U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-A-S-C-, INC.

DATE: SEPT. 28, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner seeks to operate as a dog breeding and training business and employ the Beneficiary temporarily as the "President Director" 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 had secured sufficient physical premises to house the new office; and (2) it would employ the Beneficiary in the United States in an executive capacity within one year of approval of the petition.

On appeal, the Petitioner submits a brief disputing the denial. The Petitioner states that based on its current stage of development it does not require space beyond that of the Beneficiary's current residence. The Petitioner also states that the Beneficiary has experience working as the executive director of the two claimed affiliate companies in the Ukraine and Italy and would carry out similar job duties as part of her assignment in the United States.

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. Section 101(a)(15)(L) of the Act. In addition, the beneficiary must seek to enter the United States

[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.

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.*

If the Form I-129 indicates that the beneficiary is coming to the United States in L-1A status to open or to be employed in a new office, 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. PHYSICAL PREMISES

The first issue to be addressed in this decision is whether the Petitioner established that it secured sufficient physical premises from which to operate the new office pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A). In its initial supporting statement, the Petitioner did not discuss where it would be doing business once it commences business operations.

The Director subsequently issued a request for evidence (RFE) reviewing the filing criteria that applies to a petitioner that files the Form I-129, Petitioner for Nonimmigrant Worker, as a new office. The Director pointed out that the Petitioner is required to show that it has secured sufficient physical premises to house its operation. The RFE specified the missing evidence and provided a list of documents the Petitioner could provide to cure this evidentiary deficiency. The Petitioner responded to the RFE; however, it did not provide evidence to show that it secured sufficient business premises from which to operate its business. Rather, the Petitioner explained that the Beneficiary would not acquire a space in which she would house and train pets until the instant petition is adjudicated and approved such that the Beneficiary is authorized to work in the United States.

The Director denied the petition based, in part, on the finding that the Petitioner did not meet this regulatory requirement. The Director acknowledged that the Petitioner provided a letter and photographs of dogs it intends to breed, but found that such evidence does not establish that the Petitioner secured sufficient physical premises to accommodate its dog breeding business.

On appeal, the Petitioner points to its early stage of development and the lack of an approved visa petition as the reason for not securing business premises outside of the Beneficiary's residence. The Petitioner explained that it currently does not require "much space," asserting that the Beneficiary's home is currently being used for "doing initial administrative work."

Based on the statements and evidence submitted thus far, we find that the record does not establish that the Petitioner meets the new office criteria because the record lacks evidence to establish that it secured sufficient physical premises from which to conduct its intended business operations. Even if the Beneficiary's residence were deemed sufficient to use as an office space, the Petitioner has not provided a lease to show that the Beneficiary has, in fact, secured a residential space or that such

space is adequate for the purpose of conducting "administrative work." Further, given that the Petitioner plans to operate a dog breeding and training business, the Beneficiary's residence would not be deemed as sufficient physical premises to suit the Petitioner's business needs. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The Petitioner has not provided sufficient evidence to establish that it has secured sufficient physical premises where it can breed and train dogs, which is the Petitioner's stated business purpose. Therefore, we will affirm the Director's decision and dismiss the appeal.

III. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The next issue to be addressed in this decision is whether the Petitioner submitted sufficient evidence to establish that it would, within one year of approval of the instant petition, employ the Beneficiary in an executive capacity.[2] In denying the petition, the Director determined that the Petitioner did not provide evidence to demonstrate this ability.

The term "executive capacity" is defined as "an assignment within an organization in which the employee primarily":

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) 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. If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services must take 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.

In support of the petition, the Petitioner provided a statement claiming that the nature of its business operation is to provide "services of kennel, dog breeding, training, and care to its customers." The Petitioner attributed the success of the overseas businesses to the Beneficiary's knowledge and experience in breeding and caring for dogs and operating a kennel business. The Petitioner stated that the Beneficiary's duties would include the following:

[2] As the Petitioner does not claim that the Beneficiary will be employed in a managerial capacity, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

- Direct and coordinate activities of the organization;
- Develop, train, mentor and recruit kennel, dog breeding and training staff, includes [*sic*] interviewing and hiring of staff;
- Prepare boarding, breeding and training records and invoices;
- Train and supervise all staff, includes [*sic*] overseeing staff in charge of all boarders' (animals) welfare and ensure they are properly cared for, scheduling boarding appointments, staff scheduling, and maintaining inventory;
- Analyze sales and demand, oversee advertising, and promotional events;
- Generate business plans to build the business and services and to better the services already provided;
- Build and establish relationships with clients.
- Enforce and represent company policies and mission.

