U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9204656

Date: OCT. 16, 2020

Appeal of California Service Center Decision

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

The Petitioner, which seeks to operate a gas station and convenience store, seeks to temporarily employ the Beneficiary as general 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) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer; (2) the Beneficiary has been employed abroad in a managerial or executive capacity; and (3) the new office will support a managerial or executive position within one year.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

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

[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.

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 determined that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's claimed foreign employer.

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).

Initially, the Petitioner indicated that it is a subsidiary of a shipping company based in India. By definition, a parent-subsidiary relationship is determined by the parent's ownership of the subsidiary entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(I) and (K). The record, however, contains no evidence that the foreign entity holds any ownership interest in the petitioning U.S. entity. Instead, other materials in the record indicate that the purported relationship between the two entities is that they are affiliates through common ownership by the same individual, who is also identified as the president of both the foreign entity and the petitioning U.S. company.

The Petitioner filed its articles of incorporation with the State of Georgia on January 18, 2019. A "Certificate of Stock" dated five days later indicates that the president of the petitioning company holds 60,000 shares of the U.S. entity. The Director questioned this certificate because the record does not show that the owner named on the certificate paid for his shares. The Petitioner states that the president has paid in part for his shares, but will not pay the balance until after approval of the petition.

There are several gaps and inconsistencies in the record precluding a determination that the Petitioner had met its burden of proof:

- The Petitioner's business plan indicates that the company president has already invested $30,000 in the new office, with another $30,000 to follow after approval of the petition. The Petitioner has not documented the initial $30,000 payment. The record does show that the company received $10,000 by international wire transfer on February 4, 2019, but the bank document does not identify the source of that money.

- The Petitioner's bylaws state that the company will maintain "stock transfer books," but the Petitioner does not submit a copy of this documentation to confirm issuance of the certificate reproduced in the record or show that it is the only certificate thus issued.

- The Petitioner's articles of incorporation authorized the issuance of only 10,000 shares. The Petitioner has not documented any further state filings to authorize the issuance of more shares. Therefore, the stock certificate showing 60,000 shares is of questionable validity; it attests to the ownership of shares that do not appear to exist.

For these reasons, the record does not offer any documentary support for the initial claim that the petitioning U.S. company is an affiliate or subsidiary of the foreign entity that purports to have previously employed the Beneficiary.

The Petitioner has not submitted sufficient credible, consistent evidence to establish a qualifying relationship between the foreign entity and the petitioning U.S. company.

III. EMPLOYMENT ABROAD IN AN EXECUTIVE CAPACITY

The Petitioner states that the foreign entity, a freight shipping company, employed the Beneficiary in an executive capacity as a managing director.

"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.

The petitioner must show that the beneficiary performed all four of the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(B) of the Act. If a petitioner establishes that the position meets all four elements set forth in the statutory definition, the petitioner must then prove that the beneficiary was *primarily* engaged in executive duties, as opposed to ordinary operational activities. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining whether the beneficiary's duties were primarily executive, we consider the description of the job duties, the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the beneficiary's actual duties and role in the business.

The company's president provides this breakdown of the Beneficiary's claimed duties abroad:

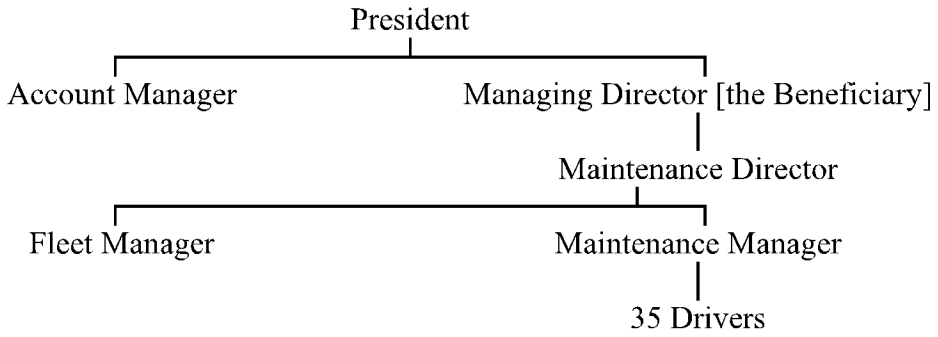
> ***25% of her time:***
>
> Oversee the Operation supervisor handle arrangements for freight shipments in a timely and cost-effective manner and insures [*sic*] that the staff is trained to properly coordinate and communicate with outside vendors.
>
> [The Beneficiary] is responsible to oversee the Maintenance Manager [and] ensures the regulations to import and export processes are closely adhered to. . . .
>
> ***50% of her time:***
>
> Oversee the operations with the Ocean Import/Export in accordance with standard procedures. . . . She must plan and implement all import and export transportation strategies . . . and administers internal movements of all goods and ensures compliance to all government regulations.

