U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF EQ-PL-A- LLC

DATE: OCT. 3, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR NONIMMIGRANT WORKER

The Petitioner, a "new office" that intends to provide test preparation and tutoring services, seeks to employ the Beneficiary under the L-1A nonimmigrant classification as general manager.[1] *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 an international business 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. The Director concluded that, contrary to the Act and Department of Homeland Security (DHS) regulations, the Petitioner did not demonstrate its acquisition of sufficient premises to house the new office or the Beneficiary's prior employment abroad in a managerial or executive capacity. The Director also found that the record did not establish that the U.S. operation would support a managerial or executive position.

On appeal, the Petitioner contends that the Director disregarded and misinterpreted evidence demonstrating the petition's approvability.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To obtain L-1A status for a position at a new office, a petitioner must establish that it or a parent, branch, subsidiary, or affiliate employed a beneficiary abroad in a managerial or executive capacity for at least one continuous year in the three years before a petition's filing. 8 C.F.R. § 214.2(l)(3)(v)(B). A petitioner must also demonstrate that the proposed employment would involve managerial or executive authority over the new operation. *Id.*

In addition, a petitioner must demonstrate that, within a year of the petition's approval, the new office would support a managerial or executive position. 8 C.F.R. § 214.2(l)(3)(v)(C). Evidence must also establish a petitioner's acquisition of sufficient premises to house the new operation and

[1] The term "new office" means an organization that has conducted business in the United States for less than a year. 8 C.F.R. § 214.2(l)(1)(ii)(F).

indicate the operation's proposed nature, scope, organizational structure, financial goals, and capital needs. 8 C.F.R. §§ 214.2(l)(3)(v)(A), (C).

II. SUFFICIENCY OF THE PREMISES

The Petitioner documented that, shortly before the petition's filing in January 2019, it leased about 480 square feet of U.S. office space. A floor plan indicates that the space includes: a 173-square-foot reception area; a 137-square-foot conference room; a 123-square-foot office; and a bathroom.

The Petitioner initially proposes to employ nine people in the United States. The Director found that the record did not establish that the company's office space could accommodate the proposed staff. *See* 8 C.F.R. § 214.2(l)(3)(v)(A) (requiring evidence of "[s]ufficient physical premises to house the new office").

Contrary to the Director's decision, however, the Petitioner stated that six – not three – of the nine employees would work on a part-time basis. The Petitioner's market study also indicates that its four, part-time teachers would provide "individual sessions at [students'] homes." Because the teachers do not work from the Petitioner's premises, the premises need only house five employees, including three full-time and two part-time workers.

Upon review, we find that the record establishes the sufficiency of the Petitioner's premises. We will therefore withdraw the Director's contrary finding.

III. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

The Petitioner asserts the Beneficiary's employment abroad in a managerial capacity. The term "managerial capacity" means an assignment where an employee primarily: 1) managed an organization, or a department, subdivision, function, or component of it; 2) supervised and controlled the work of other supervisory, professional, or managerial employees, or managed an essential function within the organization, its department, or subdivision; 3) had authority over personnel actions or functioned at a senior level within the organizational hierarchy or with respect to the function managed; and 4) exercised discretion over the day-to-day operations of the activity or the function managed. Section 101(a)(44)(A) of the Act.

A petitioner seeking to transfer a manager to the United States must show that the beneficiary assumed the high-level responsibilities described in the statutory definition of "managerial capacity." *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). A petitioner must also prove that a beneficiary primarily performed managerial duties, as opposed to operational tasks. *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

When determining the managerial nature of a foreign position, we examine its job duties. We also consider the foreign employer's organizational structure and the nature of its business, whether other employees relieved a beneficiary from performing operational duties, the duties of subordinate employees, and any other factors affecting a beneficiary's position.

Here, the Petitioner asserts that the Beneficiary has worked since 2006 as the full-time legal representative/general manager of its related company in Colombia. The record indicates that, like the Petitioner, the foreign entity provides test preparation and tutoring services. The record documents its employment of more than 20 people. Evidence further indicates that the Beneficiary directly supervises two professional managers: an administrative director, who manages accounting and financial activities; and a general coordinator, who manages development and delivery of the company's educational services and products.

The Beneficiary stated that he spends the following percentages of time at work on the following types of activities:

- 31% on sales management/advertising;
- 25% on customer service;
- 13% on planning/strategy;
- 13% on human resources;
- 6% on finance/accounting;
- 6% on legal issues; and
- 6% on other activities.

