U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12916003

Date: NOV. 27, 2020

Appeal of California Service Center Decision

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

The Petitioner, seeking to operate as a trader of used cranes and construction equipment, seeks and to temporarily employ the Beneficiary as "President" 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 an executive capacity and that the new office would support the Beneficiary in an executive position within one year of the petition's approval.[2] 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 an 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

[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.

[2] The Petitioner claims that the Beneficiary was employed abroad and would be employed in the United States in an executive capacity and does not claim that the Beneficiary was and would be employed in a managerial capacity.

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.

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.[3]

"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 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 its initial supporting statement, the Petitioner stated that it requires the Beneficiary's presence in the United States for the purpose of locating equipment inventory and hiring and training a staff for continued operations in the U.S. market. The petition also provided a job duty breakdown stating that the Beneficiary's proposed position would include the following duties:

- Formulate policies and provide "overall direction";

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

- ∑ Plan and coordinate "operational activities at the highest level" based on reports from the deputy general manager and assistant manager;
- ∑ Select business sites and create guidelines for acquiring inventory;
- ∑ Establish sales guidelines based on market analysis;
- ∑ Hire a deputy general manager to head the "Trading Department" and an assistant manager to head the "Accounting Department" and hire and train staff;
- ∑ Meet with legal counsel to ensure compliance with applicable laws;
- ∑ Conduct data analysis to assess operational success;
- ∑ Research the market to determine optimal methods for finding inventory; and
- ∑ Conduct and train staff to conduct site inspections.

The Petitioner did not provide a projected hiring plan or discuss the Beneficiary's plans for advancing the company beyond the new office phase operation so that it can relieve the Beneficiary from having to primarily perform non-executive job duties within one year of the petition's approval.

In a request for evidence (RFE) the Director noted that the Petitioner did not provide sufficient information about its company's goals or the steps the Beneficiary plans to take to meet those goals during its first year doing business. Accordingly, the Director instructed the Petitioner to provide a statement discussing the proposed number of employees it plans to hire and the positions they will hold, an organizational chart depicting its proposed staffing and organizational hierarchy and to summarize employee job duties, and a business plan for commencing the start-up of its new office, including a timetable for each proposed action during its first year of operation. The Petitioner was also asked to provide evidence showing sufficient capital contributions to fund its operation.

In response, the Beneficiary provided a statement projecting that the business would "make enough money to cover [] expenses" after the first year of operation, but stated that initially "[w]e are planning to take around USD250,000" for the U.S. operation, anticipating that the "business related expenses and living expenses" would be approximately $100,000 while the first year's income would be "at least USD50,000." Although the Petitioner discussed the foreign entity's ongoing business activities and provided evidence of the foreign entity's gross revenue for 2018 and 2019, it did not specifically identify the foreign entity as the source of start-up funds, nor did the Petitioner or the Beneficiary state who the source(s) of those funds would be. As such, it is unclear who would comprise the "we" in the Beneficiary's plan to fund the start-up operation. Further, although the Beneficiary broadly referred to "business related expenses and living expenses," he did not itemize those expenses or offer specific staffing projections explaining the Petitioner's plans for operating during its new office phase and a plan outlining the steps the Petitioner would take to move beyond that phase, so that the Beneficiary would be relieved from having to perform primarily non-executive job duties within one year of the petition's approval.

In sum, the Petitioner 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. 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). Because the Petitioner did not provide the requested evidence, we are precluded from gaining a meaningful understanding of the estimated costs and scope of the projected operation during the new office phase or the necessary steps for moving the Petitioner beyond that nascent phase. An employee

who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in an 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 within one year of the petition's approval.

In the denial, the Director pointed out that the Petitioner did not adequately address several key issues that were discussed in the RFE, highlighting the lack of detailed evidence regarding the amount and source of funding of the U.S. operation as well as the lack of details regarding the Petitioner's projected staffing and whether it would, within one year of approval, have a corporate structure in place to support the Beneficiary in an executive-level position.

On appeal, the Petitioner objects to the Director's reliance on staffing size as a determining factor of whether the Beneficiary would be employed in an executive capacity, asserting that the statutory definition of executive capacity does not impose the requirement that the Beneficiary must manage a supervisory or professional staff.

Although the Petitioner correctly observes that a company's size should not be the only factor used to determine eligibility, the Director did not solely consider this factor to the exclusion of others. Rather, in addition to the new entity's staffing, the Director pointed out that the Petitioner did not disclose its first year's business goals or steps it planned to take in order to reach those goals. The Director also noted that the Petitioner did not adequately discuss the amount and source of funding for its operation, pointing to the lack of clarity as to how the Petitioner calculated its projected expenses. Thus, contrary to the argument on appeal, the denial was not solely based on the Petitioner's staffing.

That said, staffing can and should be factored into a determination of a petitioner's eligibility, so long as this factor is considered within the context of the organization's reasonable needs as well as its overall purpose and stage of development. See section 101(a)(44)(C). In this instance, the Director clearly acknowledged the Petitioner's new office status, thereby indicating that eligibility was determined within the context of requirements that apply to a new office. The Director correctly recognized that information about a new office's projected staff, including staff size and job duties, is relevant because it allows us to gauge how the new office plans to operate and meet its business objectives and the likelihood that its operation will attain a corporate structure capable of relieving a beneficiary from having to primarily perform non-executive job duties within one year of the petition's approval. Because the Petitioner did not comply with the RFE's request for a business plan and staffing projections, it is unclear how the Petitioner plans to staff its new office and when, or even whether, it would develop an organizational hierarchy that will support the Beneficiary in an executive-level position. As previously noted, 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).

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 and projected staffing of its operation. Although the Petitioner claims that it will employ the Beneficiary in an executive capacity, it has not provided a business plan or other evidence in support of this claim. It is therefore unclear how the Petitioner will progress to the next developmental phase where the Beneficiary can primarily focus on directing the management of the organization by establishing its goals and policies. See section 101(a)(44)(B) of the Act. Further, despite pointing to evidence of the foreign entity's continued business activities and generation of new revenue, the Petitioner has not adequately discussed its projected operational costs and revenues, nor has it demonstrated that sufficient funds were invested at the time of filing to allow for payment of the Beneficiary's salary and commencement of the intended business activities. The Petitioner must support its assertions with relevant, probative, and credible evidence. See Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010).

In addition, the Petitioner's claim that it "intend[s] to hire and train staff" to carry out its operational tasks is not sufficient without further information about the number of employees it plans to hire, the timeframe within which the hiring is expected to take place, and the organizational hierarchy the Petitioner plans to have once it exists the new office phase of operation. As noted earlier, the Petitioner also has not described the actions the Beneficiary plans to take during the first year of operation, thereby further detracting from a meaningful understanding of how the Petitioner will transition beyond the new office phase within one year of the petition's approval.

The evidentiary deficiencies described above preclude us from gauging how, when, or if 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 a trader of used cranes and construction equipment. Therefore, we cannot conclude that the Petitioner will employ the Beneficiary in an executive position within one year of the petition's approval.

ORDER: The appeal will be dismissed.