U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF B-I- CO. INC.

DATE: SEPT. 27, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an international trade, investment, and real estate company, seeks to continue the Beneficiary's employment as its chief executive officer (CEO) under the L-1A nonimmigrant classification for intracompany transferees.[1] *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 approved the petition, but further determined that the Beneficiary had engaged in unauthorized employment and did not maintain his nonimmigrant status. As such, the Director concluded that the Beneficiary was ineligible for the requested extension. The Petitioner later filed a motion to reopen that the Director granted. The Director denied the petition, concluding that the Beneficiary's proposed duties would be contrary to federal law, prohibiting an extension. The Petitioner subsequently filed the instant appeal.

As a preliminary matter, we note that the appropriate procedure by the Director in this scenario would have been revocation of the approval rather than denial. However, the Petitioner has not raised this procedural error. This matter was adjudicated by the Director on the Petitioner's affirmative motion to reopen and is now before us on appeal. We deem the error to be harmless, as the Director provided notice to the Petitioner of the derogatory information and afforded the Petitioner an opportunity to rebut it prior to denying the petition. *Compare* 8 C.F.R. §§ 103.2(b)(8)(iv) and 214.2(l)(9)(iii)(B). Therefore, we see no purpose in having the Director adjudicate this matter again in a revocation proceeding, as the Petitioner was already afforded an equivalent process, and now has the opportunity to submit additional arguments and evidence on appeal and have the merits of the matter addressed *de novo*.

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period January 11, 2016, until February 2, 2017. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary 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 one year within the date of approval of the petition to support an executive or managerial position. *See also* 8 CFR 214.2(l)(14)(ii).

In its appeal, the Petitioner contends that its proposed marijuana cultivation plans are not contrary to federal law and asserts that it has not possessed, cultivated, or distributed "large quantities of cannabis." The Petitioner states that it would only proceed with its marijuana cultivation plans if it received all necessary state and federal permits.

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

## I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, 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.*

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

## II. ILLEGAL OR INVALID EMPLOYMENT

The first issue to analyze is whether the Petitioner's proposed extension of the Beneficiary's employment is based on an illegal offer of employment. In *Matter of I- Corp.*, Adopted Decision 2017-02 (AAO Apr. 12, 2017), we concluded that although U.S. Citizenship and Immigration Services' (USCIS) primarily responsibility is to adjudicate immigration benefit requests available under applicable immigration law, we will also take into account other intersecting areas of law, including federal criminal law. In other words, USCIS cannot approve a visa petition that is based on employment that contravenes another federal law.

### A. Background

The Petitioner indicated that it is engaged in international trade, including the importation of food, beverages, cosmetics, fruits, and baby products. The Petitioner submitted evidence indicating that it is wholly owned by the Beneficiary. In addition, the Petitioner submitted the foreign employer's "articles" reflecting that the foreign employer was formed through a capital contribution of 500,000 Chinese Yuan (CNY), including a 300,000 CNY contribution by the Beneficiary and 200,000 CNY provided by another individual. The Petitioner stated in a support letter provided with the petition that the Beneficiary "owns a majority 60% of stock shares of [the foreign employer]" and that he is a majority shareholder in both entities.

The Petitioner also provided evidence indicating that it created a subsidiary company in the United States, [redacted] that is 60% owned by the Beneficiary's foreign employer, 20% owned by the company's chief financial officer, and 20% owned by another individual. The Petitioner stated in response to a request for evidence (RFE) issued by the Director that "[the Beneficiary] approved to set up the subsidiary entity, [redacted]"

The Petitioner submitted documentation indicating that [redacted] purchased a 19.4 acre piece of land it planned to develop into an "ecological industry park." An accompanying project plan titled [redacted] detailed plans to construct a ten building campus for the cultivation of "cannabis," including "10,000 square feet of outdoor grow areas, laboratories, processing section, staff residence area and inventories warehousing space." The Petitioner stated in the business plan that "cannabis is highly valued and has many medical benefits" and further noted that the drug could be sold to pharmaceutical companies to produce medicines for the treatment of a wide range of ailments. In addition, the business plan indicated that California "has the highest marijuana sales" and that the State was expected to legalize recreational marijuana in January 2018. The business plan also explained that in California cannabis could "be used in pharmaceutical production [and] recreation, [and that] the extracts can also be the ingredients of food additives, supplements and even cosmetics." The plan further stated that projected investment in the project was $15 million.