The Petitioner asserts that all of the Beneficiary's job duties in Colombia "are entirely managerial/supervisory in nature." In response to the Director's written request for additional evidence (RFE), however, the Beneficiary indicated that he performs many non-managerial duties. In describing his job duties regarding sales management/advertising activities, for example, the Beneficiary stated:

> Because of its idiosyncrasy, Colombians always want to ask for a discount and even more to try to close the deal directly with the "owner." For this reason, I accompany every day, either personally, by video calls, chat or phone one of our collaborators of the Academic, support and business management team to finalize a negotiation.

The Beneficiary's daily accompaniment of subordinates to negotiate with customers indicates that he performs operational duties of the foreign company. It does not demonstrate his supervision and control over the work of other supervisory, professional, or managerial employees pursuant to the Act's definition of the term "managerial capacity." Similarly, in describing his job duties regarding customer service, the Beneficiary stated that "I dedicate 2 hours [daily] to personally answer phone calls, e-mails and follow up to product and service deliver[ies] as well as some quality problems too." The Beneficiary's personal communications with customers might constitute good business practice. But these activities also represent operational, not managerial, duties.

As previously indicated, the job duties discussed above relate to sales management/advertising and customer service, the activities on which the Beneficiary stated he primarily spends his time. Thus, the record does not establish that he primarily performs managerial duties abroad. The Beneficiary may have authority over personnel actions and may exercise discretion over day-to-day operations. But the descriptions of the Beneficiary's job duties, which indicate his daily involvement in operational minutia of the business, are insufficient to establish that he primarily spends his time on

managerial duties. 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.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

We will therefore affirm the Director's finding that the Petitioner has not demonstrated the Beneficiary's required employment abroad in a managerial capacity.

IV. PROPOSED EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director's decision considered whether the U.S. Petitioner would support an executive position. In its RFE response, however, the Petitioner clarified that it would employ the Beneficiary in a managerial capacity. As such, we will focus on the managerial nature of the proposed position.

As previously indicated, when determining the managerial nature of a position, we examine its job duties. When a new office would house the position, we also consider a petitioner's business and hiring plans, and whether the business would grow sufficiently to support a beneficiary in the intended capacity. A petitioner must establish that its business would realistically develop enough within one year to require a beneficiary to primarily perform managerial duties. Thus, in light of a petitioner's anticipated staffing levels and development within a one-year period, a totality of evidence must demonstrate the probability of a managerial position. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

A. Business Plan

Here, the Petitioner asserts that it will provide test preparation and tutoring services. The Director found that the Petitioner did not establish the financial ability of the Colombian company to fund the U.S. entity's startup. The record, however, indicates that the foreign company pledged up to $50,000 in funding.[2] The Petitioner estimates its initial, monthly expenses at $22,015. The pledged funding from the foreign company would therefore provide the Petitioner with roughly two months to hire employees and to prepare for operations. However, the Petitioner's business plan does not provide hiring timelines or revenue estimates to demonstrate that it would be self-sufficient within a two month time frame. In order for the business plan to be credible, the Petitioner would need to demonstrate that its revenue producing positions would be filled in time to generate income and that the business would reasonably have identified clients in the same time frame. The business plan is a key component to our analysis of whether the U.S. entity would develop sufficiently within one year to support a managerial position. Absent a detailed plan with timelines to support the assertions, we cannot find that the Petitioner would progress to a level capable of supporting the claimed managerial position within one year. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

[2] The Petitioner asserts that the foreign company already provided it with $5,000 of the funding. The Petitioner, however, did not submit documentary evidence to establish the source of that amount in its checking account.

B. Duties and Staffing

We also agree with the Director that the duties assigned to the Beneficiary do not demonstrate that he would be relieved of operational and administrative duties within the one year new office period. Here, in response to the RFE, the Petitioner listed the proposed job duties of the offered position and stated the percentages of time the Beneficiary would spend on various activities, including: 38% of his time on staff supervision; 31% of his time on directing sales and advertising plans; and about 19% of his time planning business strategies. The job duties listed by the Petitioner are vague. And, although the Beneficiary provided a more detailed explanation of his proposed tasks, the record does not establish that he would primarily engage in managerial tasks at the end of the one year period. *See 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) (holding that specifics of job duties are important indicators of executive or managerial roles; otherwise, petitioners could meet the definitions of those terms simply by reiterating the statute). For example, the Beneficiary stated that he would spend three hours each morning supervising staff by meeting with each employee. Beyond approving/rejecting their activities and "applying management concepts," however, the Beneficiary did not specify how he would supervise the workers or why it would take three hours each day, especially considering that only two of the Beneficiary's eight subordinates would work full-time. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. *See Matter of Chawathe*, 25 I&N Dec. at 376.

