketing that are typical of a sales representative position.

The Petitioner did not identify current or proposed employees who would be responsible for providing the company's groundwater sourcing, drilling, solar systems implementation, or training services, nor did it expressly indicate that the Beneficiary or his subordinates would be handling the direct sales and export of solar panels and other equipment. Neither of the subordinates, based on their biographies in the Petitioner's business plan, has the educational or professional background to perform most of these activities, while the Beneficiary is a civil engineer with the requisite training and experience to do so. Therefore, it is reasonable to believe that he will be the one primarily responsible for carrying out the company's day-to-day operational tasks, with some administrative and sales support from his two staff.

A company's size alone may not be the determining factor in denying an L-1A visa petition without taking into account the reasonable needs of the organization. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the Petitioner's description of the Beneficiary's duties, considered in light of the Petitioner's staffing and business plans, does not establish that he would perform primarily executive duties within one year. Even though the Beneficiary would hold the senior position within the organization, the fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. Sections 101(A)(44)(B) of the Act. Based on the nature of the business and its projected structure, it is more likely than not that the Beneficiary would primarily perform non-executive tasks necessary for the day-to-day operation of the business.

Accordingly, the Petitioner has not demonstrated that the new office would support a managerial or executive position, after the initial year of operations.

III. CONCLUSION

The Petitioner has not established that it will employ the Beneficiary in an executive capacity within one year.

ORDER: The appeal is dismissed.

Cite as *Matter of B-USA, LLC*, ID# 795355 (AAO Nov. 20, 2017)