U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10089525

Date: SEPT. 24, 2020

Appeal of California Service Center Decision

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

The Petitioner is a heavy equipment supply company looking to specialize in equipment rental, training, and inspection. It seeks and to temporarily employ the Beneficiary as "Chief Executive Officer" of its new office[1] under the L-1A nonimmigrant classification for intracompany transferees. *See* 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 establish, as required, that (1) it has a qualifying relationship with the Beneficiary's employer abroad; (2) the Beneficiary's employment abroad was for at least one year in the three years that preceded the filing of this petition; (3) the Beneficiary's foreign employment was in a managerial or executive capacity; and (4) the new office would support the Beneficiary in a managerial or executive position within one year of the petition's approval. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal because the Petitioner did not establish that it would support the Beneficiary in a managerial or executive capacity[2] within one year of the petition's approval, as claimed. Since the identified basis for denial is dispositive of the appeal, we decline to reach and hereby reserve the Petitioner's arguments regarding the remaining grounds for denial. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

[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] The Petitioner does not claim that the Beneficiary's proposed position would be in a managerial capacity.

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.*

Further, in the case of a new office petition, 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. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The primary issue to be addressed in this discussion is whether the Petitioner established that its operation would support the Beneficiary in a managerial or executive capacity within one year of the petition's approval.

"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. New Office Requirements

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. The burden is on the Petitioner to establish that it would realistically develop to the point where it would require the Beneficiary to perform primarily managerial or executive duties 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).

If staffing levels are used as a factor in determining whether an individual will be acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) takes 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.

At the time of filing this petition, the Petitioner provided a supporting statement discussing its plans to buy "useful data" from companies that have access to "data and projects information" and to use that information to bid on projects in Texas. The Petitioner stated that it will market the business by hiring a full-time marketing and business development manager, while seeking to develop the business by joining professional associations allowing it to network and gain access to industry shows.

The Petitioner also provided a business plan containing a projected organizational chart that depicts the Beneficiary at the top of the organization, overseeing a safety coordinator and an "Office Admin/Account" position at the second organizational tier and an operations manager, a "Business Dev Manager," and a scaffold superintendent at the third tier. The operations manager is depicted as overseeing an operations officer at the next organizational tier, the scaffold superintendent would oversee an undisclosed number of scaffolders, and the "Business Dev Manager" would oversee a project officer, a "Business Development Louisiana" position, and a "Business Dev Construction" position.

Aside from the projected organizational chart, the business plan also includes a spreadsheet showing projected hires over a five-year period from 2019 through 2023. The spreadsheet indicates that the 2019 hires would include one "office staff" position, one scaffolder, one "NDT inspector," and one "business dev officer" and that the following nine positions would be added in 2020: one additional "office staff," four additional scaffolders, one operations manager, one additional "Business Dev Officer," one safety and training officer, and one estimator. The Petitioner did not establish a specific timeline for the projected 2020 hires. Further, although the Petitioner stated that its marketing strategy would include hiring a marketing and business development manager to "help coordinate [the company's] business models, develop [a] client base and networking [*sic*] with the industry," neither the projected organizational chart nor the projected hires spreadsheet included a marketing and business development manager. Rather, as described above, the organizational chart included a "Business Dev Manager" overseeing one "Business Development Louisana" and one "Business Dev Construction," while the spreadsheet identified a "Business Dev Officer" position and showed that two such officers would be hired in 2020. The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, although the business plan contains a five-year plan for purchasing equipment, it does not include a breakdown of the Petitioner's initial start-up costs and operating expenses. Rather, the business plan contains a spreadsheet titled [redacted] Equipment Purchase," which itemizes the equipment the Petitioner intends to purchase in the five-year period from 2019 to 2023 and provides the projected annual "average investment" cost of the equipment. However, the Petitioner did not explain the underlying factors responsible for the wide range in its 2020 projected cost, which could be as low as $50,000 or as high as $500,000.

In a request for evidence (RFE) the Director asked the Petitioner to provide a business plan for commencing the start-up of its new office and to include a timetable for each proposed action during its first year of operation. The Director also instructed the Petitioner to provide an organizational chart depicting its proposed staffing and organizational hierarchy, summarizing employee job duties, and distinguishing between contractors and permanent employees.

In response, the Petitioner provided an updated business plan containing the previously submitted organizational chart, which is inconsistent with the updated hiring projections included in the new business plan. Namely, the updated hiring projections show that in 2020 the Petitioner will hire one "office staff" position, five scaffolders, an "NDT Inspector," an operations manager, a business development manager, and a safety and training manager.[3] However, the organizational chart does not include either an "NDT Inspector" or a safety and training manager. Further, although the chart depicts the "Office Admin/Account" as one position and indicates that it would be filled by one employee, the staffing projection list shows "Account Officer" and "Office Staff" as separate positions with the number of "Office Staff" projected to increase from one in 2020, to two in 2021, to four in 2023. The proposed organizational chart also does not include a safety and training manager, a design engineer, or an estimator, which were all included in the list of projected hires. Furthermore, although the organizational chart and list of projected hires both indicate that the Petitioner would hire a business development manager, the projected hire list does not include the two subordinate business development positions that were depicted as the business development manager's subordinates in the projected organizational chart. As previously noted, the Petitioner must resolve these discrepancies with independent, objective evidence pointing to where the truth lies. *Ho*, 19 I&N Dec. at 591-92.

