U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF U-I-G- LLC

DATE: SEPT. 10, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which seeks to export cars to Europe, 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) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer; (2) the Petitioner has secured sufficient physical premises to house the new office; (3) the Beneficiary has been employed abroad in a managerial or executive capacity; and (4) 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 asserts that it has submitted all required evidence and information to establish eligibility.

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

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*.

[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 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.

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 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.

At the time of filing, the Petitioner identified itself as a branch of the entity that employed the Beneficiary abroad. This characterization, however, is incorrect. A branch, however, is by definition the same legal entity as the foreign employer. "Branch" means an operating division or office of the same organization housed in a different location. 8 C.F.R. § 214.2(l)(1)(ii)(J). The Petitioner, however, is a limited liability company (LLC) registered in California; the foreign employer is a limited company [redacted] company registered in Poland. Therefore, the petitioning LLC is not a branch of the Polish company.

In the denial notice, the Director stated that the Petitioner's "documents do not show the ownership for the U.S. entity."

On appeal, the Petitioner states: "We did submit document showing the ownership for the U.S. entity as a branch/being parent by of Polish LLC" (*sic*). By definition, a parent has control, and some degree of ownership, of a separate entity called a subsidiary. *See* 8 C.F.R. § 214.2(l)(1)(ii)(I) and (K).

Because the Petitioner misidentified the nature of its relationship with the Polish entity, we must closely examine the evidence of record. Ownership of an LLC is established through membership, which is specified in an operating agreement. The record does not contain a copy of the petitioning LLC's operating agreement.

The Petitioner submits a copy of the LLC registration form filed with the State of California, but this form does not establish ownership. The member(s) of an LLC can manage the LLC themselves, or appoint a "manager" (who need not have an ownership interest). On the California form, the Polish entity is named on a line labeled "Manager(s) or Member(s)." Because the form does not clearly distinguish between managers and members, it cannot serve by itself as evidence of membership.

Similarly, bank records show transfers of funds from the foreign company to the petitioning U.S. LLC, which are consistent with but not inherently indicative of ownership. Of particular concern, the Beneficiary signed a commercial lease on behalf of the petitioning entity, identifying himself as the "Owner." The Beneficiary does not own the Polish company, so this use of the term "owner" cannot mean that the Beneficiary indirectly owns the petitioning LLC through ownership of the foreign entity.

The Petitioner has submitted conflicting information about the nature of the claimed relationship between the foreign and U.S. employers, and the evidence submitted is not sufficient to establish the ownership of the U.S. LLC. Therefore, the Petitioner has not established that it has a qualifying relationship with the foreign entity.

III. SUFFICIENT PHYSICAL PREMISES

A petitioner filing a new office petition must show that it has secure sufficient physical premises to house the new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

When the Petitioner filed the petition, it used an address in [redacted] California, and indicated that the Beneficiary would work at that [redacted] address.

The Director requested "[a] complete copy of the U.S. entity's lease . . . including the total square footage of the premises, including all office, production, manufacturing, and warehouse spaces," and information about the nature of the business and an explanation of "how [the chosen site] will be sufficient to conduct business."

In response, the foreign entity stated: "the beneficiary . . . represented the idea of becoming [a] car dealer to export cars to Europe." The Petitioner did not submit the lease for the [redacted] address on the petition form or any information about that site. Instead, the Petitioner submitted a copy of a month-to-month lease in a "Multi-Tenant Office Building . . . with two (2) reserved vehicle parking spaces" in [redacted] California. The lease took effect in September 2018, before the December 2018 filing date, but every form submitted by the Petitioner has shown the address in [redacted] rather than the address in [redacted]

The Director found: "The Lease Agreement does not provide detailed information such as square footage, floor plan or usage such as office, production, manufacturing, and warehouse spaces." Therefore, the Director concluded, the Petitioner had not shown that the leased space was sufficient to house the new office.

On appeal, the Petitioner observes that the lease identified the space as an office. The Petitioner submits a basic floor plan showing the size of the office as slightly smaller than 12 feet by 9 feet. The

Petitioner does not say how many people would work in this space, what they would do, or what furniture and equipment they would require. Without that information, a simple statement of square footage cannot suffice to establish sufficient physical premises.

The lease identified the Petitioner as an "Auto Broker," but did not contain any provision for storage of inventory. The Petitioner did not say how it would handle storage of the cars between purchasing them and exporting them. The lease specifies that the tenant "shall not service or store any vehicles in the Common Areas" or use more parking spaces than the two specifically authorized.

The record does not show that a 108-square-foot office is sufficient to operate a car dealership with an export operation. Furthermore, the record contains no documentation about the Los Angeles address that the Petitioner has used throughout this proceeding. On the petition form itself, the Petitioner indicated that the Beneficiary would work at the [redacted] address, not at the [redacted] address. The record does not show what business activities the Petitioner intends to conduct at each of those two locations.

