U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30850777

Date: APR. 16, 2024

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (L-1A Manager or Executive)

The Petitioner, an information technology consulting company, seeks to temporarily employ the Beneficiary as the executive partner/controller of its new office 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 that the Beneficiary has been employed abroad in a managerial or executive capacity for one continuous year in the three years preceding the filing of the petition, and that he is qualified to perform the intended services in the United States. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

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 their services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.*

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). A petitioner seeking approval of an L-1A new office petition 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. ANALYSIS

The primary issue we will address is whether the Petitioner established that the Beneficiary has been employed abroad in a managerial or executive capacity as defined at section 101(a)(44)(A) or (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) or (B).

The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker on May 22, 2023, and stated that the Beneficiary would be coming to open or be employed as an L-1A manager or executive in its new office in the United States. The Petitioner stated that its claimed foreign parent company had continuously employed the Beneficiary as a software engineer since February 2021. The Petitioner explained that his duties as a software engineer included defining and documenting business technologies solutions; debugging, troubleshooting, and resolving problems across multiple systems and applications; and creating various diagrams, flowcharts and models that illustrate the type of code needed for programmers.

The Petitioner submitted evidence of the Beneficiary's academic credentials (a bachelor's degree in engineering and a master's degree in computer science), a copy of the Beneficiary's January 2021 employment offer letter from the foreign entity for the position of "software engineer," and the foreign entity's employee roster, showing the Beneficiary as one of nine software engineers employed by the company.

In a request for evidence (RFE), the Director advised the Petitioner that its initial evidence was insufficient to establish that the Beneficiary has been employed abroad in an executive or managerial capacity for one continuous year in the preceding three years. The Director requested additional evidence related to the Beneficiary's foreign employment, including personnel or pay records establishing at least one full year of employment with the foreign entity during the relevant period, a more detailed description of his job duties identifying his specific duties and the percentage of time he allocates to managerial or executive duties, and an organizational chart providing relevant information regarding any employees he has supervised.

In response to the RFE, the Petitioner, referencing the definition of "specialized knowledge professional" at 8 C.F.R. § 214.2(l)(1)(ii)(E), stated "[t]he beneficiary serves the foreign company as a Software Engineer with a Bachelor of Engineering and a Master of Science Degree to qualify him as a "Specialized knowledge professional."

The Petitioner provided copies of the Beneficiary's monthly pay slips issued to him by the foreign entity between March 2021 and March 2022, all of which show his designation as "software engineer." It also submitted "increment letters" dated March 2022 and March 2023 indicating that he received a pay raise in this position after successful annual performance appraisals. The Petitioner stated that "the beneficiary should be classified as a highly skilled professional with an advanced degree."

In the decision denying the petition, the Director acknowledged the Petitioner's assertion that the Beneficiary has been employed abroad as a specialized knowledge professional. However, the Director emphasized that, in order for the Beneficiary to be eligible for L-1A classification as a manager or executive of a new office under 8 C.F.R. § 214.2(l)(3)(v), the Petitioner must demonstrate that he has been employed abroad as a manager or executive for at least one year. The Director concluded that the Petitioner had not met this burden.

On appeal, the Petitioner emphasizes that it provided "confidential employment records" demonstrating the Beneficiary's one year of employment abroad as a software engineer. The Petitioner once again references the regulatory definition of "specialized knowledge professional" and asserts that the Director "failed to present any legal argument to support their refusal to acknowledge the probative evidence submitted." The Petitioner also contends for the first time that the Beneficiary and the foreign entity's eight other software engineers all hold "executive positions," emphasizing that "[i]f not for the Software Engineers we would have no business to operate."

The Petitioner further asserts that "USCIS relies on the Department of Labor to determine the Employment based preference when an employer files a Labor Certification for a potential employee" and states that to meet the second preference employment-based (EB-2) immigrant visa classification, "the employer must require 5 years' experience and a minimum of a Bachelor's degree to serve in an Executive or Managerial Role." The Petitioner maintains that the Beneficiary "clearly meets these requirements."

The Petitioner resubmits copies of the Beneficiary's educational credentials, along with the offer letter and "increment letters" the Beneficiary received from the foreign entity.[1] It also provides information regarding "Software Developers, Quality Assurance Analysts, and Testers," published in the U.S. Bureau of Labor Statistics' *Occupational Outlook Handbook*. Referencing this publication, the Petitioner states that 'there is no mention of the number of subordinate employees required for a software developer to supervise so they can maintain their role as an executive."

