U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-W-, LLC

DATE: MAY 15, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, describing itself as a marketing company, seeks to temporarily employ the Beneficiary as its managing director 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 establish, as required, that the Beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner disputes the Director's decision and submits a brief in support of its contentions.

Upon *de novo* review, we will dismiss the appeal. Although we find that the Petitioner submitted sufficient evidence to establish that the Beneficiary was employed abroad in a managerial or executive capacity,[1] we find that the Petitioner has not overcome the remaining ground for denial with regard to the Beneficiary's proposed employment.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," 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 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 also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

[1] We will withdraw the Director's finding with respect to the Beneficiary's foreign employment.

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

In a supporting cover letter, the Petitioner stated that the Beneficiary will be employed in a managerial capacity and claimed that his duties would be "managerial in nature." The Petitioner did not claim that the proposed employment would be in an executive capacity; therefore, we will limit our discussion to the claim that the Beneficiary will be employed in a managerial capacity.

"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.

Based on the statutory definition of managerial 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 demonstrate that the Beneficiary will be *primarily* engaged in managerial 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.

The description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the Beneficiary's actual duties and role in the business.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we 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.

The Petitioner filed the Form I-129 in October 2016 claiming two employees. In support of the petition, the Petitioner submitted a business plan, which contained a "Milestones" timeline chart, a personnel plan, and an organizational chart. The organizational chart shows a 16+-person staff

headed by the managing director, who is depicted as overseeing four positions – (1) a general manager/creative director, (2) a [redacted] Director" in Dubai, (3) a [redacted] franchise manager, and (4) a second franchise manager. Each of these four positions would, in turn, oversee his or her own subordinate staff. The second franchise manager would oversee three franchise employees; the [redacted] franchise manager would oversee two administrative employees; the [redacted] Director" would oversee an undisclosed number of application developers, animators, modelers, and graphic designers; and the general manager/creative director would oversee an undisclosed number of sales and client service executives.

The "Milestones" timeline chart indicated that most events that are critical to the Petitioner's operation (e.g., hiring a sales and client services staff, attempting to sell products and services to prospective "top 5 clients," and developing sales kits for the research and development team in Dubai) were not projected to commence until 2017. The Petitioner also indicated that transferring the money necessary to fund the U.S. operation, presumably a fundamental step prior to hiring any employees or commencing business activity, was not projected to take place until December 2016, several months after this petition's filing date. In fact, the business plan shows all these actions as "Pending L1 Visa," thereby indicating that hiring a staff and commencing business operations are both contingent upon the outcome of this visa petition. Despite claiming two employees in the petition, the information in the business plan's timeline chart indicates that the Petitioner did not have a support staff to perform its daily operational and administrative tasks at the time of filing.[2]

In a request for evidence (RFE), the Petitioner was instructed to provide an organizational chart and quarterly wage reports for the last two quarters in 2016 as well as the company's payroll summary and Forms W-2, W-3, and 1099 showing wages paid to employees under the Beneficiary's control.

In response, the Petitioner provided an amended business plan indicating that in order to promote "newly launched brands" and the Petitioner's own brands, it added an online store to its corporate website. The Petitioner provided more hiring projections, indicating that it intended to first hire brand managers who would assume the sales responsibility until an actual sales team is hired in 2018. The amended business plan included another "Milestones" section reflecting new projections that included the added website. The Petitioner summarized its personnel plan by stating that it "will start its workforce naturally with its founders for the first six months of 2017." In light of this information, it appears that the Petitioner did not intend to staff itself with support personnel; therefore, it was not adequately staffed in October 2016 and likely unable to relieve the Beneficiary from having to primarily engage in operational functions at the time of filing.

In the denial decision, the Director acknowledged the Petitioner's submission of an organizational chart, but found that the Petitioner did not provide information about the job duties to be carried out

[2] Although the business plan indicates that the Petitioner was at the beginning stages of development at the time this petition was filed, the Petitioner checked the "No" box in the L Classification Supplement, when asked if the Beneficiary was coming to the United States to open a new office.

by the Beneficiary's subordinates to show that their positions correspond to their respective placements within the organizational hierarchy.