Also, in directing sales and advertising plans, the Beneficiary stated that he would delegate execution of the plans to a full-time business agent. The job duties of the business agent, however, state that the position would "guide, persuade and help students, parents and school directors" to use the Petitioner's services and products. The job duties do not include executing other sales and advertising plans, such that the business agent would relieve the Beneficiary from performing the operational duties of the sales and advertising functions. In addition, the Beneficiary states that he would plan daily business strategies and define daily goals, but the Petitioner has not demonstrated that this is a managerial task. As noted, 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.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. at 604. The job duties of the offered position therefore do not support the claim that the Beneficiary will primarily devote his time to managerial duties within one year of approval.

We further agree with the Director that the record does not establish that the Petitioner's organizational structure and proposed staffing would support a managerial position within a year. The Petitioner submitted a proposed organizational chart with the offered position at the top. The chart indicates that the Beneficiary would directly supervise all of the Petitioner's eight other employees except one: a part-time general services assistant who would primarily clean the office. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act. The Petitioner does not claim that the

Beneficiary would manage a function. A personnel manager must primarily supervise and control the work of other supervisory, professional, or managerial employees. 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." *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 Director found that the Petitioner did not demonstrate the professional natures of the Beneficiary's subordinate positions. 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."

Four of the subordinate positions are titled "teacher;" however, the positions are not "teachers in elementary or secondary schools, colleges, academies, or seminaries" as stated in Section 101(a)(32) of the Act, but are rather part-time test preparation tutors that do not have any minimum education or licensing standards. Moreover, the Petitioner states that the minimum requirement for these positions is a "College Degree and/or Technical Degree." A technical degree can reflect as little as two years of post-secondary studies, and the requirement of such a degree does not support the contention that these positons are professional. The record therefore does not establish the professional nature of the Petitioner's four, part-time teaching positions.

The record also does not establish the remaining, two, full-time, subordinate positions - business agent and registrar – as supervisory or professional in nature.[3] The position of business agent focuses on selling the Petitioner's educational services and products to customers. The position's job duties do not indicate that it involves supervising other employees. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring petitions to resolve inconsistencies with independent, objective evidence pointing to where the truth lies). The Petitioner also asserts that the position requires a college or university degree. But DOL states that similar positions - such as sales agents in the fields of advertising, insurance, and real estate - do not generally require baccalaureate degrees. *See Occupational Outlook Handbook*, *supra*. The Petitioner has not demonstrated why the proposed position of business agent would require a bachelor's degree.

The record also does not establish the position of registrar as professional in nature. The Petitioner describes the job's required educational level as "College Student," indicating the company's acceptance of someone in the position with less than a bachelor's degree. The Petitioner's organizational chart shows that the registrar would supervise the general services assistant. But the registrar's job duties do not include supervisory tasks. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring petitioners to resolve inconsistencies of record). Also, the record indicates that the

[3] The Petitioner's job duties identify the position as "Registrar." But the company's organizational chart refers to the job as "General Secretary."

general services assistant would work only one day a week. The record therefore does not establish the position of registrar as supervisory or managerial in nature.

Thus, of the two full-time and five part-time positions that the Beneficiary would directly supervise, the record only establishes the part-time position of accountant as supervisory, professional, or managerial in nature. Thus, the record does not establish that the Beneficiary would serve as a personnel manager, primarily supervising other supervisory, professional, or managerial employees.

Based on the lack of a detailed business plan, the general and unsubstantiated duties assigned to the Beneficiary, the inclusion of many non-managerial duties without a plan to relieve the Beneficiary of these duties, and the Beneficiary primarily serving as a first line supervisor of non-professional positions, we find that the record does not demonstrate that the Petitioner would support the Beneficiary in a managerial position within a year. We will therefore also affirm the petition's denial on this ground.