The Petitioner submitted duties performed by the Beneficiary during the previous year reflecting that he had devoted 90% of his time to the Petitioner's import and export business, including negotiating distribution agreements with vaping, baby, and beauty and cosmetic product companies in the United States. The Beneficiary's duties also indicated that he spent 10% of his time under the new office petition overseeing [redacted] the Petitioner's affiliated company in the United States, including approving the purchase of the aforementioned 19 acres of land in California and developing and approving the discussed "ecological industry park project."[2] The Petitioner also provided duties the Beneficiary would perform under the extended petition, again indicating that he would spend 10% of his time giving direction and leadership to [redacted] and establishing its policies, objectives, and strategies.

The Director denied the petition concluding that the Beneficiary had signed documents pertaining to the purchase of land and taken action to carry out a business plan that contravened federal law, namely the intent to manufacture, distribute, or dispense a controlled substance. On appeal, the Petitioner asserts that beyond purchasing land, its affiliate [redacted] has not conducted any business or employed anyone. The Petitioner refers to a Drug Enforcement Agency (DEA) program through which a license for the production of marijuana can be granted and contends that it intends to acquire this license prior to any marijuana production. The Petitioner asserts that [redacted] plans to manufacture marijuana legally, noting that it "has not possessed, cultivated, or distributed large

[2] We note that several documents submitted by the Petitioner, including the Form I-129 and accompanying letters of support, state that the Petitioner was doing business as [redacted]

quantities of cannabis." It further states that [redacted] would "implement its plans only if they can obtain all necessary permits from federal and local governments."

B. Analysis

The Controlled Substances Act (CSA) imposes restrictions on the manufacture and distribution of marijuana in the United States. *See* 21 U.S.C. § 812, 841(a)(1). The CSA states that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). Under the CSA, anyone seeking to manufacture or distribute marijuana must apply for registration. *See* 21 U.S.C § 822(a)(1).

Although certain states have legalized or decriminalized the use of marijuana—including the state of California—its possession, cultivation, and distribution remains illegal under federal law. A memorandum issued by the Attorney General of the United States in January 2018 encapsulates the federal government's current policy with respect to marijuana:

> In the Controlled Substances Act, Congress has generally prohibited the cultivation, distribution, and possession of marijuana. 21 U.S.C. § 801 et seq. It has established significant penalties for these crimes. 21 U.S.C. § 841 et seq. These activities also may serve as the basis for the prosecution of other crimes, such as those prohibited by the money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act. 18 U.S.C. §§ 1956-57, 1960; 31 U.S.C. § 5318. These statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime.

Jefferson B. Sessions, III, Att'y Gen., Memorandum for All United States Attorneys: Marijuana Enforcement (Jan. 4, 2018).

As such, there is little question that the marijuana manufacturing and distribution plans set forth in the Petitioner's business plan contravene federal law. We acknowledge the Petitioner's assertion that it and its affiliate may not have currently violated federal law, although we take no position as to this contention. Our assessment here does not lie in a determination of criminal culpability, but whether it is more likely than not that the Beneficiary's employment as stated in the petition would involve conduct that contravenes federal law. Except where a different standard is specified by law, a petitioner must prove eligibility for the requested immigration benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Under the preponderance of the evidence standard, the evidence must demonstrate that the petitioner claim is "probably true." *Id.* at 376. Therefore, following the Director's notice of intent to deny based on the legality of the proposed job duties, the Petitioner was required to demonstrate that it is more likely than not that the Beneficiary's employment would not contravene federal law.

We will first address the Petitioner's assertion on appeal that the Beneficiary is not an employee of [redacted] and therefore, not a party to the proposed marijuana production plans. Regardless of whether the Beneficiary is deemed an employee of [redacted] the Petitioner states directly in his duties that he has, and would, devote 10% of his time to overseeing the activities of its affiliate. The description of the Beneficiary's duties during the first year indicate that he approved the purchase of the 19.4 acres of land in California and developed and approved the "ecological industry park project" on behalf of [redacted] Further, the Petitioner also stated that the Beneficiary approved the creation of [redacted] and the evidence reflects that he has a controlling interest in [redacted] based on his majority interest in the foreign employer, who owns 60% of [redacted] In addition, the Petitioner submitted a Form I-129 and accompanying support letters reflecting that it was "doing business as" [redacted], despite its attempt to now distance itself and the Beneficiary, its asserted CEO, from [redacted] operations.

In sum, the Petitioner's assertion that the Beneficiary is not an employee of [redacted] and in turn, not a party to its proposed marijuana production plans is not convincing given the evidence submitted. The submitted evidence indicates that the Beneficiary ordered the affiliate's creation, that he directed its operations related to potential marijuana production, and that he holds a controlling ownership interest in this entity. Therefore, it appears more likely than not that he would continue to do this under an extended petition.

The submitted evidence demonstrates that the Beneficiary's proposed employment would more likely than not involve duties that contravene federal law. As noted, the Petitioner submits a business plan, which it still provides on appeal, outlining detailed plans for its affiliate to build an extensive marijuana production facility on land purchased in California for this stated purpose.

