U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12916393

Date: NOV. 27, 2020

Appeal of California Service Center Decision

Form I-129, Petition for L-1A Manager or Executive

The Petitioner, identifying itself as a "restaurant, food and beverages business," seeks and to temporarily employ the Beneficiary as "Chief Operating Officer" 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 Beneficiary was employed abroad in a managerial or executive capacity and that the new office would support the Beneficiary in a managerial or executive position within one year of the petition's approval. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will dismiss the appeal because the Petitioner did not establish that it would support the Beneficiary in a managerial or executive capacity within one year of the petition's approval, as claimed. Because the identified basis for denial is dispositive of the appeal, we decline to reach and hereby reserve the Petitioner's arguments regarding the remaining ground for denial. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); see also Matter of L-A-C-, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

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

[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.

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.

Further, in the case of a new office petition, 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. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The primary issue to be addressed in this discussion is whether the Petitioner established that its operation would support the Beneficiary in an executive capacity within one year of the petition's approval.[2]

"Executive capacity" means 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.

In the case of a new office petition, we review the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended executive capacity. The burden is on the Petitioner to establish that it would realistically develop to the point where it would require the Beneficiary to perform primarily executive duties within one year of the petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed managerial or executive position is plausible based on 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).

If staffing levels are used as a factor in determining whether an individual will be acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) takes 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.

In the petition form, the Petitioner claimed 11 employees and in support of the petition it provided an asset purchase agreement showing that it purchased a franchise restaurant in April 2019 and was operating a restaurant business and at the time of filing. The petition also includes a brief description of the Beneficiary's proposed position, which would require the Beneficiary to develop the U.S. market, make personnel decisions, develop training plans, networks, and contacts, and manage the company's performance, public relations, and investment and accounting practices. The Petitioner did not provide information about its projected organizational hierarchy or projected hiring plan disclosing which positions it sought to fill during its first year of operation. Likewise, the Petitioner

[2] The Petitioner claims that the Beneficiary will occupy an "executive position" within its organization and does not pursue a claim that the Beneficiary will be employed in a managerial capacity.

did not explain how it planned to progress beyond the initial phase of operation to a phase where it could support the Beneficiary in an executive capacity within one year of the petition's approval.

In a request for evidence (RFE) the Director asked the Petitioner to provide a business plan for commencing the start-up of its new office and to include a timetable for each proposed action during its first year of operation. The Director also instructed the Petitioner to provide an organizational chart depicting its proposed staffing and organizational hierarchy and to summarize employee job duties.

In response, the Petitioner provided a statement describing itself as an investment company that plans to invest in "various businesses" in the United States. The Petitioner stated that in addition to the franchise restaurant it previously purchased, it signed an agreement to acquire a second franchise restaurant and was also looking to purchase an interior remodeling company as well. The Petitioner pointed to its tax returns and financial statements, stating that these documents "show clearly" that the Petitioner had the financial ability to support the Beneficiary in an executive position. The Petitioner also stated that the Beneficiary's "primary duty" would be to "manage" these investments, but it did not clarify her proposed duties or establish that the duties that comprising management of the current and future investments would primarily be in an executive capacity within one year of this petition's approval. The Petitioner also did not provide the requested business plan, organizational chart, or the projected staffing of its operation, nor did it outline the actions it would take during its first year of operation to advance beyond the rudimentary phase of development.

Because the Petitioner did not provide the evidence and information requested in the RFE, we are precluded from gaining a meaningful understanding of not only the Petitioner's estimated costs and staffing projections, but also the staffing arrangement that would be required going forward in order to relieve the Beneficiary from having to primarily perform non-executive job duties once the Petitioner moves beyond the new office phase of its operation. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). We further note that 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., section 101(a)(44)(B) of the Act (requiring that one "primarily" perform the enumerated executive duties); Matter of Church Scientology Int'l, 19 I&N Dec. 593, 604 (Comm'r 1988). It is therefore critical for the Petitioner to outline its plan for developing its operation to a point at which the Beneficiary would focus primarily on executive job duties.