V. QUALIFYING RELATIONSHIP

Although unaddressed by the Director, the record also does not establish a qualifying relationship between the Petitioner and the Beneficiary's employer in Colombia. For L-1A purposes, a U.S. firm and foreign entity must "exactly" meet one of the qualifying relationships specified in the definitions of the terms parent, branch, affiliate, or subsidiary. 8 C.F.R. § 214.2(l)(1)(ii)(G)(*1*). In considering whether a qualifying relationship exists, USCIS must determine the individuals or entities that own and control the U.S. and foreign employers. *Matter of Church Scientology*, 19 I&N Dec. at 595. Ownership means the direct or indirect legal right of possession of an entity's assets. *Id.* Control refers to the direct or indirect legal right and authority to direct an entity's establishment, management, and operations. *Id.*

The Petitioner asserted that the Beneficiary's foreign employer is the Petitioner's parent company. The term "parent" means a legal entity that has subsidiaries. 8 C.F.R. § 214.2(l)(1)(ii)(I). The term "subsidiary," in turn, means a legal entity

> of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns less than half of the entity, but in fact controls the entity.

8 C.F.R. § 214.2(l)(1)(ii)(K).

Although the Petitioner claims that it is a subsidiary of the foreign entity, the record does not reflect such a relationship. Rather, the record documents that the Beneficiary owns 80% of the Colombian company and 50% of the petitioning U.S. entity. His spouse owns the remaining shares of the companies. Thus, the record establishes the owners of both the Petitioner and the foreign employer as individuals.

The record also does not establish the Petitioner and the foreign company as affiliates. The term "affiliate" means:

> (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
> (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

8 C.F.R. § 214.2(l)(1)(ii)(L).[4]

The record indicates that the Beneficiary controls the foreign company by virtue of his 80% ownership majority. The record, however, does not demonstrate his control over the petitioning limited liability company (LLC). A copy of the LLC's operating agreement indicates that the Beneficiary and his spouse each own and control 50% of the company. The operating agreement states:

> Except as expressly provided elsewhere in this Agreement, all decisions respecting the management, operation and control of the business and affairs of the Company and all determinations made in accordance with this Agreement shall be made by the affirmative vote or consent of Members holding a majority of the Members' Percentage Interest.

Because neither owner of the Petitioner holds a majority interest in the company, the record indicates that neither owner controls the company. As the same individual does not own and control the Petitioner and the foreign company, the entities do not qualify as affiliates under 8 C.F.R. § 214.2(l)(1)(ii)(L)(*1*).

The record indicates that the same group of individuals (the Beneficiary and his spouse) own and control both the Petitioner and the foreign company. But, contrary to 8 C.F.R. § 214.2(l)(1)(ii)(L)(*2*), the Petitioner has not demonstrated that the individuals own and control "approximately the same share or proportion of each entity." The record documents that the Beneficiary owns 80% of the foreign entity and 50% of the Petitioner. His spouse holds 20% of the foreign entity and 50% of the Petitioner. Thus, each individual's share in each entity is not "approximately the same." Rather, there are 30% differences in the owners' shares of each company. The record therefore does not establish the Petitioner as an affiliate of the Colombian company under 8 C.F.R. § 214.2(l)(1)(ii)(L)(*2*).

Citing a non-precedent decision of ours from 1993, the Petitioner's RFE response argued that a parent-subsidiary relationship does not require common owners to hold the same share of each entity. As previously indicated, however, because the Beneficiary and his spouse own the Petitioner and the Beneficiary's foreign employer as individuals, a parent-subsidiary relationship cannot exist under DHS regulations. Also, in the case cited by the Petitioner, individuals owning different amounts of the foreign and U.S. entities agreed to vote together in majority blocks in matters regarding the firms. As a result of the agreement, a majority of the foreign entity's owners also

[4] Affiliates may also include certain partnerships organized in the United States to provide accounting and managerial or consulting services. 8 C.F.R. § 214.2(l)(1)(ii)(L)(3). That definition, however, does not apply to the circumstances here.

owned and controlled a majority of the U.S. entity. Contrary to that case, the Petitioner has not documented that the Beneficiary and his spouse have similarly agreed to vote together in matters regarding the U.S. and Colombian entities. *See* also USCIS Policy Memorandum PM-602-0155, *L-1 Qualifying Relationships and Proxy Votes*, 1 (Dec. 29, 2017), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda (last visited Aug. 8, 2019) (instructing officers that proxy votes, which authorize certain owners to vote the equity interests of other owners, must be irrevocable from an L-1 petition's filing through adjudication to establish a qualifying relationship). Thus, the Petitioner's argument is unavailing.

VI. CONCLUSION

The record does not establish the Beneficiary's employment abroad in a managerial capacity, that the Petitioner would support a managerial position in the United States, or a qualifying relationship between the foreign employer and U.S. entity. We will therefore affirm the petition's denial. A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of EQ-PL-A- LLC*, ID# 5739151 (AAO Oct. 3, 2019)