U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-I-G- INC.

DATE: SEPT. 12, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which intends to operate a restaurant and an import-export trade business, seeks to temporarily employ the Beneficiary as "CEO" 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 Petitioner did not, as required, (1) secure sufficient physical premises for its business operation; (2) establish that the new office would support the Beneficiary in a managerial or executive position within one year after approval of the petition; and (3) demonstrate that the Beneficiary was employed abroad in a managerial or executive capacity.

On appeal, the Petitioner disputes all three grounds for denial. It refers to several of our previously issued non-precedent decisions[2] and points to previously submitted evidence in support of its claims.

Upon *de novo* review, we find that the Petitioner has not overcome the three grounds for denial. Therefore, 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

[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.

[2] While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on U.S. Citizenship and Immigration Services, unpublished decisions are not similarly binding.

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. SUFFICIENT PHYSICAL PREMISES

The first issue we will address in this matter is whether the Petitioner submitted adequate evidence to show that it had secured sufficient physical premises to house its new office as of the date it filed this petition. 8 C.F.R. § 214.2(l)(3)(v)(A). In the denial decision, the Director determined that the Petitioner did not execute a legally binding sublease because it did not provide evidence to show that the tenant who was named in the original lease, i.e., the sublessor, obtained consent from the original lessor as required by the terms of the original lease.

The Petitioner has argued, both in response to the request for evidence (RFE) and on appeal, that the sublessor obtained oral consent from the lessor allowing it to sublease the premises to the Petitioner. However, a petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof, particularly when supporting documentary evidence would reasonably be available. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Neither the Petitioner's claims nor those of the sublessor constitute sufficient evidence of the original lessor's consent to the sublease. Moreover, we note that the only copy of the original lease that the Petitioner provided shows a termination date of January 31, 2014. Thus, not only did the Petitioner provide insufficient evidence of the original lessor's consent to the sublease, the sublease itself stems from a master lease that expired in January 2014 and therefore was not valid in June 2017 when the instant petition was filed. Although the Petitioner provides evidence of cashed checks for rent payments, this evidence does not overcome the lack of evidence demonstrating that the Petitioner had a valid lease to house its business at the time of filing.

In light of the above, the Petitioner has not established that it had sufficient physical premises to house its new office at the time this petition was filed.

III. EMPLOYMENT IN MANAGERIAL OR EXECUTIVE CAPACITY

Next, we will address the Beneficiary's proposed employment in the United States and her employment abroad with the Petitioner's foreign affiliate. In an initial cover letter, the Petitioner stated that the Beneficiary would be employed in an executive capacity.[3] However, on appeal the

[3] Although the Petitioner repeatedly referred to the Beneficiary's position as "executive/managerial," it paraphrased the

Petitioner claims that the Beneficiary would be employed in a managerial and executive capacity within one year of approval of the petition.

"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.

A. U.S. Employment Within One Year of Approval

As previously stated, the Director determined that the Petitioner did not provide sufficient evidence to establish that its operation would support the Beneficiary in a managerial or executive capacity within one year of the petition's approval.

1. New Office Operations

In the case of a new office petition, we review the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial or executive capacity. A petitioner has the burden to establish that it would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year of the petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed managerial or executive position is plausible based on a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

In the present matter, the petition shows that the Petitioner claimed no employees and no income at the time of filing. In a supporting cover letter, the Petitioner stated that its "operations will be developed in two steps," the first of which will involve starting an import-export whole sale business of "various American-made goods such as décor elements, dishes, food and beverages." It stated

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definition of executive capacity in describing proposed employment, stating that she would establish goals and policies and exercise wide latitude in discretionary decision-making.

that it plans to export these types of goods to its foreign affiliate and to "other specialty restaurants and shops," claiming that there is a "latent demand" for various American-made goods in Russia, its target market. The Petitioner went on to discuss the second step in its plan, which involves opening a "burger joint" similar to the one the Beneficiary's foreign employer currently operates in Russia. The Petitioner stated that it will "attract financial backing of strategic investment partners" from whom it looks to secure $350,000 to cover initial expenses and operating costs until the restaurant reaches its "break-even point." Although the Petitioner stated that opening the restaurant is a top priority, it neither claimed nor provided evidence to show that it had secured funding or a restaurant location to commence operation of a restaurant as of the date this petition was filed.