The Petitioner also provided a business plan, which included a comprehensive discussion of the operational components involved in running a dog breeding and training business and providing kennel services. Section 6.3 of the business plan includes a discussion of the Petitioner's sales strategy, which will require "communicating [the Petitioner's] competitive edge to the prospective customers" and offering prospective customers tours of the facility and references from past customers. Section 7.0 discusses the Petitioner's personnel plan, which includes hiring a total of four employees – a CEO, a manager, a dog trainer, and a dog care specialist – during the company's first year of operation. The Petitioner indicated that it would hire two additional employees – an additional dog trainer and an additional dog care specialist – during the second year of operation, increasing its total staff two six employees. The personnel plan does not indicate that the Petitioner intends to hire any staff to carry out administrative functions, such as answering phones, issuing invoices, and other office-related tasks, or that it would hire sales personnel within its first year of operation. The business plan does not indicate that someone other than the Beneficiary would carry out the Petitioner's sales strategy beyond that initial one-year time period, despite including sales projections at section 6.4.1 of the business plan, forecasting $283,981 in sales after the first year and $640,000 after the second year of operation. The Petitioner also did not indicate who, if not the Beneficiary, would carry out the marketing strategy included in section 6.3 of the business plan, which states that the Petitioner will initially focus on "networking and advertising campaigns" as its key marketing strategies, hoping to eventually rely on "word-of-mouth referrals" to advertise its dogs and dog-related services.

In the RFE, the Petitioner was reminded that it must provide evidence to show that it will support the Beneficiary in an executive position within one year of the petition's approval, including evidence of the foreign entity's financial ability to pay the Petitioner's start-up costs and a statement describing the staffing of its new operation.

In response, the Petitioner stated that the Beneficiary has been employed abroad in an executive capacity and stated that the Beneficiary "is currently devising plans doing necessary work to acquire place and hire staff for operation, once the petition is approved." With respect to projected staffing, the Petitioner stated that it "is likely to hire office, training, breading [*sic*] and transportation staff

according to the needs." The Petitioner also provided a statement from the Beneficiary, who also referred to her foreign employment as that of an executive and stated that her employment abroad included: directing and coordinating activities of the organization; reviewing invoices and breeding and training records; training and supervising personnel engaged in training, breeding, and maintaining inventory; analyzing the company's sales and demand and overseeing marketing efforts; generating plans to increase business; establishing and building client relationships; and devising and enforcing company policies. This job description does not establish that the Beneficiary would primarily perform tasks of an executive nature. Further, section 7.0 of the business plan, where the Petitioner provided a list of its projected hires, made no mention of an office or transportation staff, both of which the Petitioner referenced in its response statement. It therefore appears that the personnel projections outlined in the business plan are at odds with the information the Petitioner offered in its RFE response statement.

When examining the executive capacity of the Beneficiary, we will look first to the Petitioner's description of the job duties. The Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in an executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Based on the statutory definition of executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

Further, we consider the applicable new office regulations, which take into account that when a new business is established and commences operations, 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 or executive 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 the present matter, the Petitioner has not provided sufficient evidence to demonstrate the likelihood that it would be able to support the Beneficiary in an executive position within one year of approval of the instant petition. Although the Petitioner disputes the denial on appeal, it does not provide independent, objective evidence to resolve the above described incongruity regarding its projected personnel plan. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Rather, the

Petitioner restates the Beneficiary's previously submitted job description without fully describing how, after its first year of operation, it plans to relieve the Beneficiary from having to allocate her time primarily to performing non-executive operational tasks, such as marketing and selling the breeding, training, and kennel services it plans to offer. Further, while the personnel plan indicates that the Petitioner plans to hire three subordinate employees and provides their respective position titles, there is no information as to the duties they will perform. As such, the record lacks evidence to show that the Beneficiary will be relieved from having to carry out basic administrative office functions, such as invoicing and payroll.

