U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-S-I-G- LLC

DATE: OCT. 16, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which operates a dance school through a wholly-owned subsidiary seeks to temporarily employ the Beneficiary as manager 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 record did not establish, as required, that: (1) it had secured adequate physical premises to house the new office; (2) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer; and (3) the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. On appeal, the Petitioner establishes that it did not receive the denial notice. Instead, the Petitioner received a second copy of the Director's request for evidence (RFE), to which the Petitioner had already responded. In order to give the Petitioner an opportunity to address the grounds for denial, we sent the Petitioner a copy of the denial notice. The Petitioner has not submitted any further response, and we consider the record to be complete.

Upon *de novo* review, we will withdraw the ground for denial regarding adequate physical premises because the record sufficiently establishes not only the dance studio's right to use the property specified in the record, but also that the studio has actually been using the space. We will, however, dismiss the appeal based on the remaining two grounds for denial.

[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 has been inconsistent in its statements as to whether or not it seeks consideration as a new office, but the Petitioner organized as a limited liability company less than a year before the filing date.

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.

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. QUALIFYING RELATIONSHIP

The Director found that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer. The Petitioner states that it adequately addressed this issue in response to the RFE. We find that the record ultimately supports a finding that the Petitioner has not established a qualifying relationship, but not for the reasons stated by the Director.

To establish a "qualifying relationship" under the Act and the regulations, a petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(L)(*1*) defines an "affiliate" as one of two subsidiaries both of which are owned and controlled by the same parent or individual. The Petitioner asserted that the Beneficiary previously worked abroad for [redacted] The Petitioner also claimed that the Beneficiary's father, whose initials are Z.T., "owns and controls 75% of [redacted] . . . [and] 100% of the [petitioning] U.S. affiliate." This common ownership and control by Z.T., if documented in the record, would establish the claimed affiliation.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Med. Syss., Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

The Director denied the petition, stating that Z.T.'s purchase of the petitioning company did not conform to the terms of the limited liability company (LLC) agreement. Specifically, the Director stated that the agreement set the price at $100,000 and required the purchase to be completed in November 2016, whereas Z.T. wired $500,000 to the company in June 2017.

The LLC agreement does not support the Director's findings. The LLC agreement did not fix the price of the company at $100,000. Rather, it specified different terms of payment depending on whether or not the purchase price exceeded $100,000. Also, the closing deadline in the LLC agreement referred to hypothetical future transfers of shares, rather than the initial establishment of the company. A separate unit purchase agreement set an October 2016 deadline for payment, but also indicated that the parties could agree to waive or extend that deadline. Z.T. did not meet the October deadline, but the record shows the purchase was finalized before the petition's filing date; there was no post-filing change of circumstances.

The record shows that Z.T. paid in full for a 100% interest in the petitioning company, and did so before the petition's filing date. Therefore, the record does not support the Director's finding that the Petitioner had not adequately documented Z.T.'s purchase of the petitioning entity.

Nevertheless, upon further review of the record, we cannot find that the Petitioner has established a qualifying relationship with The Petitioner stated that Z.T. "owns and controls 75% of but the record does not establish this direct ownership. Rather, an "Owners (shareholders) List" from 2016 indicated that owns 75% of and identified Z.T. as the legal representative of A simple list of shareholders is not sufficient to establish ownership of a company, and the Petitioner did not explain why it did not submit more comprehensive or authoritative evidence. Furthermore, the Petitioner did not establish the ownership of The record does not rule out Z.T. as an owner, or the sole owner, of but this mere possibility is not sufficient to meet the Petitioner's burden of proof. Further, the record contains insufficient evidence that exists as a legal entity. For example, the Petitioner did not submit copies of documents reflecting registration as a limited company.

A 2002 business license named Z.T. as "legal representative," but the Petitioner has not established that this title conveys or implies ownership or control. Correspondence from referred to the Petitioner as affiliate, but this is not *prima facie* evidence of shared ownership and control.

Documentation from 2002 referred to as a joint venture between three named parties, none of which is (or the 25% minority shareholder named on the shareholders list). The Petitioner did not document any subsequent sale or transfer of shares to nor did the Petitioner establish that (or Z.T.) owns any of the companies that are parties to the joint venture. Therefore, there is no continuity between the three parties named on the 2002 joint venture articles and the two different parties named on the 2016 shareholders list.

