U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30973821

Date: APR. 23, 2024

Appeal of California Service Center Decision

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

The Petitioner, a seller of [redacted], shaligrams, and other Hindu religious items and services, seeks to extend the Beneficiary's temporary 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 denied the petition, concluding that the record did not establish that the Petitioner would employ the Beneficiary in an executive capacity 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, 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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for a one-year period beginning on December 22, 2021. 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.

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. ANALYSIS

The sole issue to be addressed is whether the Petitioner established that it would employ the Beneficiary in an executive capacity under the requested petition extension. The Petitioner did not claim that the Beneficiary would be employed in a managerial capacity.

The term "executive capacity" is defined 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.

To establish that a beneficiary is eligible for L-1A classification as an executive, a petitioner must show that the beneficiary will perform all four of the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(B) of the Act. If a petitioner establishes that the offered position meets all four elements set forth in the statutory definition, the petitioner must then 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).

In determining whether a beneficiary's duties will be primarily executive, we consider the description of the job duties, the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other personnel 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.

The Petitioner states that it is engaged in providing "quality laboratory certified [redacted] along with Saligrams, Murties (Sculptures/Idols) of typical Hindu deities, and materials and services related to Hindu religious practices, spiritual wellbeing and occult sciences" through "retails sales and services through online sales." On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner indicated that it had one employee as of November 29, 2022, when it filed the petition. The record reflects, and the Petitioner acknowledges, that the Beneficiary was its sole employee on that date.

In a supporting letter, the Petitioner stated the Beneficiary would continue to perform "executive day-to-day functions" and provided two separate lists of duties. Briefly, the Petitioner indicated that the Beneficiary would allocate his time to six areas of responsibility as follows: (1) 20% of his time on policy making, review and planning of strategy; (2) 20% on department meetings and interaction with managers and executives; (3) 20% on management reporting, such as board meetings high level company meetings and policy level meetings; (4) 10% on networking within the industry; (5) 15% on

supervising "senior management and executives"; and (6) 15% on hiring and firing managers and executives.

A second list of job duties included in the Petitioner's initial letter included several tasks that did not fall within these delineated areas of responsibility, including: examining merchandise to ensure that it is correctly priced and displayed and that it functions as advertised; directing and supervising employees engaged in sales, inventory-taking, reconciling cash receipts, or in performing services for customers.; designing the store layout, and store interior and helping to fill the interior with quality products; organizing the store outlet with products and supplies and organizing the grand opening functions; and providing training to supporting staff on accounting and administrative functions.[2]

The Petitioner provided an organizational chart indicating the Beneficiary directly would supervise a chief advisor, a financial analyst, a [redacted] specialist, a sales specialist, and an e-commerce specialist. The Petitioner noted that the individuals named on the chart, are "identified as potential candidates for the roles but have not been hired as of yet." The Petitioner stated its intent to hire these individuals "or candidates with similar qualifications" and provided position descriptions for the proposed staff.

The Petitioner's initial evidence also included a copy of the company's September 2021 business plan which had been submitted in support of its previous new office petition. We note that the four individuals the Petitioner identified as "potential candidates" for the "financial analyst" and "specialist" positions as of November 2022 were identified in the business plan as "key business personnel" who were already assigned to these respective positions, with each expected to earn annual salaries of $20,000 to $30,000 during the first year of operations.

Based on the evidence discussed above, the record reflects that many of the duties attributed to the Beneficiary at the time of filing remained prospective in nature at the end of the one year "new office" period and therefore did not reflect his actual duties at the time of filing. For example, the record did not support the Petitioner's claim that the Beneficiary, as the sole employee of the company, was holding department meetings, interacting with, or supervising "senior management and executives," training staff, or supervising employees engaged in sales or provisions of services. Further, although the Petitioner indicated that the Beneficiary spends 20% of his time on board meetings and high-level policy and management meetings, the record reflects that he is the sole member and manager of the U.S. company and the sole proprietor of the Petitioner's foreign affiliate; the record does not identify a board or other high-level managers within the organization.