While no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. 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* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988). Here, the Petitioner has not provided sufficient evidence to show that it would likely employ a staff capable of relieving the Beneficiary from having to primarily carry out its operational and administrative tasks after its first year of operation.

In addition, 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. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and they must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. 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 the 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 the present matter, the staffing projections that were included in the Petitioner's personnel plan do not indicate that the Beneficiary would primarily direct the management of the organization. Rather, the information provided indicates that the Beneficiary would likely be tasked with the non-executive tasks associated with overseeing a non-supervisory and non-professional staff involved in breeding and training dogs. Although the Petitioner's projected staff lists one manager during its first two years of operation, the record lacks sufficient evidence to establish that this position would actually oversee and have managerial authority over the company's non-professional staff of dog breeders and dog trainers. As previously stated, the Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376.

The evidence, which includes the Petitioner's business plan, its projected staffing, and the Beneficiary's proposed job duties, precludes a finding that the Beneficiary would be employed in an executive capacity within one year of this petition's approval. The instant petition cannot be approved for this additional reason.

IV. QUALIFYING RELATIONSHIP

Finally, while not addressed in the Director's decision, we find that the Petitioner did not establish, as required, that it has a qualifying relationship with a foreign entity. 8 C.F.R. § 214.2(l)(3)(i). 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).

In the present matter, the initial supporting statement referred to the Beneficiary's foreign employer as "the parent organization, [redacted] in Ukraine and Italy." Section 2.1 of the Petitioner's business plan also states that the Petitioner "is a subsidiary of a parent company located in [redacted] Italy." However, a parent-subsidiary relationship necessarily rests on the parent entity's direct or indirect ownership of more than half of the subsidiary, which in this case would be the Petitioner. 8 C.F.R. § 214.2(l)(2)(K). Here, the Petitioner provided a copy of its shareholder agreement, which names the Beneficiary and [redacted] as 50/50 owners of the U.S. entity. Therefore, the Petitioner cannot be said to be a subsidiary of a foreign entity.

The record also does not contain sufficient evidence to establish that the Petitioner and the foreign entity have an affiliate relationship. The term "affiliate" is defined in relevant part, as (1) one of two subsidiaries both of which are owned and controlled by the same parent or individual, or (2) one of two legal entities owned by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. 8 C.F.R. § 214.2(l)(1)(ii)(K). Accordingly, in order to establish that the ownership schemes of the Petitioner and the foreign entity are consistent with an affiliate relationship, the Petitioner would have to provide evidence to show that the foreign entity has the same ownership scheme, i.e., a 50/50 ownership split between the Beneficiary and [redacted] as the Petitioner itself.

In the present matter, rather than providing evidence of the foreign entity's ownership, the Petitioner provided an RFE response statement claiming that businesses that raise, train, and sell pets in Europe do not require a license or any type of business registration. The Petitioner claimed that it was only required to register the foreign business "with related associations" and further noted that there was no need for an articles of incorporation. Therefore, while the Petitioner maintained the claim that the Beneficiary owns 50% of the foreign entity, it did not provide any evidence to support this claim. As stated above, the Petitioner cannot meet its burden of proof without providing relevant, probative, and credible evidence to support its assertions. *See Chawathe*, 25 I&N Dec. at 376. As the Petitioner has not provided such evidence to show that it and the foreign entity are similarly owned, we cannot conclude that the two entities have a qualifying relationship.

V. CONCLUSION

For the reasons discussed above, we conclude that the Petitioner has not established that: (1) it secured sufficient physical premises to house its operation; (2) its new office would develop beyond the initial phase of its operation within one year of filing the petition such that it would have the ability to employ the Beneficiary in an executive capacity; and (3) the Petitioner and the Beneficiary's employer abroad formed a qualifying relationship. Based on these three conclusions, we will dismiss this appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of C-A-S-C-, Inc.*, ID# 791592 (AAO Sept. 28, 2017)