On the other hand, the Petitioner claimed that its "trade office" is already operational and is preparing for its first product shipment; it anticipated that the trade business will be able to take care of its own operational expenses until it executes the second part of its plan to open a restaurant. The Petitioner claimed, but did not provide supporting evidence to show that the foreign entity invested $20,000 in May 2017 towards its business endeavor; rather, the Petitioner provided its bank statement for May 2017, which shows three deposits totaling $13,180 – nearly $7000 below the amount the Petitioner claimed it needed to commence operations of its trade office. Despite claiming that the foreign entity "is prepared to finance ongoing operations of the trading office at $15-20,000 per month as needed," the Petitioner did not provide evidence to demonstrate the foreign entity's intention to indefinitely fund the U.S. operation.

Although the Petitioner provided a business plan in which it acknowledged its two separate business endeavors, the plan focused primarily on the Petitioner's business objectives with respect to opening a restaurant. Despite the Petitioner's claim that it had already taken steps to execute its plan to operate a trade office, the business plan does not include even the most basic information explaining how this business will function. For instance, the Petitioner claimed that a $20,000 investment would be sufficient to start its operations, but it did not support this claim with an itemized list of projected weekly or monthly business expenses, such as the cost of inventory and hiring personnel to not only purchase and sell the inventory, but also to address the Petitioner's administrative and logistical needs, including issuing invoices, receiving the goods that are purchased, and ultimately delivering them to their final destination. Although the business plan includes graphs that project monthly revenues and expenses, it does not appear that these graphs pertain to the import-export operation, as the preceding section of the plan, which contains a financial forecast, pertains exclusively to the restaurant business and makes no mention of the Petitioner's purported plan to purchase and export goods.

Further, the business plan includes a projected organizational chart indicating that the Petitioner plans to staff its trade office with an assistant and independent contractors. However, the plan does not state which functions the assistant and contractors would carry out within the scope of the import-export operation, nor does it provide revenue projections to explain how the Petitioner plans to fund this operation and advance beyond the start-up phase. In addition, the Petitioner claimed that the foreign entity will initially serve as its "main customer and distribution channel" and that it will eventually expand its customer base to include "other specialty restaurants and stores in Russia and

neighboring countries." However, it did not provide a timeline for the said expansion or explain how it plans to generate revenue as an import-export operation if the foreign entity will comprise its main customer base indefinitely. The Petitioner also did not provide evidence to demonstrate that the foreign entity has access to distribution channels in "other specialty restaurants and stores in Russia and neighboring countries." Without further information as to how the Petitioner plans to operate and generate revenue during its first year of operation, it is unclear how it will progress beyond the "new office" phase and gain the ability to relieve the Beneficiary from having to allocate her time primarily to non-managerial and non-executive functions.

In the RFE, the Director focused on the Petitioner's plans to operate a trade office, explaining that the Petitioner did not have an actionable plan to start operating as a restaurant as of the date this petition was filed. The Petitioner was instructed to provide a statement explaining how its proposed business venture would support the Beneficiary in a managerial or executive capacity within one year. The Petitioner was also asked to submit a timetable for actions it plans to take during its first year of operation and to include an organizational chart listing the proposed positions it plans to fill, along with the job duties that will be assigned to those positions and their expected educational levels. The Director also asked for evidence establishing the size of the U.S. investment and the foreign entity's financial ability to pay the Beneficiary's salary and commence doing business in the United States.

The Petitioner's response included a loan agreement, dated October 17, 2017, in which the lender agreed to loan the Petitioner $300,000. We note that this agreement was executed more than four months after the instant petition's filing date. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). As the loan agreement in question was not in effect in June 2017 when this petition was filed, it is not relevant to the issue of the Petitioner's eligibility at the time of filing. Likewise, although we acknowledge the Petitioner's submission of its bank statements for August, September, and October 2017, as well as evidence of various bank transactions that took place during that time period, these documents also pertain to activities that took place after this petition was filed and are therefore similarly irrelevant for the purpose of demonstrating the Petitioner's eligibility at the time of filing.

The Petitioner also provided receipts for purchases of various kitchen items; with the exception of one receipt showing the foreign entity's purchase from [redacted] all other receipts named either the Beneficiary or her husband as the purchasing party and listed their residential address – [redacted] California – as the destination of the goods purchased. Although the Petitioner provided a letter clarifying its intent to open its first restaurant "by the end of 2017 – beginning of 2018," this plan is overly broad which further indicates that the Petitioner may not be ready to support the Beneficiary in a managerial or executive capacity role within one year. In an updated executive summary and timetable, the Petitioner reiterated its plan to open a restaurant in the near future and restated the same vague information it provided previously with regard to the trade office, claiming that it plans to supply the foreign entity's restaurant along with "other specialty restaurants and shops" with various U.S.-made household goods and food products.