The record does not contain sufficient evidence that Z.T. owns [redacted] or that [redacted] owns [redacted] Without adequate evidence of [redacted] ownership, the Petitioner has not sufficiently established a qualifying relationship between itself and [redacted]

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

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. (The Petitioner has, at times, claimed that the Beneficiary meets requirements of both types of position.)

"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.

"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.

Based on the statutory 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 1533.

When examining the managerial or executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Duties

The Petitioner stated that the Beneficiary would spend 45% of her time "Directing Management of the Organization," 25% of her time "Establishing Goals and Policies of the Organization," and 30% of her time on "Discretionary Decision Making." Within these three broad categories, the Petitioner listed various "Daily Duties" filling nearly two pages. The listed duties typically consist of general statements with few specific details about the company and staff. For example:

> Approve financial and employment goals and objectives for the company and approve and articulate the organization's vision by approving monthly and annual operating plans that support strategic direction. . . .
>
> Determine the most effective course of action needed to reach that goal by directing future leadership within the organization.
>
> Finalize strategies for ensuring the long-term financial viability of the company. . . .
>
> Finalize employment and compliance to regulatory concerns with department managers from situation[s] and problems that arise[] with customers[']complaints of the quality of service and dance equipment.

The description included the assertion that "the board of directors trusts [the Beneficiary's] expertise," but the record does not show that the Petitioner has a board of directors.

In the RFE, the Director requested additional details about the Beneficiary's intended duties. In response, the Petitioner submitted the same basic job description, revised to add references to the Beneficiary's oversight over subordinate managers. Like the first, this second version of the job description referred to a board of directors although the Petitioner's LLC agreement did not establish a board of directors. Instead, the agreement specified that the company would be run by a manager, identified as the Beneficiary herself.[2]

The Director found that the Beneficiary's job description lacked specificity. The Director also noted that the percentage breakdown for the three broad areas of the Beneficiary's authority was the same for her U.S. position, running a small dance studio, and her position abroad, as the director of the

[2] We do not consider the description to refer to the foreign employer's board of directors, because the Petitioner has not claimed that the foreign entity has any ownership interest in the petitioning U.S. entity. Rather, the Petitioner claimed affiliation with the foreign entity through shared ownership by Z.T. The foreign employer is a separate legal entity from any of its owners, and therefore the Petitioner's employees would not be subject to the authority of the foreign company's board of directors.

investment center of a pharmaceutical company. The Director questioned the plausibility of this resemblance, given the different responsibilities of the two positions.

On appeal, the Petitioner asserts that the denial notice is simply "a 'mirror' copy of the entire RFE," which suggests that the Director "failed to take into consideration and/or review the supplemental answers and documents" included in the Petitioner's response to that RFE.

As noted further above, the Petitioner initially received a copy of the RFE instead of the denial notice. In the denial notice, the Director listed the materials submitted in the Petitioner's response to the RFE, and made a new observation about the basic structural similarity between the foreign and U.S. job descriptions. By sending a new copy of the decision to the Petitioner, we provided the Petitioner an opportunity to respond to these findings. The permitted response period has elapsed and we have received no supplement to the appeal.

The Petitioner has not overcome the Director's finding that the Beneficiary's U.S. job description lacked specificity and bore an implausible resemblance to her foreign job description.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must 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.

The Director acknowledged that the Petitioner claimed to employ managers and supervisors, but concluded that the Petitioner did not show that the positions "qualify as managerial or supervisory for immigration purposes," or that the Beneficiary would have "the high level of responsibilities" required by the statute and regulations. The Petitioner does not address these findings on appeal

The Petitioner's staffing changed somewhat after the petition's filing date. Because the Petitioner qualifies as a new office (having done business for less than a year prior to the filing date), some organizational changes are to be expected and we can take them into account instead of relying solely on the company's structure as of the filing date.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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." Section 101(a)(44)(A) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*4*). If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary

must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*2*)-(*3*).

The Petitioner asserts that the Beneficiary will have authority over managers and supervisors.