On appeal, the Petitioner contends that it previously submitted evidence that was sufficient to establish that the Beneficiary will oversee the work of managers and that he will occupy the highest level within the organizational hierarchy. We find, however, that the Petitioner's entire petition is based on projected actions, including the hiring of support personnel, which had not yet taken place at the time this petition was filed.

Although we acknowledge the Petitioner's submission of a business plan and the various personnel and business projections made therein, 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 noted earlier in our discussion, the record indicates that at the time of filing the Petitioner was at a rudimentary developmental phase and had no support staff to relieve the Beneficiary from having to allocate his time primarily to operational tasks in order to commence business operations and ensure that the Petitioner progresses to the next developmental phase. The Petitioner expressly stated that it planned to operate with only the Beneficiary and one other employee for the first six months of operation. The Petitioner has not established that an organizational hierarchy of only two employees, including the Beneficiary, would be sufficient to support the Beneficiary in a managerial capacity. Here, the Petitioner has not provided sufficient evidence to establish that at the time of filing it was adequately staffed with managers or professional employees for the Beneficiary to oversee. As stated earlier, the Petitioner must demonstrate that the Beneficiary will be *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d at 1316; *Champion World*, 940 F.2d 1533. Here, the Petitioner appears to have had no lower-level employees to relieve the Beneficiary from having to primarily devote his time to the organization's operational and administrative functions at the time of filing.

B. Duties

Next, we will discuss the duties to be performed by the Beneficiary. In its initial cover letter, the Petitioner provided a vague job description indicating that the Beneficiary would develop and execute business strategies, oversee business plans and finances, ensure that "high-level management" understand company policies, assist with business expansion, communicate with shareholders and business partners, delegate responsibilities to executives, engage in public relations and maintaining a company profile, and analyze and provide solutions to resolve conflicts to ensure continued operations. The Petitioner restated the same list of duties in a formal company job description.

In the RFE, the Petitioner was notified that the job description it provided with the petition was not sufficient and instructed it to provide more specific information describing the Beneficiary's typical managerial duties and assigning a percentage of time to each duty.

In response, the Petitioner provided the requested job duty breakdown with a percentage of time assigned to each duty; however, the job description was once again vague and did not include a detailed statement specifically identifying the job duties that the Beneficiary would perform within an organization where the Beneficiary is one of two employees. For instance, the Petitioner stated that the Beneficiary would devote 30% of his time to directing and coordinating financial and budget activities as well as production, pricing, sales, and distribution activities. The Petitioner did not specify the actual tasks involved in directing and coordinating these activities or establish that the Petitioner was able to relieve the Beneficiary from having to actually carry out the underlying activities, given its lack of support personnel at the time of filing. Reciting vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The duties listed herein are overly vague and do not disclose the Beneficiary's daily activities that are associated with directing and coordinating the Petitioner's finances and the various aspects of selling its products and services.

The Petitioner also stated the Beneficiary would spend 10% of his time consulting with "organization officials, and staff members," 10% setting goals and strategies "for all departments," and 10% reviewing staff reports. However, all three of these components presume the existence of a staff that the Petitioner did not have when the petition was filed; therefore, they do not establish that the Beneficiary was ready to perform primarily managerial-level tasks at the time of filing. While no beneficiary is required to allocate 100% of his or her time to managerial-level tasks, the Petitioner must establish that the non-managerial 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 capacity. *See, e.g.*, sections 101(a)(44)(A) of the Act (requiring that one "primarily" perform the enumerated managerial duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In the present matter, while the Petitioner provided a job description indicating that the Beneficiary would oversee others who would carry out the organization's underlying operational and administrative tasks, it appears to offer invalid information when considered within the scope of an entity whose staff at the time of filing was comprised of the Beneficiary and one other employee. Despite claiming that a support staff would be hired in 2017, as previously noted, all eligibility requirements must have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). Therefore, any organizational changes the Petitioner may undergo after the filing of the petition would be irrelevant for the purpose of determining the Petitioner's eligibility *at the time of filing*.