While the Petitioner indicates that it does not plan to proceed until it receives DEA, and other applicable, licenses to produce marijuana, this claim is speculative. USCIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978); *see also Matter of Katigbak*, 14 I&N 45, 49 (Reg'l Comm'r 1971).

Also, the DEA license cited by the Petitioner is narrowly granted only for the provision of marijuana to government approved research projects consistent with 21 U.S.C § 823(f).[3] The submitted [redacted] business plan provides no indication that

[3] On August 12, 2016, the DEA issued guidance "to facilitate research involving marijuana and its chemical constituents . . . designed to increase the number of entities registered under the Controlled Substances Act (CSA) to grow (manufacture) marijuana to supply legitimate researchers in the United States." Applications to Become Registered Under the Controlled Substances Act To Manufacture Marijuana To Supply Researchers in the United States, 81 Fed. Reg. 156, 21 CFR Part 1301, 53846-48 (Aug. 12, 2016). The DEA guidance discusses its close control over the growing process, including taking "physical possession of all cannabis crops from all cultivators as soon as possible" and an extensive vetting and application process. *Ibid.*

plans to construct a marijuana production facility would be for the limited purpose of supplying marijuana strictly for government approved research projects through the DEA. The provided business plan points to the medical benefits of marijuana, its use in the treatment of various ailments, its medical and recreational use in California, its robust sales in California, its recreational legalization in California, and its potential use in foods, supplements, and cosmetics. Further, the submitted plans do not mention a DEA license and the provision of marijuana for approved research projects only, nor has the Petitioner provided any evidence that it, or its affiliate, have sought a license for this purpose from the DEA.

In fact, the Petitioner states that it has not possessed "*large* [emphasis added] quantities" of marijuana to date, indicating that it has or is actively possessing marijuana and potentially already acting in violation of federal law. As such, although the Petitioner asserts that its business activities have not, and would not, be in violation of federal law, its statements and the supporting evidence indicate otherwise. The Petitioner must resolve inconsistencies and ambiguities 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).

As such, we conclude that it is more likely than not that the Beneficiary's duties would contravene federal law. For this reason, the petition is not approvable and the appeal must be dismissed.

## III. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

Apart from the reasons for dismissal discussed above, review of the record reveals an additional issue which the Petitioner must resolve if it seeks to pursue this matter further. Although not addressed by the Director, we note that it does not appear that the Beneficiary would be employed in an executive capacity under the extended petition.[4]

The statute defines an "executive capacity" as 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.

As discussed, beyond its proposed marijuana production plans and related land investment through the Petitioner indicated that it was engaged in "international trade," including the export and sale of foods, beverages, cosmetics, and baby products. Although the Petitioner submitted a lengthy description of the Beneficiary's duties, the provided tasks are repetitive, many times relisting or rewording the same responsibilities related to vague strategies, goals, policies, and financial

[4] The Petitioner did not claim that the Beneficiary would be employed in a managerial capacity; therefore, our brief discussion is restricted to the executive capacity claim. *See* section 101(a)(44) of the Act; *see also* 8 CFR 214.2(l)(1)(ii) (defining managerial and executive capacity).

matters. The duty description includes several generic duties that could apply to any executive acting in any business or industry and they do not provide sufficient insight into the actual nature of the Beneficiary's role. Furthermore, the Petitioner emphasized the Beneficiary's substantial responsibilities related to the company's board of directors. However, such duties are questionable as supporting documentation reflects that he is the only member of the company's board.

The Petitioner also provided insufficient evidence substantiating the Beneficiary's delegation of non-qualifying operational duties to his subordinates. It is not clear which employees were performing the non-qualifying operational tasks of the business, namely those related to the export and sale of goods, at the time the petition was filed. The Petitioner only provided evidence to substantiate one operational-level employee, a sales employee based in the United States, as of the date the petition was filed. Further, the Petitioner submitted no evidence to support its assertion that it engaged foreign employees to perform the non-qualifying operational-level duties of the business as necessary to relieve its claimed managers and the Beneficiary from these tasks.

For these reasons, the Petitioner did not sufficiently demonstrate that the Beneficiary would act in an executive capacity under the extended petition. Therefore, even if the Petitioner had overcome the illegal offer of employment issue, we would have been required to remand this matter to the Director for the issuance of a new notice of intent to revoke to address this additional ground of eligibility.

## IV. CONCLUSION

The appeal will be dismissed as the Beneficiary's proposed employment is based on an offer of employment that contravenes federal law.

**ORDER:** The appeal is dismissed.

Cite as *Matter of B-I- Co. Inc.*, ID# 1221782 (AAO Sept. 27, 2018)