Further, because the Petitioner did not provide a description of employee job duties as requested in the RFE, it is unclear how or if the Petitioner's projected staffing and management structure would support the Beneficiary in a managerial or executive capacity within one year of the petition's approval. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The Petitioner also provided evidence of its continued business activity, included a list of existing and projected business leads, and discussed plans to offer a new "procurement" service and set up spare parts warehouses in Texas. Although the Petitioner provided a financial support letter which includes operating and capital costs, it did not adequately itemize projected expenses and income and it did not provide projected costs for the purchase of a vehicle, scaffold, or equipment, showing "TBD" in the column intended for estimated monthly costs for these items. This lack of information about the cost of doing business leads us to question how the Petitioner derived the revenue and expenditure estimates that were included in its four-year projection of financial goals. The Petitioner also resubmitted the equipment purchase projections that were included with the original supporting evidence. However, it offered no further insight about the broad 2020 projected purchase range, which indicates that the Petitioner's purchase amount may be as low as $50,000 or as high as $500,000. The lack of information as to the factors that would affect this considerable swing in purchase costs precludes a meaningful understanding of not only the Petitioner's estimated costs during its first year of operation, but also the staffing arrangement that would be required going forward in order to relieve the Beneficiary from having to primarily perform non-managerial or non-executive job duties once

[3] The updated hiring projections show no employees being hired in 2019.

the Petitioner moves beyond the new office phase of its operation. 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).

In the denial, the Director determined that the Petitioner's business plan does not show how it will support the Beneficiary in a managerial or executive position within one year of the petition's approval. The Director noted that the Petitioner did not provide a specific hiring timeline and offered documents containing "incomplete information."

On appeal, the Petitioner points to its submission of the original and updated business plans, explaining that because its business is "service-oriented" and operates "on a call-out basis," its staffing levels are not "constant." The Petitioner also asks us to consider the nascent stage of its operation and contends that its business plan "serves as a guide and not an actual transaction of business."

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 executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require a petitioner to disclose the proposed nature of the business and the size of the U.S. investment, and establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). 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.

In this instance, the record does not demonstrate that within one year of the petition's approval the Petitioner would have a support staff in place to relieve the Beneficiary from having to primarily perform non-managerial and non-executive job duties, such as marketing and selling the Petitioner's products and acting as the Petitioner's principle point of contact to broker client deals. Merely claiming that of the nature of its business precludes a "constant" staff does not result in a meaningful understanding of how the Petitioner will operate during its "new office" phase and what operational steps it plans to take during that phase to ensure that it is able to support the Beneficiary in a managerial or executive capacity within one year of the petition's approval. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). In the present matter, not only has the Petitioner provided a proposed organizational chart this is inconsistent with its projected list of hires, but it also offered no employee job descriptions or hiring timelines specifying when it plans to fill some of the positions that it deems most critical to its operation. These ambiguities preclude us from gauging how and when the Beneficiary's role would shift from one that involves primarily carrying out operational tasks to one that involves primarily managerial or executive job duties.

In light of the deficiencies described above, we cannot conclude that the Petitioner has established that its operation will be adequately staffed to support the Beneficiary in a managerial or executive position within one year of the petition's approval.

B. Duties

Aside from the Petitioner's staffing and business plan, we also reviewed the Beneficiary's proposed job duties. In a supporting cover letter, the Petitioner stated that the Beneficiary has "excellent managerial capabilities" and over 25 years of experience in the scaffold industry. In a separate job offer letter, the Petitioner provided the Beneficiary's job duty breakdown, stating that the Beneficiary would be tasked with executing various duties to ensure start-up of the U.S. business, including complying with various state filing requirements, opening a bank account, hiring and training a "permanent staff," establishing a base of operations, and networking and marketing to establish a list of prospective clients. The Petitioner did not offer a separate job description delineating the Beneficiary's prospective job duties during the next phase of the company's operation, thus leading us to question how and when the Beneficiary's position would evolve to include primarily executive or managerial job duties.

As discussed above, the Petitioner responded to the Director's RFE. However, it did not offer further information about the Beneficiary's prospective job duties beyond the Petitioner's "new office" phase of operation. Rather, the Petitioner continued to focus on the Beneficiary's knowledge and experience in the industry and his authority to make business decisions in the course of the Petitioner's operation.

We acknowledge that the Beneficiary would assume a position as the Petitioner's senior employee and that as a result, he would have authority to make major decisions regarding its finances and the overall direction of the business. However, the fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. While it is likely that the Beneficiary will continue to exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making beyond the Petitioner's initial phase as a new office, the Petitioner has not provided sufficient information about the duties the Beneficiary would be expected to perform once that initial phase of its operation is over. As such, we cannot conclude that the Beneficiary would transition to primarily managerial or executive job duties within one year of the petition's approval.

Accordingly, given the deficient evidence offered to support this petition, we cannot conclude that the Beneficiary would be employed in a managerial or executive capacity within one year of this petition's approval.

ORDER: The appeal will be dismissed.