In sum, we find that the Petitioner made broad and deficient claims about the Beneficiary's proposed job duties and provided insufficient evidence to show that it was able to relieve the Beneficiary from having to allocate his time primarily to non-managerial job duties at the time the petition was filed. Therefore, we cannot conclude that the Beneficiary would be employed in a managerial capacity under an approved petition.

III. QUALIFYING RELATIONSHIP

Further, while not addressed in the Director's decision, we find that the record does not establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer. 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 Petitioner marked the box for "subsidiary" at Section 1, No. 9 of the Form I-129, L Classification Supplement; it also indicated that its relationship with the Beneficiary's foreign employer was that of parent-subsidiary, where the Petitioner is the subsidiary. In order to establish that the foreign entity is the parent in a parent-subsidiary relationship with the Petitioner, the Petitioner would have to provide evidence to show that the foreign entity owns the majority of the U.S. entity. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(K). However, the "Membership Information," which was submitted as Exhibit A of the Petitioner's operating agreement, indicates that the Beneficiary and one other individual each owns 50% of the Petitioner's ownership interest, thereby showing that the Petitioner is not owned by another entity and does not have a parent-subsidiary relationship with the Beneficiary's foreign employer.

We also find that the two entities do not meet the criteria for an affiliate relationship, which requires the Petitioner to demonstrate that: (1) it is one of two subsidiaries that are both owned and controlled by the same parent or individual, or (2) the Petitioner and the foreign entity are both owned by the same group of individuals with each individual owning and controlling approximately the same share or proportion of each entity. 8 C.F.R. § 214.2(l)(1)(ii)(L). As determined above, the Petitioner cannot be deemed a subsidiary of another entity and thus would not meet the first prong of this definition. Therefore, we will review each entity's ownership breakdown to determine whether they meet the second prong of the definition. The ownership scheme delineated in the foreign entity's Memorandum of Association shows that the foreign entity issued 15 shares each to three individuals, including the Beneficiary, and five shares to a fourth individual, for a total 50 shares. This ownership scheme indicates that the foreign entity has a group of four owners, as compared to the Petitioner's two owners; further, where each of the Petitioner's two owners has a 50% ownership interest resulting in each individual maintaining negative control of the entity, no one individual owns a majority interest or controls the foreign entity.

Regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities. *See, e.g., Matter of Church Scientology Int'l*, 19 I&N Dec. 593; *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In light of the above, we cannot conclude that the requisite qualifying relationship exists between the Petitioner and the Beneficiary's foreign employer. Therefore the petition cannot be approved for this additional reason.

IV. CORPORATE STATUS

As a final matter, we are unable, through reference to a website maintained by the State of Texas, to determine that the Petitioner is in good standing and authorized to do business in Texas.[3] Based on Texas state records, the Petitioner's corporate status was shown as "Franchise Tax Involuntarily Ended," which means that the Petitioner's "franchise tax responsibilities ended because it ceased to exist in its state or country of formation or has ceased doing business in Texas."[4] The Petitioner's dissolution would raise questions about whether it continues to exist as an importing employer, whether it maintains a qualifying relationship with the Beneficiary's foreign employer, and whether it is authorized to conduct business in a regular and systematic manner. *See* section 214(c)(1) of the Act; *see also* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (l)(3). While not a basis for the dismissal of this appeal, the Petitioner will need to address this deficiency in any future filing where it purports to be the employing entity.

V. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that: (1) the Beneficiary will be employed in the United States in a managerial capacity; and (2) a qualifying relationship exists between the Petitioner and the Beneficiary's foreign employer. The appeal will be dismissed for these reasons.

ORDER: The appeal is dismissed.

Cite as *Matter of P-W-, LLC*, ID# 1106606 (AAO May 15, 2018)

[3] *See* https://mycpa.cpa.state.tx.us/coa/FranchiseStatusHelp.jsp.
[4] *Id.*