In the denial, the Director pointed to the lack of information about the Beneficiary's job duties, highlighting that the Petitioner did not distinguish between the job duties the Beneficiary would perform during and after the new office phase of its operation. The Director also noted that the Petitioner did not provide evidence demonstrating that its corporate structure and scope of business activities will adequately develop so that it can support the Beneficiary in a managerial or executive position within one year of the petition's approval.

On appeal, the Petitioner reiterates its goal to operate as an investment company and points to funds it invested so far and the "millions of dollars" it expects to invest into its business activities in the United States. The Petitioner also restates the job description offered in the petition form and contends that it will support the Beneficiary in an executive position within one year of the petition's approval.

As a preliminary matter, we note that the Petitioner must support its assertions with relevant, probative, and credible evidence. See Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010). A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. Here, the Petitioner merely reiterates its original claims, yet offers no evidence to support them, thereby leaving us to question how it plans to staff its operation to ensure that it has the ability to relieve the Beneficiary from having to perform primarily non-executive tasks beyond the Petitioner's first year of operation.

Further, when a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 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.

As noted above, the Petitioner has not supplemented the record with critical evidence about the scope of its operation and its staffing needs to explain how the Petitioner will progress to the next developmental phase where the Beneficiary's primary focus will be to direct the management of the organization by establishing its goals and policies. See section 101(a)(44)(B) of the Act. Although the Petitioner claims that it will operate as an investment enterprise, it has not clarified which job duties the Beneficiary will perform or the staffing composition that will be required to support an investment business and to relieve the Beneficiary from having to perform primarily non-executive job duties within one year of the petition's approval. We further note that the Petitioner has not described the actions the Beneficiary plans to take during the first year of operation to explain how the Petitioner will transition beyond the new office phase within one year of the petition's approval. Without this critical information, much of which was requested in the RFE, we cannot conclude that the Petitioner would have the capacity to employ the Beneficiary in an executive capacity within the allowed timeframe. As noted earlier, the Petitioner must support its assertions with relevant, probative, and credible evidence. See Chawathe, 25 I&N Dec. at 376.

The evidentiary deficiencies described above preclude us from gauging how and when the Beneficiary's role would shift from one that involves primarily carrying out the Petitioner's operational tasks to one that involves primarily executive job duties within the scope of an investment enterprise. Therefore, we cannot conclude that the Petitioner will employ the Beneficiary in an executive position within one year of the petition's approval.

III. EMPLOYMENT ABROAD

Finally, although the Petitioner responded to a previously issued notice of intent to deny (NOID), it did not provide sufficient evidence addressing the Director's adverse findings regarding the Beneficiary's employment abroad. The NOID focused in part on a 2016 nonimmigrant visa (NIV)

application in which the Beneficiary listed her employer as [redacted] and stated that she held the position of "Financial Director" with that employer. The Director determined that this information is inconsistent with the Petitioner's claim that the Beneficiary has been employed in the position of "General Manager" by the Petitioner's affiliate, [redacted], and that the Beneficiary's period of employment with the foreign affiliate has been "uninterrupted" from November 2010 through the date this petition was filed.

In response to the NOID, the Petitioner claimed that the Beneficiary worked part-time for the unrelated foreign entity and that such employment ended in June 2016, prior to commencement of the relevant three-year period during which the Petitioner is required to demonstrate the Beneficiary's one year of employment with a related foreign entity. The Petitioner stated that the Beneficiary commenced full-time employment with the Petitioner's foreign affiliate on June 10, 2016, immediately after her employment with the unrelated foreign entity ended, and claimed that the Beneficiary provided "updated information about the termination of her employment with [redacted] in a "subsequent" 2017 NIV application. As the Petitioner has not provided independent objective evidence corroborating the claim that the Beneficiary filed a NIV application in 2017 and that the application contains new information about the Beneficiary's foreign employment, the inconsistency regarding her employment abroad has not been resolved. See Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

While we are not making an adverse finding based on the adverse information pertaining to the Beneficiary's foreign employment, the Petitioner may need to further address the listed discrepancy in any future filing where the issue of foreign employment is material to eligibility. As stated earlier, the appeal will be dismissed based on the determination that the Petitioner did not provide sufficient evidence demonstrating the likelihood that it would be able to employ the Beneficiary in an executive capacity within one year of this petition's approval.

ORDER: The appeal will be dismissed.