Upon review, the Petitioner's assertions are not persuasive. As emphasized by the Director in the RFE and in the notice of decision, the regulations applicable to L-1A new office petitions allow for the transfer of foreign employees who have been employed abroad in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(v)(B). Prior to the denial of the petition, the Petitioner consistently claimed that the Beneficiary, a software engineer, served in a specialized knowledge capacity with the foreign entity. As explained by the Director, the Petitioner cannot establish his eligibility for transfer to its new office in L-1A classification based on a claim that he was employed abroad in a position involving specialized knowledge.

On appeal, the Petitioner refers to the educational and experience requirements for classification of members of the professions holding an advanced degree at section 203(b)(2)(A) of the Act and asserts that the Beneficiary meets these requirements for "EB2" classification. However, the Petitioner cannot demonstrate the Beneficiary's eligibility for L-1A nonimmigrant classification by claiming he is eligible, based on his education and experience, for an unrelated immigrant visa category. The two

[1] The evidence submitted on appeal includes evidence that the Beneficiary completed a master's degree in computer science at [redacted] in Illinois in December 2020.

classifications are based on different statutory and regulatory provisions. The Petitioner's reliance on the Department of Labor's published position description for the occupation of "software developer" is similarly misplaced.

The Petitioner claims for the first time on appeal that the Beneficiary, and all the foreign entity's software engineers, hold "executive positions" because they are critical to its ongoing activities as an IT consulting business. To establish that the Beneficiary has been employed abroad in an executive capacity, the Petitioner must demonstrate that that he primarily performed the duties described at section 101(a)(44)(B) of the Act. Under the statute, "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.

Here, the job duties associated with the Beneficiary's position as a software engineer, as described on the Form I-129 and in the Beneficiary's resume, are consistent with his job title, and do not demonstrate that he performs the higher-level responsibilities reflected in the statutory definition of "executive capacity." While we do not doubt that the work performed by software engineers is critical to the success of the foreign company's IT consulting business, the Petitioner has not demonstrated that the Beneficiary has been an executive employee of the foreign entity within the meaning of section 101(a)(44)(B) of the Act. Further, the Petitioner has neither claimed nor established that the Beneficiary has been employed abroad in a managerial capacity as defined at section 101(a)(44)(A) of the Act.

For the reasons discussed, the Petitioner has not overcome the Director's determination on this issue, and the appeal will be dismissed. Because this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve its appellate arguments regarding the Beneficiary's qualifications to perform the intended services in the United States. *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).

III. ADDITIONAL ISSUE

Although not addressed in the Director's decision, the record as presently constituted contains insufficient evidence to establish that the Beneficiary has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition. *See* 8 C.F.R. § 214.2(l)(3)(iii).

This foreign employment requirement is only satisfied by the time a beneficiary spends physically outside the United States working full-time for a qualifying entity; a petitioner cannot use any time that the beneficiary spent in the United States to meet the one year of foreign employment requirement, even if a qualifying foreign entity continued to employ and pay the beneficiary. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A) (providing that periods spent in the United States shall not be counted toward fulfillment of the one year of continuous employment abroad requirement); *see generally* 2 *USCIS Policy Manual* L.6(G), https://www.uscis.gov/policy-manual.

The Petitioner filed the Form I-129 in May 2023 and indicated that the Beneficiary had been employed by its claimed parent company since February 2021. The Petitioner stated that the Beneficiary, as of the date of filing, was in the United States in F-1 student status and that he was last admitted on September 6, 2022. Although the Petitioner provided one year of monthly payroll records as evidence of the Beneficiary's employment with the foreign entity, Department of Homeland Security records reflect that he has been physically present in the United States in F-1 status for most of his tenure with the Indian company and spent no more than two to three months abroad between February 2021 and May 2023.[2]

While this additional deficiency is not grounds for our dismissal of this appeal, the Petitioner will be required to address it in any future filings, whether in further pursuit of the instant petition or with regard to any other employment-based petition where this issue is relevant to eligibility.

III. CONCLUSION

For the reasons discussed, the Petitioner has not established that the Beneficiary has been employed abroad in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

[2] Specifically, DHS arrival and departure records indicate that the Beneficiary was in the United States from January 12, 2020 until March 22, 2022; from April 5, 2022 until April 29, 2022; from June 4, 2022 until August 20, 2022; and from September 6, 2022 until the filing of this petition on May 22, 2023.