The Fleet Manager must track freight movement and communicate any delays to [the Beneficiary] so that she can advise the customer as soon as possible.

25% of her time:

- Negotiating freight contracts to save the company any excess in freight costs.
- Processing all Letters of Credit and submitting bank documents.
- Monitoring ocean and air freight shipments very closely to keep to customers' arrival schedule.
- Maintaining direct lines of communication with buyers and assistant buyers.

An organizational chart shows the following structure for the foreign entity:



The chart does not show an operations supervisor, to whom the job description referred. Apart from a brief mention of the fleet manager, as shown above, the Petitioner has not provided job descriptions for the claimed subordinate employees. The chart indicates that the drivers report not to the fleet manager, but to the maintenance manager. The record does not sufficiently establish the accuracy of the organizational chart or the Beneficiary's job description.

We agree with the Director's conclusion that, in the absence of further details about the claimed subordinate employees and evidence to corroborate their employment, the Petitioner has not established that the foreign entity has sufficient organizational complexity to warrant a primarily executive position for the Beneficiary.

We further note the Petitioner's submission of a "Register for Wages," purporting to show the signatures of employees of the foreign entity, acknowledging receipt of payment in April 2019 for salary earned during March 2019. The register shows the Beneficiary's signature, although (as discussed below) the Beneficiary was in the United States throughout March 2019. The Petitioner does not explain how the Beneficiary was able to sign this document or why she continued to receive her full salary for foreign employment at a time when she had been in the United States as a student for at least several months (and possibly longer).

The Beneficiary's presence in the United States as a student raises a related issue. The Petitioner must show that, while abroad, the Beneficiary worked continuously for the foreign entity for at least one year during the three years preceding the filing of the petition in March 2019. The question of the

Beneficiary's presence in the United States is particularly significant because, although the Petitioner contends that the Beneficiary has worked abroad for the foreign entity since 2013, documentation submitted by the Petitioner shows that the Beneficiary was an F-1 student residing in [redacted] Georgia, in 2014. The Petitioner has not resolved this discrepancy by submitting independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Another discrepancy is that, while some materials in the record indicate that the Beneficiary's employment abroad began in April 2013, the Beneficiary's résumé indicates that she has worked for the foreign entity since April 2016. The materials show no end date for the employment abroad, and the Beneficiary's name is on the foreign entity's "Register of Wages" and "Corporate Organizational Chart 2019," but on the petition form, the Petitioner indicates that the Beneficiary has been in the United States since September 2018, more than five months before the filing date in March 2019. The record does not directly document this claimed arrival date or establish the dates of the Beneficiary's earlier visits to the United States. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Also, the Beneficiary was in the United States as an F-1 nonimmigrant student when this petition was filed. Study in the United States interrupts the continuity of employment abroad.[2] Without more details and evidence about her employment and her travel to and from the United States between March 2016 and March 2019, we cannot conclude that the Beneficiary was continuously employed abroad for at least a year in the three-year period before the filing of the petition. The Beneficiary's whereabouts and activities between 2016 and 2019 are directly material to her eligibility for the classification sought. The burden is on the Petitioner to establish that the Beneficiary was working abroad for the foreign entity, not studying in the United States, for at least one continuous year during that three-year period.

For all of the reasons discussed above, the record does not show, by a preponderance of the evidence, that the Beneficiary was employed abroad by the foreign entity, in an executive capacity, for at least one continuous year between March 2016 and March 2019.

IV. NEW OFFICE

A petitioner seeking to employ a beneficiary as a manager or executive of a new office must establish that the new office will support an executive or managerial position within one year of approval of the petition. The petitioner must establish the proposed nature of the office, describing its scope, organizational structure, and financial goals; the size of the United States investment and the foreign entity's financial ability to remunerate the beneficiary and to commence doing business in the United States; and the foreign entity's organizational structure. 8 C.F.R. § 214.2(l)(3)(v)(C).