In a request for evidence (RFE), the Director acknowledged the submitted position description for the Beneficiary and the proposed organizational chart. However, the Director emphasized evidence reflecting that the Beneficiary was the company's sole employee at the time of filing and advised that the initial evidence did not establish that he would primarily be engaged in duties that fall within the definition of executive capacity at section 101(a)(44)(B) of the Act. The Director provided an opportunity for the Petitioner to submit additional evidence, noting that it should provide a more

[2] Although the Petitioner referred here to its store's layout and "interior," we observe that other evidence in the record indicates that the company's conducts its product sales online; the Petitioner has not shown that it owns or leases physical premises suitable for a retail store.

detailed description of his job duties and additional evidence related to the company's staffing and organizational structure.

In response to the RFE, the Petitioner submitted a revised position description for the Beneficiary, noting that many of the duties attributed to him at the time of filing were required to set up the new office, but had now been completed. Specifically, the Petitioner stated that during the first year, the Beneficiary had set up the company's goals, planned budgets, promoted the company and its products, coordinated with the foreign entity, handled merchandise, planned the recruiting and hiring process and prepared training materials for future employees. The Petitioner indicated that the Beneficiary's duties under an extended petition would fall within the categories of "strategic leadership," "financial management," "human resources management" and "marketing and sales."

With respect to the company's staffing, the Petitioner stated that the Beneficiary's recruitment of full-time employees did not go as planned due to labor shortages, inflation, and post-pandemic delays in visa processing, which had kept him outside the United States for nearly two months during the first half of 2023. The Petitioner claimed that these factors prevented the Beneficiary from completing the hiring process by the end of the first year of operations but indicated that he had filled the positions of finance manager, sales manager, [redacted] consultant and e-commerce developer as of January 1, 2023. We note that the persons identified as new hires for these positions were the same individuals named in the Petitioner's 2021 business plan as the company's "key business personnel." If the Petitioner had already identified these individuals to staff the positions as of September 2021, prior to filing the new office petition, it is unclear why were not hired until after the Director issued an RFE in this matter. The Petitioner's explanation that the Beneficiary could not staff the new office due to a labor shortage, inflation, and his temporary absence from the United States is therefore unpersuasive.

The Petitioner's RFE response included a new organizational chart that included the finance manager, sales manager, [redacted] consultant and e-commerce developer positions, as well as two contractors (an attorney and a CPA), and revised position descriptions for the subordinate staff.[3] The Petitioner also provided a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, reporting five employees for the first quarter of 2023; copies of employee pay statements; and copies of its IRS Forms 1099-MISC evidencing its payments to a CPA and an attorney in 2022.[4] Finally, the Petitioner submitted an amended Form I-129, page 5, indicating the company's current number of employees as "5" instead of "1" as initially filed.

In the decision denying the petition, the Director emphasized that, pursuant to 8 C.F.R. § 103.2(b)(1), the Petitioner must establish eligibility at the time of filing and therefore declined to consider changes to the Beneficiary's duties and the company's staffing composition that occurred while the petition

[3] Some of the duties attributed to the newly hired staff indicates their interaction with personnel who do not appear on either version of the Petitioner's organizational chart. For example, the Petitioner states that the finance manager "monitors the performance of the operations team," while the sales manager collaborates with "the marketing team," and the [redacted] consultant collaborates with "the Operations manager." The record does not indicate that the Petitioner has an operations manager (or operations team) or a marketing team.

[4] We observe that the four newly hired employees, based on the information that appears on their pay statements and IRS Forms W-4, are all residents of [redacted] Nebraska, while the Petitioner is in [redacted] Indiana, approximately 600 miles away. The Petitioner did not explain how they would perform all their claimed job functions remotely.

was pending. The Director concluded that the Beneficiary could not be deemed to be employed in an executive capacity under section 101(a)(44)(B) of the Act merely by having a "CEO" job title or because he is the Petitioner's sole owner. The Director determined that the Petitioner did not meet its burden to demonstrate that the Beneficiary, who was the company's sole employee at the time of filing, would be engaged in primarily executive duties under the requested petition extension, given the lack of staff available to relieve him from engaging in the non-executive functions required for the day-to-day operations of the business.