Although the Petitioner claimed that it is currently in the "final stages" of negotiating an exclusive distributorship agreement with a U.S. supplier, it did not explain how this business arrangement would result in the progression of its business beyond the start-up phase. Likewise, the Petitioner's claim that it conducted its first "gastro-tour of California" in August 2017 does not help establish that the Petitioner would have the ability to progress to a level of development that would support the Beneficiary in a primarily managerial or executive capacity. Moreover, aside from the single claim made in the RFE response, the Petitioner provided no evidence to demonstrate its intent to operate a tour business.

In the denial decision, the Director determined that the Petitioner did not adequately describe its proposed business or establish that it would be able to support the Beneficiary in a managerial or executive capacity.

On appeal, the Petitioner argues that the foreign entity has the ability to support the U.S. operation, pointing to translated documents that pertain to the foreign entity's earnings. We find, however, that these documents are deficient because they do not meet the regulatory criteria requiring that all foreign language documents be accompanied by a full English language translation along with a certification from the translator confirming that the English language translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. 8 C.F.R. § 103.2(b)(3). The translated documents in the record were not properly certified; as such, we cannot meaningfully determine whether the translated material is accurate and thus supports the Petitioner's claims. Moreover, as previously noted, the Petitioner did not provide evidence to support the claim that the foreign entity invested $20,000 to fund its start-up operation.[4] Therefore, even if the Petitioner submitted sufficient evidence of the foreign entity's financial ability, such evidence would not be sufficient to establish the foreign entity's commitment to provide necessary capital to fund the U.S. operation and ensure that the Petitioner advances beyond the start-up phase so that it can support the Beneficiary in a primarily managerial or executive position.

The Petitioner also contends that the Director overlooked relevant evidence, which shows that it is now "in the process of choosing a location" for the restaurant it plans to open. We find that this evidence does not establish that the Petitioner was able to commence doing business upon approval of the petition such that it could progress to the next developmental phase of its operation within one year from the date of the petition's approval. As noted earlier, although the Petitioner indicated that its initial plan for generating revenue would rely exclusively on an import-export operation, it did not provide sufficient evidence to show that it had the funds to commence doing business or that it had a set plan for staffing this operation to ensure that it would support the Beneficiary in a managerial or executive capacity within one year of the petition's approval.

[4] The Director determined that the Petitioner provided evidence of a $50,000 deposit into its account. However, we note for the record that this finding was incorrect, as the Petitioner neither claimed nor provided evidence confirming a deposit of $50,000 into its account. As this error is not critical to our discussion and does not alter our finding, it need not be addressed further.

2. Duties

We also reviewed the Beneficiary's proposed job description and find that the Petitioner provided insufficient evidence to establish that the Beneficiary would perform primarily managerial or executive duties within one year of the petition's approval.

As noted earlier, the Petitioner claims that the Beneficiary will be employed in a managerial and an executive capacity. It provided a job duty breakdown indicating that the Beneficiary will allocate her time as follows:

- 20% will be allocated to developing and ensuring implementation of strategies, goals, policies, and procedures and defining performance indicators and objectives;
- 20% will be allocated to supervising and directing employees and independent contractors in the United States and abroad and making personnel decisions, including hiring, firing, promoting employees and taking disciplinary actions;
- 20% will be allocated to directing market research to expand into international markets, creating advertising campaigns to attract more clients, and negotiating a lease and overseeing the development of the burger restaurant location;
- 10% will be allocated to coordinating subordinates with affiliate companies and ensuring "worldwide legal compliance and licensing" with zoning, construction, health department, and other government regulations;
- 15% will be allocated to overseeing "major acquisitions" and projects, conduct meetings with "potential key team players," investors, and various business partners; and
- 15% will be allocated to overseeing the trade operation and financial and budgeting activities, "engag[ing] IT and other professionals," and ensuring worldwide tax compliance.

The above job description does not acknowledge the Petitioner's early stage of development or explain how the broadly stated job duties would enable the Petitioner to advance to a phase of operation that would support the Beneficiary in a managerial or executive position.

When a new business is 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 activities not normally performed by employees at the managerial or executive level and that often the full range of managerial or executive responsibility cannot be performed. However, the record must 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 managerial or executive job duties.

Although the Petitioner in this matter stated that the Beneficiary would engage in lease negotiations for the restaurant operation it seeks to open "by the end of 2018," it provided little information about the job duties the Beneficiary would undertake with respect to the trade operation, which it claims is currently operational and would be its main source of revenue during this initial stage of operation. Thus, the initial job description did not clarify the Beneficiary's job duties or explain how she would

help the Petitioner to transition to a stage of development that would support her in a position where she would primarily perform managerial- and executive-level job duties.

In the RFE, the Petitioner was asked to provide a letter explaining how the proposed business will, within one year, support a managerial or executive position. In response, the Petitioner again reiterated prior claims that the import-export business is currently operational and provided two letters from its vice president; both letters discussed the Petitioner's plan to open its first restaurant in the United States. Neither the letters, nor any other evidence submitted in response to the RFE, specifically addressed the Beneficiary's job duties with respect to the existing import-export business.