When a new business is first 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 low-level activities not normally performed by employees at the executive or managerial level and

[2] *See* USCIS Policy Memorandum PM-602-0167, *Satisfying the L-1 1-Year Foreign Employment Requirement; Revisions to Chapter 32.3 of the Adjudicator's Field Manual (AFM)*, 4 (Nov. 15, 2018), http://www.uscis.gov/legal-resources/policy-memoranda..

that often the full range of managerial or executive-level responsibility cannot be performed in that first year. The "new office" regulations allow a newly established company one year to develop to a point that it can support a primarily managerial or executive position.

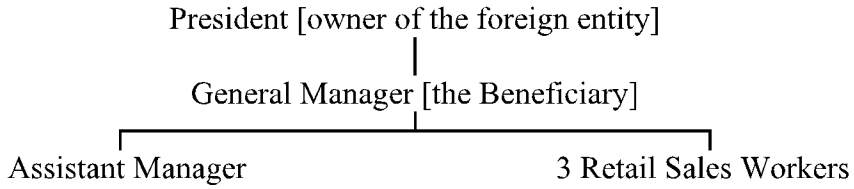
Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. This evidence should demonstrate 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. *See generally* 8 C.F.R. § 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

The Petitioner does not specify whether the Beneficiary's intended U.S. position would be managerial or executive. The Petitioner's description of the Beneficiary's proposed duties in the United States indicates that the Beneficiary will "[s]upervise the day-to-day tasks and performance of all managing associates," but the job description also includes several tasks that appear to be neither managerial nor executive. Examples include:

- Create and submit daily store sales reports.
- Reconcile and prepare bank deposits.
- Order product to keep shelves fully stocked.

The job description also indicates that the Beneficiary will control various aspects of the gas station and convenience store business, such as "cash handling" and "merchandise and fuel handling" but does not specify how she will oversee those functions without actually performing operational or low-level administrative tasks.

A proposed organizational chart shows the following hierarchy:



The Beneficiary would not be the highest-ranking official, and therefore would not have overall authority over the operation of the business.

The Beneficiary's job description refers to authority over "managing associates," but it is not evident from the chart who those "managing associates" would be. The retail sales positions are minimum-wage positions, involving basic tasks such as operating the cash register, refilling windshield washer tubs, and cleaning the store. The assistant manager's stated duties include preparing reports and checking inventory. Neither the job description nor the organizational chart indicates that the assistant manager has any authority over the retail sales staff. The assistant manager's job description also

refers to "reviewing professional publications" and "participating in professional societies," activities that are not self-evidently relevant to the operation of gas station/convenience stores.

The Petitioner's business plan indicates that the store will include "organic produce, and a deli" where customers "could . . . pick up a sandwich." None of the submitted job descriptions indicate who would be responsible for making sandwiches at the in-store deli or maintaining the organic produce (a responsibility that would appear to go beyond simply ordering inventory and stocking shelves).

The Petitioner has not shown that the store's planned organization structure is sufficiently complex to warrant either an executive or managerial position, rather than a first-line supervisor of primarily part-time non-professional employees.

On appeal, the Petitioner states:

> The beneficiary will be responsible for the preparation of all the regulatory federal and state financial reports. She negotiated the lease agreement, established the bank account, negotiated the purchase of store fixtures, established relationships with vendors, she established the policy and procedures manual and she also establish[ed] the accounting for the business. She will interview, hire and train her management staff.

Most of the tasks described above are one-time activities necessary to establish the business rather than ongoing responsibilities. The Petitioner has not shown that the task of setting up the company would take the entire first year of operations; the submitted business plan anticipates over $800,000 in sales during that first year, a figure forecast to increase only slightly in the second year, indicating that the Petitioner anticipates full-scale operations for most of its first year.

Apart from the issue of the nature of the Beneficiary's intended employment, review of the record reveals a serious discrepancy relating to the finances of the new office. This issue is material to the petition because the regulations require the Petitioner to establish the new office's financial goals and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States. 8 C.F.R. § 214.2(l)(3)(v)(C). The Petitioner's business plan allocates $13,000 per year to rent the gas station and convenience store property, but the commercial lease agreement in the record requires rent payments of $8500 per month, or $102,000 per year. This major discrepancy calls into question the origin and reliability of the other figures in the business plan.

For the above reasons, the Petitioner has not established that the new office could support a managerial or executive capacity position within one year of approval of the petition.

V. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision.

ORDER: The appeal is dismissed.