On appeal, the Petitioner submits additional evidence regarding its products and asserts the Director erroneously concluded that the Beneficiary would be engaged in the day-to-day operations of the business. The Petitioner further contends the Director did not give sufficient weight to the Beneficiary's job duties or due consideration to its explanation for the company remaining unstaffed at the end of the one year "new office" period. Upon review, the record supports the Director's determination that the Petitioner did not meet its burden to establish that the Beneficiary would be employed in an executive capacity.

The Petitioner's new office petition was approved for a one-year period beginning in December 2021. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. Therefore, the Petitioner was expected to implement its first-year business plan during this 2021 to 2022 period and to demonstrate at the time of filing its request for an extension that it had made sufficient progress to support the Beneficiary's employment in an executive capacity under the extended petition. The Petitioner's business plan prepared in September 2021 indicated that the Petitioner expected to fill four subordinate positions upon approval of the new office petition and that the Beneficiary had already identified ideal candidates for these positions. It is undisputed that the Petitioner did not hire any employees prior to the expiration of the new office petition. As noted, although the Petitioner provided various reasons why the Beneficiary could not carry out the hiring plan as scheduled, its explanation is undermined by the fact that the Petitioner ultimately hired the same four individuals already identified in the business plan as the company's "key business personnel."

Further, the Petitioner's assertion that the Director did not give due consideration to the Beneficiary's job duties is unpersuasive. As discussed above, the job description submitted at the time of filing was primarily prospective in nature, as it reflected the Beneficiary's interactions with company staff who had not yet been hired. It was not a reliable and probative job description of his actual duties as of the date of filing, nor was the revised job description provided in response to the Director's RFE, which was intended to reflect the Beneficiary's job duties as of May 2023, after the Petitioner hired staff. The Director acknowledged the submitted job descriptions and explained why they were insufficient to establish the Beneficiary's eligibility.

The Director appropriate emphasized that the fact that a beneficiary will direct a business as its "chief executive officer" and sole owner does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(44)(B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. Section 101(A)(44)(B) of the Act. While the Beneficiary has the authority to establish the Petitioner's goals and policies, and the authority to exercise wide latitude in discretionary

decision making with minimal oversight, the Petitioner did not meet its burden to demonstrate that his actual duties were primarily executive as of the date of filing.

On appeal, the Petitioner contends that the Director placed undue emphasis on the lack of U.S. employees at the time of filing. The Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in determining whether the Beneficiary would be employed in a managerial or executive capacity. *See* section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner explains the nature of the [redacted] and shaligram products it sells, noting that they are "only found, harvested, created and produced in [redacted] The Petitioner emphasizes that "the Beneficiary is not involved in the harvesting, production, creation or packaging" of these products, "all of which would be considered as day-to-day operations of the business." We note, however, that the Petitioner does not claim to be engaged in the production or creation of the products it sells; rather, it engages in the sale and distribution of these products and related services. The day-to-day operations of the business would therefore include purchasing, sales, order packaging, shipping and delivery, website maintenance, and provision of services sold by the company, as well as administrative functions. The evidence in the record indicates that the Petitioner was engaged in sales activities throughout 2022 while staffed only by the Beneficiary, who reported nearly $340,000 in gross receipts on his IRS Form 1040, Schedule C, Profit or Loss from Business. However, the Petitioner did not demonstrate how the Beneficiary, as the company's sole employee, was relieved from engaging in the duties necessary for the Petitioner to achieve those sales at the time the petition was filed.

The Petitioner emphasizes that "staffing levels are only one relevant factor" in evaluating whether the Beneficiary will be employed in an executive capacity. But the Petitioner still bears the burden to establish that the Beneficiary would, more likely than not, perform primarily executive duties. Here, the Petitioner did not submit a position description that reflected the Beneficiary's actual duties as of the date of filing or provide evidence that the company had carried out any of its hiring plans for the first year of operations, such that the Beneficiary had subordinate personnel to carry out the company's operational and administrative functions. Further, the regulations provide specific evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the Petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation only one year within the date of approval of the petition to support an executive or managerial position. If a business does not have the necessary staffing after one year to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible for an extension.

For the reasons discussed, the Petitioner did not establish that it would employ the Beneficiary in the claimed executive capacity. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.