In the denial decision, the Director determined that the Petitioner did not establish that within one year of operation it would have the ability to elevate the Beneficiary to a managerial or executive position. We agree with the Director's conclusion.

Although not expressly stated, it is understood that the Beneficiary, in her leadership role, will perform duties that are critical to the Petitioner's development, despite their non-managerial or non-executive nature. However, the Petitioner is allowed only one year from the date of approval of the petition to support the Beneficiary in a managerial or executive position. 8 C.F.R. § 214.2(l)(3)(v)(C). Without a meaningful description of the tasks the Beneficiary will perform during the Petitioner's initial stage of operation, it is unclear how the Petitioner will advance to the next phase of its development.

In the present matter, despite claiming that one segment of its business – the import-export trade office – was operational at the time of filing, the Petitioner has primarily focused on its goal to open a restaurant at the end of 2018; it has not adequately discussed its import-export business or explained the Beneficiary's role in that business at any stage of its operation. Beyond claiming that the Beneficiary would assume the top role within its organization, the Petitioner did not provide a detailed job description delineating the Beneficiary's actions during its first year of operation, nor has it distinguished her initial job duties from those she would perform after the Petitioner's "new office" phase of operation expires. In other words, the Petitioner has not provided a meaningful discussion explaining what activities the Beneficiary would undertake during its "new office" phase or how those activities would advance the Petitioner into the next phase of its development where the Beneficiary would be relieved from having to primarily perform the organization's operational and administrative tasks. We note that 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).

On appeal, the Petitioner contends that, within one year of approval of the petition, the Beneficiary will manage an essential function and be employed in an executive capacity. It cites to non-precedent decisions to support these claims, stating that the Beneficiary will be its "'public face,'"

perform its "major function," and hold the "highest executive office" within a complex organization, which will be comprised of 15-20 full-time employees, including five "professional/managerial employees" in the United States and a "dedicated staff of 15 employees in the foreign office."

Although the Petitioner focused on the Beneficiary's top placement within its organizational hierarchy and her use of discretionary authority to develop the business and set its goals and policies, it did not provide further information about the Beneficiary's job duties to explain how the Petitioner would progress from a rudimentary phase of development to a more advanced phase during which it would be able to relieve the Beneficiary from having to primarily perform non-executive and non-managerial functions. The Petitioner also did not clarify how the foreign employees will support the Beneficiary's role in the United States during any phase of its operation, nor did it specify whether the foreign employees would assume a supporting role with regard to the trade operation, the restaurant business, or both. That said, we note again that the Petitioner has consistently focused almost entirely on its business objectives regarding the opening of a restaurant, which was not an objective it predicted reaching within one year of filing this petition; the Petitioner has provided almost no information about the Beneficiary's current or future role in its trade operation, nor has it provided any information that would establish the realistic likelihood that the trade operation would advance the Petitioner to the next phase of its development.

In sum, the Petitioner has not clarified the Beneficiary's job duties during its initial phase of operation or adequately explained how she would ensure that the company progresses to the next phase of development. As such, the Petitioner has not established that within one year of the petition's approval it would have the ability to employ the Beneficiary in a managerial or executive capacity where she will be relieved from having to spend her time primarily performing operational and administrative tasks of the organization.

B. Employment Abroad

Because of the dispositive effect of the above findings of ineligibility based on factors that pertain to the proposed employment – namely, the Petitioner's physical premises at the time of filing and the Beneficiary's employment in a managerial or executive capacity within one year of this petition's approval – we will briefly address the remaining issue pertaining to the Beneficiary's employment abroad.

The Director determined that the Petitioner did not establish that the Beneficiary was employed abroad in a managerial or executive capacity. Based on our review of the Petitioner's supporting evidence, including the Beneficiary's job descriptions and the foreign entity's organizational and management structures within the scope of a restaurant business, we find that the Petitioner has not adequately demonstrated that the Beneficiary assumed a position where the primary portion of her time was devoted to performing duties that primarily involved managing a staff of supervisory or professional employees or primarily directing the management of the organization and establish its goals and policies. Therefore, we agree with the Director's finding and need not further address this issue in the instant decision.

IV. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that: (1) it had secured sufficient physical premises for its U.S. operation at the time of filing; (2) it would be able to employ the Beneficiary in the United States in a managerial or executive capacity within one year of an approval of this petition; and (3) the Beneficiary was employed abroad in a managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of W-I-G- Inc.*, ID# 1619687 (AAO Sept. 12, 2018)