The Petitioner has not shown that, at the time of filing, it had secured sufficient physical premises to house the new office.

IV. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that the Beneficiary has been, and will be, employed in a managerial or executive capacity. The Petitioner specifies on appeal that the Beneficiary has been, and will be, an executive. Therefore we restrict our analysis to whether the Beneficiary will be and has been employed in an executive, rather than managerial, capacity.

"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.

When examining the claimed 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 performed by the beneficiary and indicate whether such duties were 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. Employment Abroad in an Executive Capacity

The petitioner must submit evidence that the beneficiary's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3)(iv). The Petitioner claimed that the Beneficiary was employed abroad in a managerial capacity.

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. 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.*

In 2013, the Beneficiary became president of the entity in Poland. A letter from an official of the foreign entity described that company as a "food truck business" with "11 employees." A separate letter include a "full list of main and daily duties and percentage of time spent on each":

- Annual reports to members – after closing the year;
- All decisions made by himself – high responsibility;
- Finding and signing contracts with suppliers;
- Preparing business plans for next year;
- Budget supervising;

Daily responsibilities:
- Stock orders; 15%
- Currency rates daily confirmation; 10%
- Currency delivery orders; 5%
- Employees supervising; 25%
- Finding new advertisement forms; 15%
- Preparing documents for accountant; 5%
- Finding new market and income possibilities worldwide; 25%

In the denial notice, the Director found that the Petitioner did not show how the above job description is consistent with a primarily executive capacity. Vague statements such as "[s]tock orders" did not describe the Beneficiary's actual duties, and tasks such as "[f]inding new advertisement forms" appear to be operational rather than executive.

The Director also noted the Petitioner's reference to "11 employees," but found that, because the Petitioner did not provide any information about the roles of those employees (or evidence to confirm

their employment), the Petitioner did not establish that the Beneficiary's authority over them was at an executive level.

On appeal, the Petitioner states: "In Poland President of the Board is the highest level in organizational hierarchy." An employee, however, does not necessarily qualify as a manager or executive simply by occupying "the highest level in [the company's] organizational hierarchy." Rank is a necessary, but not sufficient, element of a managerial or executive capacity. The Petitioner did not provide enough information about what the Beneficiary did from day to day, and did not show how subordinate staff relieved him from primarily performing non-qualifying tasks.

The Petitioner lists the four elements from the statutory definition of executive capacity, calling them the Beneficiary's "main tasks" "as President of the Board of Polish LLC." Merely repeating the language of the statute or regulations does not satisfy a petitioner's burden of proof. *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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

The Petitioner has not provided enough details and corroborating evidence to establish that the Beneficiary was employed abroad in an executive capacity.

B. U.S. Employment in an Executive Capacity Within One Year

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 that often the full range of managerial responsibility cannot be performed in that first year. The "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of a beneficiary in 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's initial submission provided little information about the company's intended operations in the United States. The Director asked for information and evidence, such as a business plan, a description of the company's planned staffing, and other details of what the company will do and how the Beneficiary will oversee the operations as a manager or executive within one year.

In response, the Polish company indicated that the U.S. company would be a "car dealer to export cars to Europe," and that the Beneficiary "would be responsible for [the] prosperity of US branch."

The Director denied the petition, stating that the Petitioner did not submit a business plan or specify how many subordinates it would hire or what their roles would be in the company. The Director found that the record did not establish that the company would support a managerial or executive position within a year following the approval of the petition.

On appeal, the Petitioner states: "Being an executive has the knowledge to lead U.S. company to highest profit due to it being established to realize the idea provided by the President of the Board, that is why beneficiary is the best person to make profit." The Petitioner also referred to "planned yearly income of $260,000."

The information in the record does not sufficiently describe the proposed nature of the office, its scope, organizational structure, and financial goals. The Petitioner has registered as an LLC, received startup funds from the foreign company, and leased month-to-month office space, but the Petitioner has not shown that these preparations are sufficient for the Petitioner to begin doing business and support an executive position within a year after approval of the petition. The Petitioner has not addressed the lack of a business plan, for instance, and does not show that it had made any preparations to operate a car dealership, such as securing permits or making sourcing arrangements. The reference to "planned yearly income of $260,000" does not explain how the Petitioner will take in that revenue or where the Petitioner derived that estimated yearly total.

The Petitioner also has not explained how it intends to staff the company during its first year of operations, and how those employees will relieve the Beneficiary from having to perform primarily non-executive duties relating to the purchase, marketing, sales, and exportation of automobiles, and the administrative tasks required to support those endeavors. It cannot suffice simply to assert that the Beneficiary will be the highest-ranking official at the company.

Based on the deficiencies discussed above, the Petitioner has not established that it will employ the Beneficiary in an executive capacity in the United States within one year after 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. In visa petition proceedings, it is the petitioner's burden to establish

eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of U-I-G- LLC*, ID# 5870096 (AAO Sept. 10, 2019)