U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-US INC.

DATE: SEPT. 11, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which seeks to develop solar energy farms, seeks to temporarily employ the Beneficiary as managing director 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 concluded that the Petitioner did not qualify as a new office, and denied the petition, concluding that the record did not establish that the Petitioner would employ the Beneficiary in the United States in a managerial or executive capacity.

The Petitioner appealed that decision, and we found that (1) the Petitioner does qualify as a new office, and (2) the Petitioner would employ the Beneficiary in a managerial or executive capacity within one year after approval of the petition. We remanded the petition because the Petitioner had not established, as required, that it would begin doing business within one year after approval of the petition.

The Director issued a new decision, denying the petition because the Petitioner had not established (1) that it would begin doing business within one year, and (2) the new office would support a managerial or executive position within one year.

The matter is now before us on appeal. On appeal, the Petitioner asserts that the Director erred by repeating a ground for denial after we found that the Petitioner had overcome it, and that the Director overlooked "ample documentation" of eligibility and "improperly reject[ed] critical evidence."

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

[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.

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. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner quotes the following passage from our June 2018 remand order:

> After reviewing the record under the appropriate regulations, we find that the Petitioner established that it would employ the Beneficiary in a managerial capacity within one year. Although the Petitioner will maintain a small staff initially, it provided a detailed business plan explaining how the Beneficiary would perform primarily managerial duties with the support of the U.S. employees, contractors, employees of the foreign entity, and business partners working with the Petitioner to develop solar energy projects in the United States.

The Petitioner asserts that, because our remand notice is binding on the Director in this proceeding, the issue of the Beneficiary's claimed managerial capacity is essentially settled in the Petitioner's favor. If this were all there was to the Director's decision, then that decision could not stand. However, we need not reach a new finding relating to that issue, because the remand order raised another issue, regarding the expected timetable for the Petitioner's commencement of business operations.

III. 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).

A petitioner that indicates that a beneficiary is coming to the United States to open a "new office" must show that it is prepared to commence doing business without further delay. 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 filed the petition on September 27, 2017. The Petitioner also requested premium processing, which could have resulted in a final decision on the petition within 15 days. In such a case, the Petitioner would had until October 2018 to begin doing business.

At the time of filing, the Petitioner stated that its "strategy for developing its activities in the US territory will be based on two main axes: [redacted] development, and acquisition of early stage development projects." The Petitioner continued:

> The USA [redacted] development will be mainly focused on solar projects, and new development areas for solar projects . . . . The expected development timeframe for a solar utility-sized solar power plant is 4 years on average. . . . For the second axis of US developments, [the Petitioner] is mainly interested in acquiring projects in the early development stage to complete development, finance the development cost, and launch the permitting process and the interconnection studies . . . .
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> [The Petitioner] will be mainly responsible for the current development of two projects: 1) the [redacted] development of a solar power plant, the [redacted] Solar Farm . . . , a joint project with [redacted] . . . The commission operational date of the power plant will be the end of 2019; and 2) the acquisition of a solar project portfolio in Georgia State, the Georgia [redacted] . . , which is currently under early stage development by a local developer.

The Petitioner stated that the initial filing included a "Service Agreement with [redacted]," but we can find no such document in the record and the Petitioner's own list of enclosed exhibits did not include that agreement.

The Petitioner reported income on its 2015 and 2016 tax returns, but asserted that the reported amounts reflected "financial support received from the petitioner's parent company," "and do not signify revenues from actual operations." The Petitioner stated that it "has been engaged solely in market research and business development activities. There has not yet been a continuous provision of goods and/or services."

The Petitioner stated that its development milestones for 2017 and 2018 included identification, acquisition, and development of various projects, with operation to begin in 2019. The Petitioner anticipated that the Georgia [redacted] would begin commercial operation "by mid-2019," and the [redacted] Solar Farm would begin commercial operation "by the end of 2019." These projected

dates both fall more than a year after the petition's September 2017 filing date. The Petitioner's business plan did not forecast any operational income until the fourth year.

In our remand order, we stated:

> Although we are withdrawing the Director's decision, the record as presently constituted does not establish that the new office would be doing business as a qualifying organization within one year.
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> . . . The Petitioner described [the [redacted] and Georgia] projects in detail, but it did not provide supporting documentation that would assist in evaluating their current stage of development, such as the service agreement with [redacted] or documentation related to its acquisition of the Georgia-based project.
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> Further, although the Petitioner has budgeted for significant development and investment costs for these and future projects, but its forecasted project profit and loss statement shows that the company anticipates $0 in annual revenues in both 2018 and 2019. Since the petition was filed in September 2017, additional evidence would be needed to demonstrate how the Petitioner's activities in the interim would meet the definition of "doing business" within one year, and at what point it will begin to engage in the regular, systematic, and continuous provision of services. If the Petitioner will not reach that stage of development within one year, then the petition is not approvable.

Noting the lack of corroboration of the Petitioner's projects, and the Petitioner's assertion that the company would not earn operational income for several years, the Director asked the Petitioner for more evidence that the company would be able to do business within a year. In response, the Petitioner submitted a copy of an August 2017 consulting agreement in which [redacted] agreed to provide certain services to [redacted] LLC; the latter company would therefore be purchasing, rather than providing, service under this agreement. The Beneficiary signed the agreement as "M&A Director" of [redacted].