The Petitioner's organizational chart shows the following structure (including modifications in response to the RFE):

General Manager [the Beneficiary; Full-Time]
- Artistic Director [Full-Time]
  - Artistic Assistant [Full-Time]
  - Lead Dance Instructor [Part-Time]
    - 3 Instructors [Part-Time Contractors]
  - Lead Fitness Instructor [Part-Time Contractor]
    - 2 Instructors [Part-Time Contractor]
- Marketing Outreach Manager [Full-Time]
  - Marketing Assistant [Full-Time]
  - Administrative Assistant [Part-Time]
    - Front Desk [2 Part-Time Employees; 1 Part-Time Contractor]

The organizational chart provided the following capsule job descriptions for the Beneficiary's two highest-level prospective subordinates:

> Artistic Director: Manages the artistic direction of the company. Responsible for the studio curriculum and student education, creating the schedule, managing the lead instructor and hiring new students.
>
> Marketing Outreach Manager: Develops the marketing strategy and plans. Brainstorms various ways to market the studio to increase enrollment and client base. Prepare action plans and schedu[le] which identify targets to reach business development goals and objectives.

The Petitioner acknowledged that the individuals in the above two positions were both "newly hired"; the positions did not exist until after the Petitioner acquired [redacted] in October 2016. The timing of the hires raises the possibility that the Petitioner created the new positions to convey the appearance of organizational complexity for the sake of the petition. The Petitioner did not show that dance studios of comparable size typically employed full-time artistic and marketing managers. Also, because the Petitioner provided minimal details about the duties of those positions, the Petitioner did not establish that the positions are primarily managerial rather than primarily operational with incidental duties over (mostly part-time) subordinates.

IRS Forms W-2, Wage and Tax Statements, showed that paid 23 employees in 2016 (the last full year before the filing date). Only two of those employees earned amounts that could be consistent with year-round, full-time employment; only six earned more than $5,000 for the year.

Payroll documents for the months around the filing date show significant variation in work hours. A payroll report for August 2017 indicated that only one employee, the artistic director, worked full-time. Pay receipts for September 2017, the month of filing, showed full-time salaries for the artistic assistant, marketing outreach manager, and marketing assistant, while the lead dance instructor worked only 15.75 hours during the month.

A December 2017 employment agreement, executed shortly before the Petitioner responded to the RFE, set the artistic director's salary at $4000 per month, but the record does not contain subsequent payroll records to show that the Petitioner actually paid that amount. In the months immediately before that agreement, payroll documents show that the employee received only $833 per month.

Payroll documents in the record show that the Petitioner increased the number of full-time employees after it purchased and changed the artistic director's position from part-time to full-time after the Director issued the RFE. The record does not show that the resulting increase in payroll costs would be sustainable. According to the Petitioner, during the first half of 2017, the dance studio's expenses ($120,004) were almost double its income ($60,989), and the salary increases occurred after that period. The Petitioner did not show that its income had increased to a level that would support the newly raised salaries. This issue is material to the important question of whether the Beneficiary's position truly warrants subordinate layers of full-time management, or whether the Petitioner created those jobs to support the petition.

Because of the deficiencies discussed above, the Petitioner has not shown that the Beneficiary will supervise managers.

To determine whether the 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 United States 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."

The Petitioner showed that some of the subordinates hold bachelor's degrees, but not that the positions *require* those degrees. Therefore, the Petitioner did not show that the Beneficiary will supervise professionals.

The new organizational structure that the Petitioner created when it acquired includes levels of supervision, but the record does not establish the extent to which the higher-ranking employees would supervise lower-level workers rather than perform operational tasks of their own. The

presence of three or more layers on an organizational chart is not *prima facie* evidence that a company employs, or will employ, a manager.

The Petitioner also has not articulated a specific function that the Beneficiary will manage. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that:

> (1) the function is a clearly defined activity; (2) the function is "essential," i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations.

Matter of G- Inc., Adopted Decision 2017-05 (AAO Nov. 8, 2017). In this matter, the Petitioner has not described or provided evidence that the Beneficiary manages an essential function.

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 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 an 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 Petitioner established that the Beneficiary would be the highest-ranking official of the company, but this does not suffice to establish executive capacity. As explained above, the Petitioner did not establish that any of the Beneficiary's intended subordinates qualify as managers, and therefore the Beneficiary would not direct the management of the company through those subordinates.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it will employ the Beneficiary in a managerial or executive capacity in the United States.

IV. CONCLUSION

The Petitioner did not establish that it will employ the Beneficiary in a primarily managerial or executive capacity, or that a qualifying relationship exists between the Petitioner and the Beneficiary's claimed foreign employer.

ORDER: The appeal is dismissed.

Cite as *Matter of S-S-I-G- LLC*, ID# 1420383 (AAO Oct. 16, 2018)