The Petitioner also submitted lease documentation regarding a site in Georgia, indicating that the Petitioner secured the use of the land in 2018, after the filing date. The term of one lease was divided into "an 'Option Term' of up to three (3) years, a 'Development Term' of up to three (3) years, and an 'Operating Term' of up to forty (40) years." The Petitioner entered into agreements with power companies in Georgia and nearby states as an "interconnection customer" in 2018; these agreements refer to future feasibility studies that would precede any development and operational use of the land. The Petitioner indicated that, owing to delays, the Georgia site was now expected to become operational in 2021.

The Director denied the petition, concluding that the record did not establish "that the U.S. entity will be engaged in the regular, systematic, and continuous provisions of services" within a year. In addition to the Petitioner's projections of $0 revenues during the first years of development, the Director noted

that the agreement relating to the [redacted] project referred to [redacted] LLC, not the petitioning corporation. The Director found that the Petitioner did not establish a qualifying relationship between those two separate legal entities or establish the nature of the Petitioner's own intended involvement in the [redacted] project.

On appeal, the Petitioner protests that the Director had requested the most recent versions of tax returns, bank statements, and other documentation, but the Director then disregarded these materials because they post-dated the filing of the petition.

Because a new office petition relies, in part, on projections about the company's development after the filing of the petition, we agree with the Petitioner that the Director should not have simply disregarded more recent materials, particularly after specifically requesting recent documentation. Nevertheless, the Petitioner does not show that the Director's error changed the outcome of the proceeding.

The Petitioner initially indicated that the company was several years away from engaging in revenue-generating operational activity. On appeal, the Petitioner asserts that "the prolonged delay" in adjudicating the petition has forced the company to revise its business plan and push key operational dates further into the future. Nevertheless, the Petitioner also asserts that it "will be doing business during the one year period of its new office petition."

The Petitioner cites several unpublished appellate decisions in which we found that the various entities were preparing to do business, but not yet actually doing business:

- A car service company that had not yet opened its franchised shop;
- A chemical company that had not yet manufactured or sold any products; and
- A dentist's office that was under construction and not yet providing dental services.

The Petitioner states that its case is different from the cited examples:

> Petitioner's objective is to develop, finance, and operate solar and wind power plants. The development of solar and wind power plants involves, among other necessary steps, the acquisition of project sites; performance of . . . required studies . . . ; preparation of design plans and specifications; negotiation of contracts; purchasing required construction[] materials; financing of project costs; and construction of the facility. Due to the scope of these utility-scale power plants, the typical development is about four years on average. In contrast to the AAO cases discussed above, Petitioner will be engaged in its intended activity of developing solar and wind power plants. . . . Petitioner's activities will not be limited to initial preparatory work, such as securing and furnishing an office space. On the contrary, Petitioner will be fully engaged in all of the activities necessary for the development of solar and wind power plants. By engaging in these activities, Petitioner will both offer and acquire services, purchase materials, and otherwise participate in the local, regional, and national stream of commerce.

The Petitioner, on appeal, does not identify services it will regularly, systematically, and continuously provide during the first year of operations. The Petitioner acknowledges that "securing . . . office space" is not doing business, but does not explain how that is fundamentally different from "the acquisition of project sites." The Petitioner would not perform studies on behalf of its parent company or any other customer. Rather, it would perform those studies (or hire contractors to do so) in preparation for its own future business activities. Preparing plans, negotiating contracts, purchasing materials and securing financing are all preparatory steps toward the Petitioner's planned business activities, rather than commercial activities in their own right. "Construction of the facility" is not a service provided to any customer; rather, the Petitioner anticipates having two employees during its first year of operation and would presumably hire contractors to perform the actual construction work, in which case, the construction would be a service provided *to*, rather than *by*, the Petitioner.

The Petitioner does not dispute the evidence showing that the company would not take in revenue during its earliest years of operations, but the Petitioner asserts: "Although revenues may be a relevant factor in this determination, the regulations do not specify it as a requirement." The Petitioner further contends that "a company should not be excluded from satisfying the regulatory criteria because its project is complex and capital intensive." The regulations do, however, specify that "doing business" entails "the regular, systematic, and continuous provision of goods and/or services." Participating in the "stream of commerce" as a purchaser does not constitute doing business; all the cited examples from past appellate decisions were companies that incurred expenses while preparing to offer goods or services of their own. A company is not entitled to a different or more lenient standard for what constitutes doing business simply because that company "is complex and capital intensive." Unpublished, non-precedent decisions are not binding in unrelated proceedings, but given the Petitioner's reliance on citing non-precedent decisions, it is worth mentioning *Matter of T-O-D- LLC*, ID# 1415274 (AAO Aug. 9, 2018). That decision involved a real estate developer which argued that the multi-year process of purchasing land, acquiring permits, and construction were all part of the larger process of "providing" housing. We did not accept that argument, and dismissed the appeal because, as here, the company was at a very early stage and would rely on start-up capital for several years before it would be able to provide services.

While we previously found that the Petitioner can organizationally support a managerial or executive position within one year, we specifically did not find, at that time, that the Petitioner had established that it would begin doing business within one year. The Petitioner has not overcome this finding.

This finding does not prohibit the Petitioner from operating in the United States in preparation for future business activity. Rather, it is a finding that the Petitioner, at the time of filing, had not shown that it would begin doing business within a year. As such, the Petitioner was not yet in a position to petition for L nonimmigrants when it filed the petition in September 2017.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons. 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 N-US Inc.*, ID# 5098777 (AAO Sept. 11, 2019)